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Mae Kuykendall

The writings of Ralph Waldo Emerson take a simple form in surface memory yet sound chords deep in the American psyche. A lecturer, essayist, and poet, Emerson was the leading exponent of transcendentalism, an American movement in literature and philosophy that flourished in New England from about 1836 to 1860. Although

* Professor of Law, Michigan State University College of Law. The author presented an early version of this paper at the International Conference on Divorce: Causes and Consequences, sponsored by the International Society of Family Law and China University of Political Science and Law (co-host for regional conference in China), Beijing, China, July 2004. The author wishes to thank Susan Bitensky, Mary Burke, Susan Goodman, Kristin Hass, Jacqueline Lapidus, Ruth Mendel, Greg Mitchell, Cyril Moscow, Linda Oswald, Robert Rich, Lee Starnes, and Lynn Wardle for their comments. The author extends special gratitude to Professor Stanley Cavell for his generous attention to the thesis developed in this paper and his inspiration in expanding the imaginative reach of the essay and to Professor Lawrence Buell for his friendly interest in the work.

1. In a felicitous phrase suited to the context of Emerson's influence on the American moral imagination, Donald Yannella calls Emerson a "rare, extravagant spirit." DONALD YANNELLA, RALPH WALDO EMERSON I (1982). One early assessment summarized his significance:

   It becomes more and more apparent that Emerson, judged by an international or even by a broad national standard, is the outstanding figure of American letters. Others may have surpassed him in artistic sensitiveness, or, to a criticism averse to the stricter canons of form and taste, may seem to be more original or more broadly national than he, but as a steady force in the transmutation of life into ideas and as an authority in the direction of life itself, he has obtained a recognition such as no other of his countrymen can claim. And he owes this pre-eminence not only to his personal endowment of genius, but to the fact also that, as the most perfect exponent of a transient experiment in civilization, he stands for something that the world is not likely to let die.


2. 4 NEW ENCYCLOPEDIA BRITANNICA 473 (Mortimer J. Adler et al. eds., 15th ed. 1982).
transcendentalism was never a rigorously systematic philosophy, it had some basic tenets that were generally shared by its adherents. The beliefs that God is immanent in each person and in nature and that individual intuition is the highest source of knowledge led to an optimistic emphasis on individualism, self-reliance, and rejection of traditional authority.3

There are tensions in the American family that can be illuminated by reflecting on the thinking, life, and influence of Ralph Waldo Emerson. These tensions are apparent in the contrast between the public narrative of marital duration4 as the defining feature of marriage as a social good and a private American narrative of the perennial possibility of personal renewal.5 Emerson is a good prism through which to examine the moral

3. STEPHEN B. WHICHER, FREEDOM AND FATE: AN INNER LIFE OF RALPH WALDO EMERSON 21 (1953) ("The rock on which he thereafter based his life was the knowledge that the soul of man does not merely, as had long been taught, contain a spark or drop or breath or voice of God; it is God."). See also COLUMBIA ENCYCLOPEDIA (6th ed. 2001) available at http://www.bartleby.com/65/em/Emerson.html (last visited Feb. 22, 2006).

4. David Meyer evokes the value of duration in his summation of Justice Byron White's approach to the right of privacy, which involved an effort to identify "the values constituting the indispensable core of the social institution of family," which Meyer suggests for Justice White "seemed to require some positive aspiration to association, to durable intimacy, and to mutual obligation and the fulfillment of dependency." David D. Meyer, Justice White and the Right of Privacy: A Model of Realism and Restraint, in Symposium on the Life and Work of Justice Byron R. White, 52 CATH. UNIV. L. REV. 915, 956 (2003). In his essay on Lawrence, Meyer usefully distills the writings of family law commentators such as Milton C. Regan, Jr., and Carl Schneider, who have emphasized the "channeling function" of family law, which might be threatened by too much openness to change in the acceptable forms intimacy may take and thus be "disabled from channeling intimate conduct into relationships reflective of durable commitment," with "human interaction drift[ing] toward more self-centered, unstable, and transient forms." David D. Meyer, Domesticating Lawrence, 2004 UNIV. CHI. LEGAL F. 453, 474-77.

5. Cynthia Starnes summarizes the pressure brought upon the value of duration and of the attendant treatment of marriage as a status-based legal relation that is a creature of the law, by the emergence in the mid-twentieth century of strong norms of individual fulfillment in personal relationships. "In the years following World War I, traditional reverence for the institution of marriage began to yield to a new emphasis on individual fulfillment. This new emphasis seemed at odds with extensive state regulation of marriage, and seemed especially inconsistent with fault based divorce laws, which often limited individual choice." Cynthia Starnes, Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault, 60 U. CHI. L. REV. 67, 107 (1993), citing MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (Butterworths, 1981). See also ROBERT N. BELLAH, ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE (1985).

The broad theme of reinvention is captured well by Walter Kirn:

Although the Constitution doesn't directly mention it, Americans have always reserved the right to reinvent themselves — to wade into the waters of rebirth and emerge with new faiths, new livelihoods, new spouses, new sexual preferences, and even new names. The cult of unending self improvement, our informal national religion, takes as its primary article of faith the idea that who a person was yesterday or happens to be today doesn't determine who he'll be tomorrow. Whether for first generation immigrants or seventh generation establishment WASPs, this is the land of clean slates and second chances — where, for example, a decades old drunk driving arrest need not prevent a man from becoming President. It's no
tenor of these contrasting dispositions in family life. Emerson crystallizes contradictions between the demands of society and of the self, and like Americans in their conduct in family affairs, bears the brunt of withering criticism: charges of rank individualism, irresponsibility, and a misplaced idealism that ignores the realities of human nature and the call of duty. Yet Emerson remains pre-eminent as a formative figure in American culture and intellect. Understanding why, despite his critics, he endures accident that most self help groups use “anonymous” in their names; to Americans, the first step toward redemption is a ritual wiping out of the self, followed by the construction of a new one.


6. The pre-eminent philosopher and Emerson interpreter Stanley Cavell relates Emerson’s sense of the complicated choices between society and self as related to language: “[E]very word that comes from us, the address of each thought, is a moral act, a taking of sides, but not in argument. In Emerson’s terms, the sides may be called those of self-reliance and conformity . . . .” STANLEY CAVELL, EMERSON’S TRANSCENDENTAL ETUDES 204 (2003) [hereinafter ETUDES]. The highly influential statement of Emerson’s own duality in this regard is WHICHER, supra note 3.

7. See Orestes Brownson, Review of R. W. Emerson’s “Divinity School Address” 1838, at http://www.historytools.org/sources/brownson-DSA.html (last visited September 15, 2005); CHARLES E. MITCHELL, INDIVIDUALISM AND ITS DISCONTENTS 4 (1997) (explaining that “the perceived appropriateness of [Emerson’s] individualism has been a key to critical treatment of Emerson and for the fifty years or so after his death in 1882, the cumulative force of these evaluations was singularly dismissive.”). A recent critical analysis of Emersonian individualism can be found in CHRISTOPHER NEWFIELD, THE EMERSON EFFECT: INDIVIDUALISM AND SUBMISSION IN AMERICA (1996).

8. In writing about the essay, Power, O.W. Firkins makes a light reference to the sense that Emerson did not bother with the messy facts about lesser beings for whom his “liking . . . almost, indeed, for blackguards and libertines” might be impractical encouragement. “Emerson, sitting in his fireproof universe, admires the activity of the torchbearer and fire kindlers. The common man’s morals unfortunately are not lined with asbestos.” O.W. FIRKINS, RALPH WALDO EMERSON 218 (1915). See also id. at 142, 314 (describing “Emerson’s philosophical defect [as] . . . the failure to allow sufficiently for the failure of average flesh,” and noting that “[m]ost thoughtful men will agree that to substitute for the phrase, ‘Follow your insight,’ addressed to the strong man, the phrase, ‘Follow your instinct,’ addressed to everybody, is an infelicitous and even reckless mode of giving emphasis to a plain truth.”).

9. LAWRENCE BUELL, EMERSON 289 (2003) (describing as one ground for the periodic dismissal of Emerson by his successors a view of him as an “unworldly idealist”).

10. Yale English Professor Harold Bloom makes some of the strongest statements about Emerson’s contemporary influence over Americans:

   Born on May 25, 1803, Emerson is closer to us than ever on his 200th birthday. In America, we continue to have Emersonians of the left (the post pragmatist Richard Rorty) and of the right (a swarm of libertarian Republicans, who exalt President Bush the second). The Emersonian vision of self reliance inspired both the humane philosopher, John Dewey, and the first Henry Ford (circulator of The Protocols of the Learned Elders of Zion). Emerson remains the central figure in American culture and informs our
as a cultural force may help to illuminate the nature of the moral enterprise in which Americans pursue their ideal of the marriage bond.

In brief, the Emerson lesson in family values is that the definition of marriage is found in the private realm, where a continuing engagement between the parties and morally serious aspirations provide the essence of marriage. Marriage is resistant to idealizations or critiques from traditionalists, radical gender theorists who see marriage as oppressive, or feminists who imagine marriage as the site for perfecting gender relations. As a critical rite of assent in a democracy, marriage is paradoxically both deeply private and important to the constitution of citizenship. As such, its moral character should be understood through the lens of Emerson family values and not through rigid moral categories derived from gender roles, religious precepts, or theories of the need to regulate the private realm to achieve social justice. Emerson family values, morally serious striving for engagement and renewal in marriages, have more payoff for the political system and private flourishing than do aspirations for permanence in the form of marriage or in individual marriages. Further, Emerson family values, private understandings of moral purpose, are superior to a vision of family life informed by varieties of contemporary feminist theory.

I. INTRODUCTION: NARRATIVE CONTRADICTION IN FAMILY LAW

Family law narrative has two equally hardy strains: One spoken almost entirely in a public register and the other remitted to the register of private conversation and advice. In public ceremonies and cultural exhortation, Americans optimistically idealize marital bonds and the related idea of permanence. With equal, if not greater, optimism, Americans are wedded to beliefs in new beginnings and personal change,\textsuperscript{11} which find their concrete expression in the dissolution of those marital bonds that they have affirmed and the advice to one another to embrace change. But the individualism implicated by their quest for renewal is not the sole

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\textsuperscript{11}STANLEY CAVELL, CONTESTING TEARS 122 (1996) [hereinafter TEARS] (explaining how the study of human change as liberation is the subject of Now Voyager, a film of the unknown woman, and that physical transformation of actors in such films demonstrates Emerson's (and Nietzsche's) idea of "the courage to become the one you are").
explanation of marital contingency. Individual renewal is linked to an understanding of marital essence as a deep form of communication that creates the "truth of a marriage" and serves as the means of renewing consent and maintaining an obligation to participate in the marriage comparable to the obligation to remain engaged with the political order.\textsuperscript{13}

Belief in the paramount importance of personal transformation is deeply rooted in the American psyche and finds a pure expression in several of the writings of Ralph Waldo Emerson.\textsuperscript{14} Americans are not unique in these paradoxical attitudes, but they have a political culture and a heritage of ideas that bring these tendencies to full flower. The popular reading of Emerson is both morally serious and too simple: Emerson's long life of writing created texts filled with nuance and with traces of an evolution in his thinking as a Puritan\textsuperscript{15} set upon an intellectual journey to find the source of truth and moral law and to reconcile polarities in his thought about freedom versus duty.\textsuperscript{16} Yet a call to individual courage to make personal transformations remained a critical part of his moral challenge to his readers.\textsuperscript{17}

This then is the contradiction in "Emerson family values" and is at the core of the American outlook on marriage: an affirmation of the lasting nature of marriage and a morally serious concern with virtue,\textsuperscript{18} expressed as an affirmation of marital devotion and, in tension, a deep belief in freedom manifested in the personal courage to make endings and embark on renewals linked to American hopes for a covenant of involvement.\textsuperscript{19} The pull toward renewal is not merely temptation, in the imaginations of Americans or in the thoughts of Emerson. This pull is moral choice and possibly an obligation owed to the ideal of consent, as well as to oneself in the Emersonian sense. As a result of the moral complexity implicated by

\begin{footnotes}
\item[12.] CAVELL, TEARS, \textit{supra} note 11, at 122. Emerson wrote, "If you [see the same truth I see], we are happy together: but when presently one of us passes into the perception of new truth, we are divorced and the force of all nature cannot hold us to each other." ROBERT D. RICHARDSON, JR., \textit{EMERSON: THE MIND ON FIRE} 330 (1997).

\item[13.] STANLEY CAVELL, \textit{CONDITIONS HANDDOM AND UNHANDSOME: THE CONSTITUTION OF EMERSONIAN PERFECTIONISM} 105 (1988) [hereinafter CONDITIONS].

\item[14.] Emerson's essay, \textit{Circles}, captures his view that a continuing process of transformation is the essence of the human condition. See RALPH WALDO EMERSON, \textit{Circles}, in \textit{ESSAYS AND LECTURES} 412 (Joel Porte ed., 1983).

\item[15.] YANNELLA, \textit{supra} note 1, at 1 ("Emerson's paternal forebears had occupied the pulpit of the Congregational Church in Concord, Massachusetts, for all but thirty-two years since 1635, and these several decades included the ministry of his step-grandfather. Although a few of these men had been touched by the religious renewal of the Great Awakening in the mid-eighteenth century, they had for the most part been orthodox clergymen, playing significant if minor roles in colonial history.").

\item[16.] WHICHER, \textit{supra} note 3, at 6-13.


\item[18.] WHICHER, \textit{supra} note 3, at 41 (concerning Emerson's view of virtue).

\item[19.] E-mail from Stanley Cavell to Author (July 12, 2005) (on file with author).
\end{footnotes}
marital flux, the law may not find its competence in constricting marital renewal in individual marriages or in the form of marriage; family law must contend with an expansive quest that is uniquely American.\textsuperscript{20} The capacity of law\textsuperscript{21} to encourage morally worthy conduct in family life lies in a strengthened imagination about the moral purposes in duration and renewal, which law must supply through narrative expansion\textsuperscript{22} and refinement.

This Article suggests that the public narrative of marriage relates to political consent and to the “unseizable possibilities”\textsuperscript{23} offered to Americans by Emerson and still central to American sensibilities. A narrative of political consent, initiated through public vows and kept vital by the ideal of renewal, belongs to and can be enriched by all citizens who participate in the formation of the regime of consent by their creation and conduct of family life. “Emerson family values” describe and explain the moral purpose of marriage as a public act in a society based on political consent. In this society, vows of duration stand for a type of commitment to engagement. Moral engagement, rather than permanence, serves such a society as the defining test of moral success or failure (though individuals’ commitment to duration may often reveal good character). Prescription for a society of “Emerson family values” includes finding means to encourage a search for self in a discourse that is enriched by a grasp of the complications of human connection.

\textsuperscript{20} Robert Frost describes the effect Emerson had on him on the matter of freedom: “I owe more to Emerson than anyone else for troubled thoughts about freedom. I had the hurt to get over when I first heard us made fun by foreigners as the land of the free and the home of the brave.” Robert Frost, \textit{On Emerson, reprinted in Emerson’s Prose and Poetry} (Joel Porte & Saundra Morris, eds. 2001).

\textsuperscript{21} “Freedom is one jump ahead of formal laws, as in planes and even automobiles right now. Let’s see the law catch up with us very soon.” \textit{Id.} at 652.

\textsuperscript{22} It is not the purpose of this essay to discuss the various efforts to define marriage restrictively as the union of one man and one woman. Nonetheless, by tying the form marriage may take to a claim to duration of form unleavened by other moral aspiration, the constriction in the definition betrays the law’s potential to expand moral purpose and hence to enrich moral imagination about the marital covenant.

\textsuperscript{23} \textit{Whicher}, supra note 3, at 118 (using the phrase “unlimited possibilities” in describing Emerson’s faith in the human spirit in the context of Emerson’s growing realization of human limitations) and at 111 (“Man is promised the world — a promise perpetually made and never kept.”); \textit{see also} Irving Howe, \textit{The American Newness: Culture and Politics in the Age of Emerson} 25 (1986) (using the phrase “unseizable possibilities”).
II. CONSIDERING EMERSON: AMERICAN MORAL REACH

Emerson interpreter and philosopher Stanley Cavell explains that Emerson provides a theory, an aesthetics, and a theology of reading.\textsuperscript{24} He explains that Emerson’s query about reading and writing is, “How is it that a text we care about in a certain way . . . invariably says more than its writer knows, so that writers and readers write and read beyond themselves?”\textsuperscript{25} Writing and reading reveal the character and the form, for Emerson in his writing, of his existence and our capacity to apprehend his existence.\textsuperscript{26} For each of us, “language is an inheritance,” and hence speaking may be first hand or second hand, or thinking or imitating.\textsuperscript{27} Cavell states that “. . . [w]ith every word you utter you say more than you know you say . . . which means in part you do not know in the moment the extent to which your saying is quoting.”\textsuperscript{28} On a concrete level, this statement recognizes Emerson’s influence in situations where Americans think and speak about their lives, perhaps imitating, thinking and “reading beyond themselves,” without a grasp of all that they know and say.

There are many efforts to explain the extent of Emerson’s hold on the American mind.\textsuperscript{29} The simple view, without reference to a theory of reading and writing expounded by Emerson, and further expounded by Cavell, is that Americans have absorbed Emerson into their bloodstreams but have lost ready access to Emerson’s texts\textsuperscript{30} and life. Despite the depth

\textsuperscript{24.} CAVELL, ETUDES, supra note 6, at 94. See also ERIC CHEYFITZ, THE TRANSPARENT: SEXUAL POLITICS IN THE LANGUAGE OF EMERSON 9 (1981) (describing Emerson’s theory of interpretation as a theology of reading).
\textsuperscript{25.} Id.
\textsuperscript{26.} Id. at 94.
\textsuperscript{27.} Id. at 92. Cavell fills in the way in which language is an inheritance as follows: “Words are before I am; they are common.” Id.
\textsuperscript{28.} Id. at 95.
\textsuperscript{29.} Explaining Emerson in poetic irony, Robert Frost declared himself an Emersonian and gave various reasons, including Emerson’s status as a “poetic philosopher or . . . a philosophical poet,” Emerson’s influence on Frost’s understanding of sentences, Emerson’s effect on Frost’s thinking about freedom, and Emerson’s casual dismissal of evil. Frost calls Emerson one of the four greatest Americans: “George Washington, the general and statesman; Thomas Jefferson, the political thinker; Abraham Lincoln, the martyr and savior; and Ralph Waldo Emerson, the poet.” Porte & Morris, supra note 20, at 650-4.
\textsuperscript{30.} See CAVELL, ETUDES, supra note 6, at 43 (describing Emerson and Thoreau as founding thinkers of American culture but arguing that knowledge of them is not possessed in common by that culture). See SACKS, supra note 5, at 4 (calling Emerson America’s scholar but suggesting that his oration, “The American Scholar,” given Emerson’s quirks and rhetorical strategies, “is not well understood”). Joel Porte described Emerson as “the least appreciated, least enjoyed, least understood — indeed, least read — of American’s unarguably major writers.” Joel Porte, The Problem of Emerson, reprinted in EMERSON’S PROSE AND POETRY 684 (Joel Porte & Saundra Morris eds., 2001). Walter Kirn describes his meeting at home in Minnesota with a friend named Karl after he completed his education at Princeton. Karl stayed home to help with the dairy farm and became a serious reader, with an interest in Buddhism and Emerson. Karl asked Kirn, “So what are your views on Emerson?” Karl thought that he and a recent Princeton graduate would share interests in the words of Emerson. Kirn reveals, “But we didn’t, in fact, and I didn’t know
of Emerson’s cultural presence, contemporary Americans often equate Emerson with high school curricula. When law professors cite Emerson, they rarely do more than borrow a trivial quotation or give a perfunctory bow to his writings on nature, a quotation on quotation, or the implications of his writings for bankruptcy. In 1915, O.W. Firkins already observed that the world seizes upon Emerson’s “sagacities” yet “ignores his philosophy: he is at the same time honored and forsaken.” In the midst of shortfalls and flux in the way Americans attend to Emerson’s life and how to tell him this. To begin with, I couldn’t quote the Transcendentalists as accurately and effortlessly as he could. I couldn’t quote anyone.” Walter Kim, *Lost in the Meritocracy*, *The Atlantic Monthly* (Jan/Feb 2005) available at http://www.theatlantic.com/doc/200501/kim (last visited September 11, 2005). The anecdote bears telling for its illustration of the haphazard distribution among Americans of the habit of reading, including Emerson, with a dairy farmer’s grappling with reading Emerson and searching to expand and change the meanings he encountered, and a young Princeton graduate, on his way to Oxford, reporting the incident in an account of his progress toward becoming a reader after losing his way in the rites of one contemporary American version of reinvention.

31. As well they might. See *Buell*, supra note 9, at 319 (“Emerson is still required reading in thousands of college and school programs.”); *See Cavell, *Etudes*, supra note 6, at 171 (describing the inability of our American culture to listen to the words, to possess them in common, [of Emerson], “an inability which presents itself to me as our refusal to listen to ourselves, to our own best thoughts.”); *Porte, The Problem of Emerson*, supra note 30, at 679 (describing Emerson’s earlier treatment as “an all-American aphorist once dear to captains of industry, genteel professors of literature, and hopeful preachers of suitably uplifting remarks”).

32. The most popular trivial Emerson quote among law professors is, “A foolish consistency is the hobgoblin of little minds.” A rough count of the first 401 citations in a TWEN search for Ralph Waldo Emerson reveals 245 quotations of Emerson with no substantive content. Library search, MSU College of Law, September 2, 2005. In addition, Emerson quotations are used on greeting cards. Some are apocryphal, such as the definition of success: “To laugh often and much; to win the respect of intelligent people and the affection of children; to earn the appreciation of honest critics and endure the betrayal of false friends; to appreciate beauty, to find the best in others; to leave the world a bit better, whether by a healthy child, a garden patch or a redeemed social condition; to know even one life has breathed easier because you have lived. This is to have succeeded.” Transcendentalists, Ralph Waldo Emerson, Quotes, Success, http://www.transcendentalists.com/success.htm (last visited September 4, 2005). According to Simran Khurana, the quotation is likely from a poem by Bessie Stanley contained in a book with actual Emerson quotes. *Id.* The one quote from Emerson about marriage in general circulation is trivial: “Is not marriage an open question, when it is alleged, from the beginning of the world, that such as are in the institution wish to get out, and such as are out wish to get in?” Wisdom Quotes, Ralph Waldo Emerson, http://www.wisdomquotes.com/000949.html (last visited September 11, 2005).

33. Lawrence Buell is tolerant of the rampant “quotationism” as a source of nourishment of Emerson influence in contemporary life: [Emerson] survives at the grassroots as an inspirational force in the form of his sayings. “Insist on yourself, never imitate.” “All life is an experiment.” You find these and hundreds of other Emersonianisms at internet sites like inspirationspeak.com and giftofwisdom.com maintained throughout the United States, Europe, and the Anglophone world. *Buell*, supra note 9, at 329.

34. *O.W. Firkins, Ralph Waldo Emerson* 373 (1915).
thought,\textsuperscript{35} Emerson’s depth of engagement with ideas as the moving force in his life\textsuperscript{36} and his sense of the calling of the American project pervades American consciousness.\textsuperscript{37} More tellingly, Americans write and speak their words and lives as inheritors of Emerson’s texts and his aesthetic of reading. Further, their marriages are spoken in varieties of imitation and thought and are not demonstrably the creation of those within them. Hence American marriages are not invariably confirmation of human existence within the spoken life.\textsuperscript{38} Like writing, marriage is a form of expression, and one who engages in that expression does not always know whether he is engaging in a form of idolatry that is merely imitation, or creating an existence that expands meaning for the participants in the marriage and for the community.

A. READING EMERSON

Ralph Waldo Emerson defies ready understanding\textsuperscript{39} even as he

35. Firkins also suggested, in 1915, that the Americans might fluctuate in their capacity to apprehend Emerson:

\text{He is less obscure today because time has shortened the distance. “Self-Reliance” and “Compensation” have tinctured the air, and the study of the parents has borne swifter fruit in the intuitions of the children. Fifty years of approach have lightened many difficulties, and one reflects curiously that fifty years of recession, should they occur, might involve our grandchildren in the same perplexities which befogged our grandsires.}

\textit{Id.} at 234.

36. \textit{See SACKS, supra note 5, at 55} (describing how Emerson tied ideas to life and wrote from his lived experience).

37. In an essay that treats “Emerson’s project” as “in some obvious sense” a failure, Howe concludes that “… neither disciples nor opponents of Emerson would deny the lasting impress of his word. By summoning and then transcending an American sense of possibilities, he placed these before future generations, forever to lure and baffle.” \textit{HOVE, supra note 23, at 29. See also id. at 25} (saying as “caller for that revolution of the spirit which encompasses and dwarfs all other revolutions, he set the agenda for generations to come”).

38. \textit{CAVELL, ETUDES, supra note 6, at 97} (describing the readers’ subjecting himself to a writer’s words “as the writer has by undertaking to enact his existence in saying them.”).

39. \textit{Id. at 5} (observing that prominent readers of Emerson have said that “if what I [Cavell] say about Emerson is true of him, almost no one could, or could seem to, understand him — at least without doing little else in the day except read him.”). But it is a mistake to suggest that Emerson was “muddleheaded or contradictory.” \textit{STEVEN M. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 263, n.26} (1990). \textit{See also CAVELL, ETUDES, supra note 6, at 176} (referring to John Updike as “one more in the line of artful detractors of Emerson, who from time to time are moved to get him in perspective by condescending to him.”). The hazard for Emerson has been his being taken “at face value, without supposing the demand of interpretation.” \textit{Id.} at 176. John Updike, \textit{Emersonianism, THE NEW YORKER, June 4, 1984, 112-32 at 128} (“I myself have found that the essays melt and merge in the mind . . . . We have been superbly exhorted, but to what effect?”). Cavell explains reading, what he calls the “theology of reading,” as a process of attainment in which “Emerson (and Thoreau) dare us to read them and dare us not to[. . . .] The problem is that the text’s thoughts are neither exactly mine nor not mine. In their sublimity as my rejected — say repressed — thoughts, they represent my further, next, unattained but
influences the thinking of Americans. The best philosophers struggle to understand his writings and to evoke their meaning. Lending support to the possibility that Emerson may be applied by Americans to their lives in ways that both vindicate their decisions as morally serious undertakings and reflect a debased understanding is Richard Hofstadter's remark that, though Emerson is not anti-intellectual in the sociological and political sense in which Hofstadter uses the term, he "has provided anti-intellectuals with a great many texts." A key element in the high-culture understanding of Emerson is that Emerson's writing is about reading, and reading is about discovery that must be followed by alteration — reading Emerson does not end; it is a calling. One who reads Emerson undergoes change. Emerson "proposes in his essays a genre of writing that shows a finite prose text to contemplate an infinite response." Stanley Cavell, the leading Emersonian philosophical critic, sees Emerson as a bridge between dispensations in philosophy.

attainable self. To think otherwise, to attribute the origin of my thoughts simply to the other, thoughts which are then, as it were, implanted in me — some would say caused — by let us say some Emerson, is idolatry." CAVELL, ETUDES, supra note 6. The phrase "unattained, but attainable self" is drawn from Emerson. See RICHARDSON, supra note 12, at 311 (citing THE EARLY LECTURES OF RALPH WALDO EMERSON (Stephen E. Whicher, et al. eds., (1972)).

40. CAVELL, ETUDES, supra note 6, at 5.
41. RICHARD HOFSTADTER, ANTI-INTELLECTUALISM IN AMERICAN LIFE 9 (1963). Bloom remarks: "[Emerson's] spiritual elitism could only be misunderstood, but he did not care much about being misread or misused." Bloom, Introduction to RALPH WALDO EMERSON 10 (Harold Bloom ed., 1985). According to Packer, Emerson believed the reader should be kept from reaching ready conclusions about a writer's meaning:

Late in life [Emerson] remarked to a young admirer that the best writing is that which does not satisfy the reader. 'A little guessing does no harm, so I would assist him with no connections.' His own refusal to provide transitions was strategic, a sacrifice of judiciousness to power. But the strategy itself reflected a deep skepticism about the capacity of language to embody truth.


42. CAVELL, ETUDES, supra note 6, at 95. ("On the reading side, the idea of mastering Emerson is not that of controlling him, exactly (though it will be related to monitoring him), but rather that of coming into command of him, as of a difficult text, or instrument, or practice... mastering his text is a matter of discerning the whim from which at each word it follows.")

43. Id. at 97 ("Your work, what is yours to do, is exemplified, when you are confronted with Emerson's words, by reading those words — which means mastering them, obeying and hence following them, subjecting yourself to them as the writer has by undertaking to enact his existence in saying them... you find your existence in conversion, by converting to it, that thinking is a kind of turning oneself around."). T. S. McMillin, OUR PREPOSTEROUS USE OF LITERATURE 126 (2000) ("How we gather meaning out of texts informs how well we will participate in the worlds of our words; how well we do our readerly work affects (and is affected by) our ability to go on toward nextness and out of prefabricated notions of who we have become.").

44. Id. at 4.
45. Id. at 84.
Emerson’s meaning, which comes in fragments wrested from his text, continues to find its genius. Americans, even those who do not know his work, are involved in reading the text he wrote, through writers who “write and read beyond themselves.” Indeed, in his fascination with Emerson, Cavell has selected a group of motion picture “remarriage comedies,” such as The Lady Eve, The Philadelphia Story, Adam’s Rib, and The Awful Truth, and analyzed them using Emerson’s writings on the basis that they are “inspired by Emersonian transcendentalism” and Emerson is in the bloodstream of American culture, through extensions, misreadings, and cultural osmosis in a culture receptive to “imagining departures from [their] lives as constituted.” Emerson’s writings embody the American preoccupation with locating meanings “transfigured by our unprecedented experience of discovery, displacement, and inhabitation . . . and unending disappointments with our failure to become a new world.”

Perennially difficult to classify, Emerson disdained features of the English romanticism of his time; although cerebral, he nonetheless qualifies as a mystic as well as a “savage” with “deep kinships with the Dionysiac and the Shamanistic.” “America’s prophet of possibility,”

46. CAVELL, ETUDES, supra note 6, at 133. See also CHEYFITZ, supra note 24, at 10 (“Gaps — abysses and mysteries — abound between paragraphs and often between, and even within, sentences. Putting Emerson aside, we cannot remember what we have read or if we have read anything, in the sense of being able to repeat a coherent statement of the author’s. Essays are read numerous times and still they slip away, eluding the grasp of comprehension.”).

47. Id. at 95 (referring to Emerson’s theory of reading and writing as designed to answer the question, “What is the genius of the text?”).

48. Id.

49. STANLEY CAVELL, CITIES OF WORDS: PEDAGOGICAL LETTERS ON THE REGISTER OF A MORAL LIFE 6 (2004) [hereinafter CITIES].

50. CAVELL, CONDITIONS, supra note 13, at 126. Hofstadter portrays the determination of Americans to found a new world in their approach to religion. Americans were free to make a choice of religion and “[in] this process, the decision to join a church had been made over and over again by countless individuals . . . [who chose] denomination[s] . . . infused with the American’s yearning for a break with the past, his passion for the future, his growing disdain for history.” HOFSTADTER, supra note 41, at 82. See MCMILLIN, supra note 43, at 2 (2000) (“Since the midnineteenth century, Emerson and his writing have been used to stand for the true nature of America, for what is best (or sometimes worst) and most American in the nation’s literary tradition, and for all that is good, just, moral, real, and genteel in the universe.”).

51. CAVELL, CITIES, supra note 49, at 28.

52. CAVELL, ETUDES, supra note 6, at 43 (describing Emerson and Thoreau as founding thinkers of American culture but arguing that knowledge of them is not possessed in common by that culture); Id. at 54 (posing a query whether portions of the essay Self-Reliance have “any philosophical point beyond the literary.”). See also GEORGE SANTAYANA, THE SENSE OF BEAUTY: BEING THE OUTLINE OF AESTHETIC THEORY 1896-1955, ix, 142-43 (describing “absence of form in composition” in Emerson as consisting of “significant fragments [that] are collected, and no system, no total thought, constructed out of them”).

Emerson nonetheless differentiated himself from English Romantic poets with a critique of the poet Lord Byron, saying that the "wild striving" of art to find the vast in nature "in Byron...is blind, ...sees not its true end—an infinite good, alive and beautiful, a life nourished on absolute beatitudes, descending into Nature to behold itself reflected there."55 But a critical contemporary believed his writings reduced to, "[a]nd so, in the end, every one will be found to take the way which his impulse or fancy or self-interest may lead him," and lamented that, "[w]hoever turns to his 'Essays' for a system, a code, or even a set of definite principles will be disappointed."56 Emerson recognized that "it can be costly to believe in individuals' essential divinity,"57 but proceeded for his whole writing career to embrace "costly confirmations"58 of such a conviction. Literary interpretations of Emerson explore how his writings engage the reader in a text that loops around to a mastery of Emerson by the reader: "what the essay is remembering, or membering, the one will it creates itself to obey, is that which puts itself in motion, the will of a persisting, listening reader."59 For readers, and perhaps for an inattentive culture imbued with the echoes of "persisting, listening reader[s]," "an Emersonian essay is a finite object that yields an infinite response."60 Whether Emerson counts as a philosopher or a poetic essayist remains hard to settle. He is called "a writer with whom we have never settled, who retains so much secrecy, who asks of us transcendence, transformation, aversion, the response to an infinite object, the drawing of a new circle, the rememberment of fragments torn from his work..."61

B. READING EMERSON’S LIFE

Emerson scholar Stephen Whicher explained Emerson’s life and work as a long effort to reconcile polarities in his evolving thought, expressed as freedom versus duty, or moral law.62 Emerson sought a means of acquiescence in his own limitations to reach his high ambition and to identify and accept his vocation as a thinker.53 In searching for insight,
Emerson wrote about particulars to reach judgments about the ideal, and drew upon the ideal to render particulars insubstantial. In his essay “Friendship” Emerson wrote, “True love transcends the unworthy object and dwells and broods on the eternal . . .” Despite his ultimate concern with the eternal, Emerson “lived an intense emotional life” brought forward in his writings. In the terms used by Cavell, who, as discussed, focuses on remarriage comedies as a source of insight about moral thinking, Emerson effectuated his aversion to society by “turning toward.” In Whicher’s terms, he accepted society as containing a whole that might yield the genius he saw as a young man in the god in the individual. Emerson’s thoughts about his life ended in “Olympian consent” to the insubstantiality of human life — “enter[ing] an upper region where the atmosphere is almost too rarefied for mortal lungs.” Emerson eventually saw duty as a means for the thinker to take part in the “tendency of the whole” and hence to “reach freedom through thought.” Emerson’s detachment, expressed in his writing and to a certain degree in his personal relations, provides a formidable example. For Emerson, love and friendship have the platonic purpose of “elevat[ing] the individual lover or friend.” The sense of connectedness that delight in a friend or lover creates pales as the real distance between any two people becomes evident, but the purpose of bonds remains in the magnanimous participation in an abstract connectedness that eventual detachment permits. There is a cost nonetheless. “Nothing is got for nothing, and perhaps the largest pragmatic consequence of being ‘part or particle of God’ [from Nature] is that your need for other people is somewhat diminished.”

Despite his views on concrete connection and some evidence of his emotional isolation, Emerson lived a family life and made the small and

64. Whicher, supra note 3, at 63.
65. Id; see also Ralph Waldo Emerson, Friendship, in Essays and Lectures 354 (Joel Porte ed., 1983).
66. Whicher, supra note 3, at 63. See also Richardson, supra note 12, at 432 (referring to “the extravagant, wild, ecstatic side of Emerson” and asserting that, “Only outsiders thought him detached. Emerson had a hunger for friendship and a delight in affection.”).
68. E-mail from Stanley Cavell to Author (July 12, 2005) (on file with author).
69. Whicher, supra note 3, at 125-6.
70. Id. at 134.
71. Id. at 129; see also Richardson, supra note 12, at 308 (“[H]e defined growth as the constant effort of the soul to find outside itself that which is within, and he characterized culture as the ‘constant progress of the heart.’”).
72. Whicher, supra note 3, at 132.
73. Buell, supra note 9, at 15.
74. Bloom, supra note 41, at 6.
75. Howe, supra note 23, at 7 (“[N]othing in Emerson’s journals is more poignant than his repeated self-excoriation for failing to show sufficient warmth to friends.”); Maurice Gonnaud, An Uneasy Solitude 30 (1987) (“[Emerson] formed the habit of
large choices that become markers of a person's character. A young widower, he received an inheritance from his wife, Ellen, which allowed him to withdraw from his ministry and avoid "his servitude to a world he never made." He remarried and honored Ellen with the naming of his first daughter, Ellen Tucker Emerson. He thus preserved the imprint of a marriage cut short by death by giving it a shaping force in the moral imagination of his new marriage, achieving a renewal of necessity while attaining a form of duration. Yet, in illustration of the potential vectors of moral perfectionism in application to lives, there is evidence that, as a prophet of renewal and, more prosaically, of dissent, Emerson chafed at the durational claims of marriage. According to one recent description, he "opened himself to complex emotional involvement with . . . women" other than his wife and engaged, in particular, in a rich correspondence with Margaret Fuller that "attests to an only slightly repressed erotic relationship, about which he clearly fretted." In contrast to Americans who celebrate duration and engage in forms of renewal that interrupt duration, Emerson celebrated the importance of renewal but gracefully acceded to the claims of duration. Emerson may have applied his philosophy to his life — given his deepest meanings, he must have — and reached a conclusion for his conjugal life that carried a moral depth not easily attained by Americans who bear Emerson’s DNA "under their skin."

Buell comments on his marriage to Lidian as follows: "...the combination of consistent loyalty versus intervals of discord, mutual disappointment versus mutual admiration, probably had much to do with provoking Emerson's periodic complaints about the artificiality of monogamous marriage and with shaping the affirmative side of his mature conviction that self-sufficiency is more fundamental than interpersonal relations...." Stanley Cavell demonstrates, in his analysis of "remarriage comedies" in which a couple divorces or quarrels, and then renews their marriage, that one can apply an Emersonian standard to one's life, and choose duration. Yet Americans, however well or poorly they
read Emerson (if at all) and apply him to their lives, and whether they choose or reject duration, are attempting to answer Emerson’s demands upon their moral imagination.

One writer has said that Emerson wrote no essay on the topic of marriage, but in his journal, he applied his mode of thinking to marriage: “. . . married and chained through the ages is frightful beyond the binding of dead and living together.” Living in a time when the weight of the conventional morality that he scorned channeled lives in ways it no longer does, and in the innate kindness of his nature, Emerson remained married to his wife Lidian and “displayed tenderness, solicitude, and esteem for [her].” Furthermore, Emerson dismissed emotions such as misery “in theory,” but fell prey to deep grief. Living in a time when acting on his private theorizing about marriage was unlikely, Emerson never had to weigh the real consequences of applying his belief in present insight to the web of obligation and social reliance created by a marriage. Without

When you came in sight I got that old feeling
The moment you came by I felt a thrill
And when you caught my eye
My heart stood still
Once again I seemed to have that old yearning
And I knew the spark of love was still burning
There’ll be no new romance for me
It’s foolish to start
For that old feeling is still in my heart

SAMMY FAIN & LEW BROWN, THAT OLD FEELING (1937). For Cavell, marriage, and remarriage, are much more than “that old feeling.” As a moral matter, the remarriage comedies “project the idea that what constitutes marriage lies not . . . outside of marriage (in church, state, sexual satisfaction, or the promise of children) but in the willingness for marriage itself, for repeating the acknowledgment of the fact of it, as if all genuine marriage is remarriage.” CAVELL, CONDITIONS, supra note 13, at 104.

84. See RICHARDSON, supra note 12, at 331. But see FIRKINS, supra note 8, at 231-32. Firkins suggests that Emerson disliked the novel as a genus because of “its tireless emphasis on money or marriage or physical safety or — what wearied Emerson almost as much — the stringencies of temptation and remorse.” Id.

85. Id. at 330.

86. Emerson changed her name from Lydia to Lidian after their marriage. RALPH L. RUSK, THE LIFE OF RALPH WALDO EMERSON 212, 223 (1949).

87. See RICHARDSON, supra note 12, at 331.

88. Id. at 359 (paraphrasing Emerson’s wife Ellen).

89. A conservative writer on the importance of order has pointed to the buffering context of the substantial social order in which Emerson existed and wrote: “In an essay on Ralph Waldo Emerson and the nature of Transcendentalist individualism, McClay points out that even the radical selfhood explored by Emerson ‘silently presupposed — indeed, it took utterly for granted — a profound degree of social order and a wide range of social, institutional, cultural, and moral supports provided by the family and community life into which he was born.’” Bruce P. Frohnen, Law’s Culture: Conservatism and the American Constitutional Order, 27 HARV. J. L. & PUB. POL’Y 459, 473 (2004) (quoting Wilfred M. McClay, Mr. Emerson’s Tombstone, in COMMUNITY AND TRADITION: CONSERVATIVE PERSPECTIVES ON THE AMERICAN EXPERIENCE 7 George W. Carey & Bruce Frohnen eds., 1998). John Updike observes: “A social fabric, [Emerson] did not seem to realize (and in the security of pre-Civil War America, in the pretty farm town of Concord, what would
Emerson’s skepticism, the cultural brakes of the nineteenth century that shaped Emerson’s concrete sense of the possible, his emotional elegance, or the weight of a private narrative of moral duty joined to an Emersonian understanding of moral character, Americans plunge forward, driven by a deep well of aspiration fed by an American mystic who never tested his convictions in the matter of marriage. And they may not turn to Emerson to learn precepts by which to channel his belief in their divinity: “Emerson’s prose... offers neither exemplary narratives of how to live nor systematic constructions of truth.”

Yet in evaluating the moral worth of the conduct of Americans influenced in family affairs by Emerson, Emerson’s idea of compensation provides instruction, “God is promoted by the worst.” Emerson interpreter B.L. Packer characterizes Emerson’s “laconic explanations” of the fallenness of the world as resulting from self-distrust, with “the corresponding imperfections of the social and natural world not as adamantine limitations, but as parodic or entropic forms of the good.” Such a view of the significance of failures in human enterprise, including marriage, indicates that individual failures to act with sufficient moral seriousness in ending a marriage may be only imperfect contributions to a serious common undertaking to attain high aspirations to deep engagement in family bonds. Paradoxically, self-distrust may parody claims to self-reliance, but the law’s role is to encourage the self-trust that contests the “fallenness of the world” as manifested in family life.

We now have widespread debate on the larger significance of such ways of living, of arranging our intimate lives. The fulcrum to express concern is the plight of children stranded amid broken promises and family chaos. But there are larger meanings and consequences associated with the forms of consent given and withheld in family life, the disruptions of assumptions about a particular marital narrative, and the test by which a perfectionist scrutiny of one’s marriage is judged. Asking questions about
one’s marriage does not foreordain the answer as one of exit or duration, and does not preclude debased choices to stay or go. Either conclusion can assume a mantle of American self-discovery, and either can be a failure to meet the Emersonian challenge. Indeed, in the nature of the matter, we do not know how well Emerson fared in this feature of his moral life. By comparison with his feminist friends, Margaret Fuller, Elizabeth Peabody, and Harriet Martineau, who variously illustrated moral courage by “aversion to conformity” and experimentation, he did not use his life to embody resistance to a convention. However, it can be argued that he did use it to embody a moral perfectionist examination of his marriage.

C. RE-READING EMERSON ON HUMAN BONDS

Although, as mentioned above, Emerson wrote no essay on the topic of marriage, his essay “Love” addresses the emotions encountered in the course of a marriage. In Emerson’s period, he readily conflated love with marriage. His essay “Love” is one of his less complex. He moves from describing the enchantment of love for the young as “relations of transcendent delicacy and sweetness;” to the reconciliation that the married must attain in mid-life upon seeing one another’s flaws, “[f]or it is the nature and end of this relation, that they should represent the human race to each other,” to their discovery of the “deciduous” nature of all that drew them together, so that “the purification of the intellect and the heart, from year to year, is the real marriage, foreseen and prepared from the first, and wholly above their consciousness.” One of the most striking fragments in “Love” is Emerson’s description of the nature and end of marriage as that of representing the human race to each participant in the marriage. This view grounds marriage in a capacity for a given marriage to sustain recognition and thereby serve a goal of participation in general human understanding. He follows this portrait of a marriage that attains for the individuals “a thorough good understanding” with thoughts on the supplanting of the beautiful relations of youth, “when the affections rule and absorb the man, and make his happiness dependent on a person or persons,” and with the reassurance that “we need not fear that we can lose anything by the progress of the soul.” Emerson portrays marriage as

95. WHICHER, supra note 3, at 29 (“Conscious of the limits of his strength and practical ability . . ., [Emerson] turned out in practice a conservative, in that he remained faithful to his poet’s nature and fell in easy with the circumstances that made its pursuit possible.”).
96. See RICHARDSON, supra note 12, at 331.
98. Id. at 336.
99. Id. at 337.
100. Id. at 366.
101. Id. at 367.
102. Id.
beginning with the enchantment of love and proceeding to internal progressions in heart and intellect set in motion by the beginning enchantments but finally "los[ing] their finite character . . . to attain their own perfection."103 Emerson described the shape of a marriage in New England in his time, but his sense of the progression of the soul suggests that a marriage must have the capacity to create understanding of the human, to purify the heart and intellect, and to finally release the parties from the claims of enchantment to move to "something more beautiful."104 By writing descriptively, Emerson suggests that this is the shape marriages take in New England, and by writing in his aphoristic style, he describes the quest of marriage to attain beauty. While there is in his portrait of moral progression an unstated but strong "claim to duration," in the combination of his description of the waning of enchantment and the moral, or spiritual, results of marriage, there is a charter for renewals where enchantment is no longer a memory that gives the marriage transcendental shape and is also not a beginning point for the journey of the soul. Emerson succeeds in fusing the duration ideal to the renewal quest by the complexity of his description of marriage as being grounded in both enchantment and elevation of the soul through acceptance of progression, disenchantment, and change in the marriage, and a response to such change through one’s own spiritual change. Duration and renewal can be intertwined in a marriage through “turning to,” and through personal renewals of commitment justified by one’s own moral transcendence. Presaging the remarriage comedies of later times, duration is seen to stand for a moral project of engagement in which the self retains a private purpose and duration admits of a perfectionist moral test of mutuality.105 In his journal writings about marriage, Emerson clearly understood that renewal might include divorce. Both outcomes — continuance in time and endings — might derive from the fused ideal of duration and renewal as markers for political consent and moral transcendence.

Where then, in Emersonian moral perfectionism as applied to the family, might the claims of literal duration find a place? As Cavell instructs us, a deep task of reading and thus of moral inquiry is to find an "infinite response to a finite text."106 Cavell has made a life’s work of reading Emerson. Texts are not disposable but are our master. Moral perfectionism and urgent concern about inconstancy to the literal meaning of spoken words,107 which are made and remade as we make and remake ourselves, lack a common concern. Emerson claims in “Circles” that the possibilities of a friend can be exhausted. In saying so, he was

103. EMERSON, Love, supra note 97, at 337.
104. Id.
105. CAVELL, CITIES, supra note 49, at 11.
106. CAVELL, ETUDES, supra note 6, at 4.
107. CAVELL, CONDITIONS, supra note 13, at 115 (on promising).
emphasizing the right of rejection of a stale idea whose only hold was its role in his past and which lacked moral force to mandate his continuing obedience. But the focus on moral perfectionism remains that of fidelity to oneself, and fidelity to oneself does not mandate disregard for the unexhausted possibilities in reading another but suggests that the pursuit of insight is a claim of duration.

In “Friendship,” Emerson emphasizes both the felicity of the combination and the importance of separateness and even detachment. He praises unreciprocated goodwill (“thou art enlarged by thy own shining”\textsuperscript{108}) and the illusory aspect of what one attaches to friends, though not to friendship (“The higher the style we demand of friendship, of course, the less easy to establish it with flesh and blood. We walk alone in the world. Friends, such as we desire, are dreams and fables”\textsuperscript{109}). His expectation of a friendship is so high it almost surely fails (“There must be very two, before there can be very one. Let it be an alliance of two large, formidable natures, mutually beheld, mutually feared, before yet they recognize the deep identity which beneath these disparities unite them”\textsuperscript{110}). He recognizes the likelihood of mistake (“[o]ur impatience betrays us into rash and foolish alliances which no God attends”\textsuperscript{111}). The standards are demanding (“[i]t should not fall into something usual and settled, but should be alert and inventive, and add rhyme and reason to what was drudgery”\textsuperscript{112}). Despite its snares and illusions, friendships have value (“[w]hen they are real, they are not glass threads or frostwork, but the solidest thing we know”\textsuperscript{113}). Yet they are by no means, at their best, perfect unions of two natures (“[a]lmost all people descend to meet. All association must be a compromise, and, what is worst, the very flower and aroma of the flower of each of the beautiful natures disappear as they approach each other”\textsuperscript{114}).

Our own soul is preferred as what we know (“In strictness, the soul does not respect men as its respects itself. In strict science, all persons underlie the same condition of an infinite remoteness”\textsuperscript{115}). Our efforts at friendship are betrayed by hopes for simple pleasures, when we seek our friend “not sacredly”\textsuperscript{116} but “with an adulterate passion.”\textsuperscript{117} (“What a perpetual disappointment is actual society, even of the virtuous and

\textsuperscript{108} RALPH WALDO EMERSON, Friendship, in ESSAYS AND LECTURES 341, 354 (Joel Porte ed., 1983).
\textsuperscript{109} Id. at 352.
\textsuperscript{110} Id. at 350.
\textsuperscript{111} Id. at 352-3.
\textsuperscript{112} Id. at 349.
\textsuperscript{113} Id. at 346.
\textsuperscript{114} Id. at 345.
\textsuperscript{115} Id. at 343-4.
\textsuperscript{116} Id. at 345.
\textsuperscript{117} Id.
Thus, Emerson emphasizes union as both of a high order and in great part an illusion. Choosing well is critical and mistakes can be made, indeed are likely. Resolution of the imperfections in the attempted union is to be made by self-reliance. But his resort to ultimate self-knowledge and detachment seems to assume that a choice that can disappoint for the shortfall from what might have been reasonably hoped in the absence of impatience can still have value.¹¹⁹

The moral quest is internal. Emerson does not speak of what we owe to our friends but what we owe to ourselves. The act of friendship is a transcendental quest, in which the great understand the futility, try to choose well, and, in the end, take resort to their own greatness by finding independence in transcending “the unworthy object.”¹²⁰ Finally, one must not say these things of a friendship but adopt as the essence of friendship “an entireness, a total magnanimity and trust”¹²¹ and by treating the object “as a god . . . deify both.”¹²²

The psychology and inner moral logic of friendship are then complicated. They hold the highest aspirations of a quest to make something transcendent of an object sure to disappoint, something that is a dream and a fable. Engagement and transcendence are achieved by a sort of withdrawal and by a deification of someone understood as a compromise. The risk of choosing “cheap”¹²³ is real. Ultimately, friends are relieved to be alone (“[o]ur faculties do not play us true, and both parties are relieved by solitude”¹²⁴).

Emerson’s account of love, and by implication, of marriage, bears a resemblance to his account of friendship. The account of how one’s own transcendence is achieved includes forms of magnanimity that serves duration in marriage. Yet duration is not a value he has identified as critical; rather, the emotional state required to make of friendship and love that of which they are capable serves duration, but only on the implicit assumption that the other demanding features of Emerson’s account are satisfied. Thus, Emerson does not say one may discard a spouse chosen in the mistake of passion (in love, he hopes that passion will serve the

¹¹⁸. EMERSON, Friendship, supra note 108, at 345.
¹¹⁹. Id. at 349. See supra note 25 (“True love transcends the unworthy object, and dwells and broods on the eternal, and when the true interposed mask crumbles, it is not sad, but feels rid of so much earth, and feels its independency the surer.”).
¹²⁰. Id. at 354. Cavell explains the tight connection between a philosopher’s concern with friendship and the remarriage comedy treatment of marriage: “[M]arriage is an allegory in these films of what philosophers since Aristotle have thought about under the title of friendship, what it is that gives value to personal relations, and this is a signature topic of moral perfectionism.” CAVELL, CITIES, supra note 49, at 15-6.
¹²¹. Id. at 351.
¹²². Id. at 354.
¹²³. Id. at 352.
¹²⁴. Id. at 345.
chooser), but he also does not say one must persist with a particular friend. Rather, he suggests that a form of persistence is a feature of friendship and love, if the undertaking succeeds.

Thus, the term individualism, often applied to Emerson as well as to trends in American family life, is in part misleading. Emerson's ideas of self-reliance and individualism address to each person the recommendation for emotional and spiritual health drawn from a description of the transcendent component in connections nourished by individual self-knowledge and by the discipline by which separate selves may achieve a semblance of the unity of the inner divinity he sees in each person. Emerson's ideas of self-reliance and individualism describe what can be made, given our natures, of our earthly bonds. If the dispositions of Americans in family affairs are heavily individualistic, it is an individualism with some rooting, often shallow to be sure, in the deep understanding of moral aspiration embodied in Emerson's general writings on individual self-cultivation and in his specific discussions of love and friendships. Emerson acknowledged the separateness of human beings but emphasized that in a deep friendship one sees the face of the human race. One attains a generosity toward others for one's own transcendence, but each individual does so for the divine essence in which all participate. Individualism in the Emerson sense allows for a process of refinement in learning to choose bonds and counsels duration as a means of "deifying" oneself and one's beloved. Duration results from moral ascendance but is not its purpose or its measure. Public affirmations of duration as an aspiration help to incorporate into the American quest for renewal an Emersonian understanding: One can achieve renewal through the alteration of a bond that began in passion into a vindication of a higher form of self and hence a state, shared in human concourse, of transcendent moral good.

A commentator on Emerson's "Divinity School Address" detected the same form of reasoning concerning the individual process of moral perfection and identified it with "pure egoism." Put the rule, Mr. Emerson lays down, in the best light possible, it proposes nothing higher than our own individual good as the end to be sought. He would tell us to reduce all the jarring elements of our nature to harmony, and produce and maintain perfect order in the soul. Now is this the highest good the reason can conceive?

125. DAVID M. ROBINSON, THE SPIRITUAL EMERSON 2 (2003) ("[T]o describe Emerson's message as purely individualistic is to distort and falsify it. He hoped to cultivate self-awareness and self-confidence in his audience, but he also aspired to inculcate a critical self-awareness and a self-confidence shaped by an underlying humility. The complex but arousing poetry of his lectures and essays began to find a receptive audience in a culture famished for intellectual integrity and spiritual sustenance.").
126. Brownson, supra note 7.
127. Id.
This is a reaction to Emerson that has persisted. It illustrates that the element of moral aspiration in Emerson requires careful reading; Emerson identifies individual elevation and harmony as the factual basis for shared humanity. His empyrean indifference, parodied by Nathaniel Hawthorne in the character Winsome,\(^1\) confounds a common understanding of his moral reach while Americans attempt repeatedly to achieve it.

Parodied by his contemporaries and patronized by twentieth-century readers,\(^2\) it is Emerson's imprint that makes of American individualism a force with moral aspiration in the domestic realm.\(^3\) American individualism is uplifted by a public narrative enriched by reading, and re-reading, Emerson and Emersonian thought.

Emerson gives an epistemology of moral relations in terms of human bonds. He gives an experience-based account that he views as the only path to the moral transcendence to which he advises his readers to aspire and to which aspiration in human intercourse is viable. The critics fail to see obligation in the Emersonian mandate to the individual to transcend and they fail to see obligation in the absence of coercion provided by the imposition of a higher law either by God or man.

The evidence of American life since Emerson is that coercion in family affairs is not viable except to the extent that it involves the imposition of financial obligations, particularly to minors. Much of the writing about American family affairs concerns the element of moral aspiration that the law should provide and claims that trends such as no fault divorce and gay marriage which permit emotional freedom of maneuver are bad for American morals. The Emersonian account of morals suggests this can never be correct. The law's role in enforcing obligations pertains to the protection of the vulnerable and enforcing financial obligations to those placed in a dependent circumstance. Its role in the adjudication of the moral insights of Americans about the transcendent values to be gained from their close and intimate bonds is only that of expanding the moral imagination, not that of enforcing a coercion imposed by understandings of higher law.\(^4\)

\(^1\) Updike, supra note 39, at 115.
\(^2\) See CAVELL, ETUDES, supra note 6, at 5.
\(^3\) See Elizabeth Scott, Rehabilitating Liberalism in Divorce Law, 1994 UTAH. L. REV. 687, 739 (1994) (arguing that "communitarian" ideals are important to the aspirations for the good life shared by many people and thus can influence family life within a liberal framework).
\(^4\) CAVELL, CONDITIONS, supra note 13, at 110-26 (on "the condition of democratic morality" and "the conversation of justice and of living").
III. THE LAW'S ROLE IN THE MORAL LIFE OF MARRIAGES: MARITAL RECKONING USING EMERSON'S MORAL COMPASS

A. READING AMERICANS' DOMESTIC LIVES

Contemporary Americans resemble Emerson specifically in contradictions between their attitudes about marriage and their actual marriages. As previously discussed, Emerson was a widower and then a husband anchored to the duties of marital vows. He wrote that marriage should not be permanent yet his conduct belied his theory. Contemporary Americans idealize marital bonds and the related ideal of permanence but depart from marriages with considerable ease. Contemporary Americans maintain age-old public rituals to affirm the dignity and preeminence of marital promises. Celebrations of married love as devotion occur in the ceremonies that launch marriages and in the stories of successful marriages. The American narrative of commitment brimming with optimism is heavily public; the recitals that affirm it are embedded throughout the ceremonial culture. Americans are optimistic about marriage.

But American optimism is expressed with equal fervor in leaving marriages and looking for fulfillment in a renewed personal life. Simultaneously with their stories of unwavering commitment, Americans embrace only partially public but heavily embedded personal narratives of exit and renewal that they value more than endurance. The meanings attached to American marriage are found in both the public ceremonies affirming its claims to duration and in the numerous private narratives of renewal told by Americans to one another and dipped in the tincture of American experiment. Critically, Americans claim Constitutional protections that guarantee the right to divorce, which is respected as one of the necessary features of American liberty. They support an industry of books and television shows that advise one another that personal change is

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132. See Rebecca Traister, A Fine Romance, SALON.COM (June 8, 2005) http://dir.salon.com/mwt/story/mwt/feature/2005/06/08/bancroft_brooks/index.html. (last visited February 25, 2006) (writing on the death of Anne Bancroft): “In Bancroft and Brooks, we had a couple we could be invested in — even from a gawking distance — without shame. They were a wonderful model, a worthy object of our fascination and adoration. And I hope it’s not an intrusion into anyone’s privacy to say that I am truly, truly sorry that their marriage has come to an end.”


good. Americans believe in new beginnings, not necessarily just the ones forced by unavoidable endings, but those prompted by the Americans’ belief that their lives should be open to change. Change, and thus divorce, is a feature of American optimism, as are marriage and promises of commitment. Historian Richard Hofstadter sensed the connection between American attachment to change as both a right and a form of sanctified quest in an analogy that characterized the plight during the Great Awakening of established ministers confronted by charismatic evangelists and “at somewhat the same disadvantage as an aging housewife whose husband has taken up with a young hussy from the front line of the chorus.” While Hofstadter dryly equates religious fervor with a form of spousal inconstancy, Americans, drawing on a populist religious tradition that emphasizes choice and change and on the philosophical message of transcendentalism, sanctify their familial renewals with the heritage of low-culture religious practice and Emersonian high-culture philosophy. Romance fuels the quest: an American President who was admired by many precisely for his optimistic nature enjoyed a second marriage that became celebrated as a great American love story and that erased any public interest in his first marriage.

There is thus a deep meaning attached to the idea of a marital ideal signified by recitations of the traditional vow of permanence, “Till Death Do Us Part,” so much so that that vow of permanence can be renewed in subsequent vows with different partners and retain its symbolic power. Those who make the vow and those who honor it by their presence embrace the infinite possibility of the future, in which personal transformation beckons, mistakes of the past are recognized and left behind, and new, perhaps equally ephemeral, commitments to permanence are embraced. Putting an early life, or false starts, behind oneself, while embarking on similar projects with the same freshness of first starts, is as much an article of American faith as are ideas of loyalty and commitment. Americans believe in both with equal fervor, but their behavior and advice to one another — be true to yourself — give a clue of where their heart.

135. A minister who maintains a marriage ministry spoke glowingly of new beginnings: “I feel called upon to celebrate with the divine. I happen to believe that God gets a kick out of new beginnings. It may be an unusual way for a clergy person to say it, but hey, that’s how I express my theology.” The minister describes crying with a couple whom he married soon after their grueling divorces: “During their vows, they both sobbed with joy for about 10 minutes... I was so moved, I ended up crying with them.” Francine Parnes, Get Me to the Church on Time? Not With New Ministries, N.Y. TIMES, Apr. 17, 2004, at A12.

136. HOFSTADTER, supra note 41, at 67.


138. Interestingly, two readers question whether this recital remains typical in marriage vows, thus suggesting the commitment to transformation has affected the public recitals affirming duration.
really lies. Americans have a public narrative of family permanence and the option of exit, infused by the private narrative of liberty, choice, and romantic and personal renewal.

There is also a harshness in the widely shared practical view of those disappointed by discovering that a commitment to a lifelong marriage was contingent. There is limited sympathy for adults to whom a promise was made and broken. Indeed, Americans have adopted the emotional equivalent of the at-will doctrine. The equal availability of exit to either party makes unilateral divorce a fair bargain. If you marry, you must know that divorce is one possible result, so you have no real complaint. The informal advice: Get over it. Americans are in many respects more critical of a spouse who remains in a “bad marriage” than of one who leaves. The doggedly loyal spouse offends deep ideas Americans carry with them about marriage: it is perfect, or it is wrong. Marriage must be romantic and forever. If a particular marriage is not, it should end. Little effort is made to fight mass opinion: breaking a promise to another adult is not especially serious. Your spouse is an adult. Again, the voice with which we advise one another can be heard: don’t worry, we all do it. Find your real self. The moral loss inflicted by ceremonies that mimic the forms of a former cultural commitment is not weighed sufficiently in the moral balance, if debased readings of Emerson are allowed to countenance license. The harshest critics of the culture indict the public narrative as insincere and the private narrative as shocking and shallow.

Critics of the culture maintain that for many of those speaking the words, “Till Death Do Us Part” is a ceremonial recitation that is grave yet subject to the charge of insincerity because the culture encourages an awareness at the time of recitation that there is an option of exit and personal renewal. “Till Death Do Us Part” is a sentiment, critics of the culture might say, so fine it is well worth repeating, with the background factor of divorce making it at a minimum ambiguous. For some, it may be insincere. For others, it is a shaky gamble, and for others, it is an unshakeable commitment. But the ubiquitoussness of the ceremony and the empirical facts of family life mean the avowal has greater meaning as a ritual than as a guiding rule in which permanence is the literal meaning of

139. The tone of this common phrase is captured in the Eagles’ lyrics:

Get over it
Get over it
All this whinin’ and cryin’ and pitchin’ a fit
Get over it, get over it


140. Id.

141. My secretary wrote in the margin: “Do words mean anything? No! They have no meaning!” The exclamation marks are provided to indicate the manner of her recitation of the marginal notes.
the words. Friends have been known to reassure the jittery groom or bride about the alarming implications of a permanent commitment with the reminder, “If it doesn’t work, you can get a divorce,” or, more mildly, “Don’t worry. Everyone gets nervous before the wedding.” Betrothed couples proceed to the altar resolved to make a recitation about permanence to one another but variously aware of the counter narrative of exit. If one takes a cynical view with the critics of American domestic culture, one could say that at least some couples take the pledge, “Till Death Do Us Part,” or “So Long As We Both Shall Live,” with their fingers crossed.

In truth, the Emerson standard is not license, but the moral courage of an intelligent self that is part of a whole. Misuses of Emerson do not alter the way in which Emersonian meanings infuse statements of aspiration, in the public narrative of duration and in private hymns to renewal, and serve in the American rituals of engagement. To dismiss a statement of high aspiration as lacking meaning because its literal words are not a precept for conduct would be facile. The practice of wedding vows is a cultural rehearsal of an embedded way of reciting and reading the moral aspiration of marriage, but it manifestly has a function other than creating a rigid metric of duration in each marriage given legal recognition through such a recitation.142 The fact that the recitation does not predict the cultural pattern of marital duration points to the need for interpretation through the Emersonian ambition to make and remake meaning, the quest for Americans to remake themselves through reading, saying, and quoting.

B. FAMILY VALUES: INTERPRETING AMERICAN MARRIAGE IN EMERSONIAN TERMS

Other cultures experience divorce and remarriage. The cultural aspirations and interpretations that provide narrative coherence and cultural meaning to the way Americans read and reread their marriages have significance for understanding the moral tenor of Americans’ domestic lives. They also suggest the limits of the power of reformers to reshape family life. The American temperament, influenced by a thinker determined to find ways to capture the “new man,” infuses family life with meanings that are made and remade and keeps the American imagination engaged with “an infinite response” to the “finite text” of marriage. Efforts to halt the working of the American imagination in the construction of the family texts that Americans write face the ongoing force of Emersonian creation in the hands of individual Americans, both careless readers and serious philosophers, those who meet the challenge of Emersonian moral perfectionism143 to avoid conformity144 and those who, with the usual ease,

142. Cavell notes that remarriage comedies never show the wedding because the marriage lies in “the willingness for marriage itself.” CAVELL, CONDITIONS, supra note 13, at 103-4.

143. Id. at 21.
debase our Emersonian moral perfectionism. The Emersonian project infuses American marriage and remarriage with the highest political meanings, defined by the quest to find oneself and to capture in private lives a grounding for the American effort to learn one’s meaning through saying and, in doing it, to help America “become a new world.” In Cavell’s terms, “. . . our sense of an unattained self is not an escape from, it is rather an index of, our commitment to the unattained city, one within the one we sustain, one we know there is no good reason we perpetually fail to attain.”

As a store of aphoristic writing and of readings that invite the reader into the exploration of moral depth, Emerson gives both license and moral weight to American tendencies to seek personal re-creations, in some cases based on impulse and justified as the beauty of infinitude, and in other cases having to do with the moral freedom to demand a marriage of engagement and, in Cavell’s terms, conversation. Emerson’s abstractions about reliance and transformation take concrete form in the imaginations of Americans of less elevated sensibilities, whose main concerns may well be emotional gratification in their private lives rather than the “eloquence” in conduct sought by Emerson through the medium of expression, yet also in the imaginations of those committed to a depth of moral inquiry in their lives that cannot be captured in simple ideas of duty. The decision to “work on” a marriage may well derive from psychological fads (described uncharitably) or moral aspiration (described respectfully) that locate the realization of personal development and thus renewal in the effort at emotional rapprochement with a spouse — but not in simple notions of obligation derived from the religious and ethical roots of the public narrative about commitment.

Thus, American marriage and divorce consist of inherited religious and ethical precepts, celebrated and maintained as enduring in our public narrative, combined with deeply felt lessons of self-reliance and personal renewal. Endings do not disrupt the public narrative because they are the starting point for stories of renewal, which are recited endlessly in a rushing stream of private narratives of high intellect and low culture, given

144. CAVELL, CONDITIONS, supra note 13, at 21.
145. CAVELL, CITIES, supra note 49, at 11.
146. Id. at 18.
147. CAVELL, ETUDES, supra note 6, at 95 (explaining that “mastering Emerson . . . relates the process to his dedicating of his writing as heeding the call of his genius, which to begin with he is able to note as Whim [and] [i]t follows that mastering the text is a matter of discerning the whim from which at each word it follows.”).
148. Emerson wrote that “the epochs of our life are not in the visible facts of our choice of a calling, our marriage, our acquisition of an office and the like, but . . . in a thought which reverses our entire manner of life.” RICHARDSON, supra note 12, at 317 (1995). It is difficult in an America that remakes personal lives through changes in intimate and professional affiliation not to think of a change in manner of life as including changes in “the visible facts” of their lives, including marriage and career.
mystical stature by an American thinker of originality and power. Endings are the starting point for new promises of commitment and further enactments of a public narrative of the aspiration embedded in vows of permanence in marriage. The meaning of permanence is understood as a form of commitment to an ideal of consent capable of renewal under rules of moral perfectionism, tested by a commitment to engagement. Abandonment of engagement, rather than withdrawal of consent, is a breach. Yet consent can be withdrawn in part because of one's own altered self.

C. ASSESSING CONTEMPORARY FAMILY ALTERATIONS

In their recitations of commitment, Americans seek to find meaning about themselves and one another in the social microcosm of a marital bond, which introduces to individual lives deepened meanings and disruptions, and to the shared social life new forms and altered understandings. Americans combine a strongly individual approach to family life with a quest to create community in the forms they give to the rituals that make families. Failures of duration are a challenge to a readily understood common moral framework, but they are not allocated exclusively to the debit side of the marital moral quest. Given the complexity of moral meaning embedded in marriages and marital forms, law necessarily suspends simple moral accounting in which claims to duration settle, or even tend to settle, the moral questions presented by marital bonds. If law is to have a moral role in the construction of a

149. CAVELL, TEARS, supra note 11, at 9 (“The relation as between human beings is not, in the comedies, perceived as one that pervades society as it stands, but it is shown to hold between a pair who are somehow exemplary of the possibilities of the society perceivable from its current stance.”).

150. E-mail from Stanley Cavell to Author (July 12, 2005) (on file with author).

151. In its strongest form and in its religious roots, the aspiration to duration insists upon the invalidity of remarriage, even where one party breached the marital covenant by unilateral abandonment of the other. Craig Keener & William A. Heth, Remarriage: Two Views, CHRISTIANITY TODAY, December 14, 1992, available at http://www.christianitytoday.com/ct/article_print.html?id=15900 (last visited October 9, 2006) (explaining that upon marriage, a man and a woman become “one flesh” and a justified divorce does not create a permission for remarriage).

152. Review of Anne Tyler, THE AMATEUR MARRIAGE (2004), in praise of Tyler’s sure literary control, captures the necessity of nuance in assessing the moral ledger of a marital ending:

Michael and Pauline got married at a time when the common wisdom, expressed by Pauline’s mother, was that “marriages were like fruit trees... Those trees with different kinds of branches grafted onto the trunks. After a time, they meld, they grow together, and... if you tried to separate them you would cause a fatal wound.” They live into an era in which the accumulated incompatibilities of marriage end, logically, in divorce. For Michael, who leaves Pauline on their 30th anniversary, divorce is redemption. For Pauline, the divorce is, at first, a tragedy; gradually, separation becomes a habit. A lesser novelist would take moral sides, using this story to make a didactic point. Tyler is much more concerned with the
coherent marital narrative, its best role is to help expand the scope of the moral meanings with which Americans invest their marital beginnings and endings. The genius of marriage is most apt to be understood and communicated to its participants by a generous moral imagination,153 fed by deep reflection and accelerated by a wide incorporation of moral insight. The moral life of marriage cannot be captured in a formula but can be deepened by making the moral underpinnings of marriage, in the hands of individualist seekers after moral truths, more ambitious. Thus, while, for example, one might conclude that the failure of gay marriage to engage the moral imagination of most Americans mitigates against incorporating it into public rituals that carry constitutive meaning for the political order, the better conclusion is that the ritual of marriage requires for its continuing health the input of all who invest it with intensity of moral aspiration and who seek to engage in the ritual of consent that marriage represents. Remarriage by those for whom marriage is financially risky154 is also evidence of the continuing wellspring of moral and political meaning; those who remarry, when no practical circumstance, such as economic survival or family formation is involved, attest to the symbolic meaning offered by the marriage ritual for participation in a common life under conditions of consent.

In their family affairs, there is reason to believe that Americans apply Emerson’s template for the moral life, which Stanley Cavell describes as “Emersonian moral perfectionism,”155 a moral philosophy “emphasizing that aspect of moral choice having to do, as it is sometimes put, with being true to oneself”156 and linking the concerns of moral philosophers with everyday life. Such a statement of the moral project for the individual can be debased,157 and is. Yet the scope of Emerson’s undertaking, the weight
of his genius, and his presence in American culture make an Emersonian strain of moral perfectionism a register of the cultural and political meanings created by the intimate decisions and words of Americans. Emerson’s moral thinking also provides a measure of the claims of reformers with perfectionist prescriptions for American family life that they base on arguments about natural law158 or sound social engineering.159

Thus, critical questions presented by the interplay of duration and renewal are how Americans apply Emersonian philosophy in entering and leaving marriages, how to assess and elevate the moral timber of their family decisions, and what significance to accord their approach to their personal lives in cultural and political life. In locating an Emersonian influence on the form of American domestic lives, I give Americans credit for an experiment rooted in the ideas of a foundational American thinker and dismiss claims both that the “helping professions” have invaded the private domain of Americans with therapeutic models as a means of controlling the family in the interests of capitalism,160 or for some other controlling plan for social or economic life, and that Americans leave marriages, and experiment with family forms, for mainly morally defective purposes. At the same time, the American experiments in domestic life impose costs of imperfect “moral perfectionism,”161 a cost captured in the phrase “costly confirmations”162 in reference to Emerson’s belief in individual divinity. Issues about duration in marriage do not have a necessary link to gender roles; Americans with “Emersonian ears”163 listen, and act to make a world. What they do has differential effects, depending on family members’ vulnerabilities determined by the frailties of gender and age;164 gender claims a place in the moral reflections of many of our domestic Emersonians. Despite traces of gender logic in personal arrangements, the domestic projects of moral perfectionism are not a function of gender.165 Specific views on gender, or practices in his

158. See Keener & Heth, supra note 151. “Legislators should . . . consider restrictions on divorce so as to strengthen the family as a divinely ordained natural society entitled to the protection of the State.” Charles Rice, Some Reasons for a Restoration of Natural Law Jurisprudence, 24 Wake Forest L. Rev. 539, 566 (1989).
159. Id. See also Bloom, supra note 41.
161. Joel Porte describes the view of Emerson by conservative “New Humanists” in the twenties as “the pre- eminent voice of the American conscience . . .” and applies the Fitzgerald quotation describing Nick Carraway as having “wanted the world to be at a sort of moral attention forever.” Porte & Morris, supra note 20, at 681.
162. Hughes, supra note 53, at xi.
163. Cavell, Etudes, supra note 6, at 189.
164. Inter-generational family duration is addressed in filial support provisions, see Matthew Pakula, Comment, A Federal Filial Responsibility Statute: A Uniform Tool to Help Combat the Wave of Indigent Elderly, 39 Fam. L.Q. 859 (2005).
165. Cavell, Cities, supra note 49, at 16. Professor Cavell’s extensive work analyzing the remarriage comedies of cinema in the late 1930s and early 1940s and linking
nineteenth-century life, potentially attributable to Emerson, are the residue of a period and do not have import for Emersonian philosophy, which readily transcends the particulars of a time and place. Putting gender to transcendentalism, which is discussed below, treats gender as an explicit feature of the narratives of remarriage, with Biblical roots. Despite his linking of remarriage comedies to gender, given its overt presence in the films and in the inspirations for them, Professor Cavell’s larger points about remarriage comedies relates to political consent. See infra notes 165-66 and accompanying text.

166. Some feminist writers have attributed views on gender to Emerson, or complacent assumptions about the availability of women for the gratification of the needs of men. For example, Martha Saxton, in her biography of Louisa May Alcott, claims that “[Bronson] Alcott and Emerson repeatedly used the word ‘womanly’ to describe traits such as intuitive understanding, diffidence, receptivity, warmth — in short, qualities that made the men feel welcome.” MARTHA SAXTON, LOUISE MAY ALCOTT, A MODERN BIOGRAPHY 66 (1995). She further claims that, in idealizing women as superior and characterized by the trait of affection, transcendentalists hobbled women and expressed “distaste” for actual women. Id. She further suggests that, “Ailing women were regarded with approbation, particularly if their illnesses caused them to become frail and interesting . . . .” and goes on to suggest that the illness that killed Emerson’s first wife, Ellen Tucker, “was especially romantic because the patient remained optimistic and alert while wasting away.” Id. at 67. The implication, without a direct assertion, seems to be that Emerson participated in an exaggerated devotion to his wife based on an idealization that enabled him to take satisfaction in her early death. The basis for the suggestion is not present in any evidence about Emerson, who lived within the conventions of his time but was not concerned with programmatic precepts about how individuals might best conduct themselves, see infra. It may be possible to attribute his loyalty and affection for his wife to narrowly sentimental conventions of a period but it is neither generous nor perceptive about Emerson’s participation in human emotion nor about his good character.

Stanley Cavell has responded to a misreading of Emerson that takes a similarly imperceptive form of seizing upon a fragment of Emerson’s phrasing to render his reference to “the nonchalance of boys who sure of a dinner” as an illustrative instance in which “Emerson’s ideal of manly self-empowering reduced womanhood to spiritual nurturance while erasing female subjectivity.” CAVELL, TEARS, supra note 11, at 34 (1996) (quoting David Leverenz, The Politics of Emerson’s Man-Making Words, 1986 PUBLICATIONS OF THE MODERN LANGUAGE ASSOCIATION 101 (January 1986)). Cavell describes the use made of this Leverenz misreading of Emerson by Tania Modleski to accuse Cavell of utilizing the notion of “faceless mothering” mistakenly attributed to Emerson by Leverenz to criticize Cavell’s analysis of films about the “unknown woman” in support of self-effacing motherhood. CAVELL, TEARS, supra note 11, at 36. The correct reading of the entire Emerson passage, as Cavell demonstrates, is to apprehend the “nonchalance of boys” as a figure for innocence in the period before adult experience, with Emerson himself as “the provider of the sure dinner.” Id. at 35. Emerson’s concerns were with abstract concepts such as innocence, which referred in an entirely abstract way to innocence as “neutrality,” unencumbered by the commitments that experience causes one to accumulate and which compromise one’s expectation of “a sure dinner.” Id. at 34 (extract of Emerson text on the nonchalance of boys). Emerson’s concerns, expressed in his writings, were at an abstract level, without an agenda relating to anyone’s innate eligibility to join him in his immersion in abstraction. His language necessarily reflected the figures of speech offered by contemporary life, but, as Cavell says, “we are free to imagine that [Emerson] would indeed welcome the change” of the speaker from a boy to a girl. Id. at 35. Again to quote Cavell, “How does it help the cause of women, or any emancipation, to listen, for example, to Emerson, just long enough to find a profitless interpretation of what he says?” Id. at 36. The readings of Emerson in this Article seek profit in understanding some part of Emerson’s moral challenges and to use them to think about the construction of marriages in which moral capacity is distributed to those who will seize it. Gender is only relevant as a
aside, the relative moral weight of claims to duration versus the commitment of Americans to “Emersonian moral perfectionism,” or the search for self-definition that fits an individual to a way of life, presents judgment questions for the cultural assessment necessary to a sound program of family law.

D. MARRIAGE PRACTICES AND CULTURAL DEBATE: EXPANDING THE MORAL FRAMEWORK WITH EMERSON’S OPTIMISM

In the terms of one skeptic about marriages in which the promise is not ironclad, contemplation of escape as an option renders a marriage inauthentic. In the absence of a religious moral precept of inviolable permanence, however, moral perfectionism gives to provisionality in marriage features of its essence — the demand for engagement in the presence of a commitment to sustaining a mutual illusion about the metaphysical certitudes of engagement. The explanation of the hardiness of such “costless confirmations” in the face of the manifest evidence of their doubtful validity may thus lie in the service that the traditional forms provide for formative moments, in which personal foundings re-enact and enrich the aspiration of the republic to “a meet and cheerful conversation” on which consent is based. The vow of lifelong commitment is a vow of engagement that can be made in no other words. At some deep level, the participants believe that the words are a moral measure of the standard that will sustain, but which could, also, end the marriage; and it is fair to propose that the society, by its members’ re-enactment of repeated ceremonies of commitment that do not meet tests of background factor insofar as moral decisions might be affected by the circumstances of marital partners and dependents upon the financial and emotional framework of a marriage in a world in which gender and age play a part in creating vulnerabilities relevant to moral obligations.

167. See, e.g., Eisenstadt v. Baird, 405 U.S. 438 (1972) (state cannot impede a person’s access to birth control based on marital status); Stanley v. Illinois, 405 U.S. 645 (1972) (statutory presumption against fitness of unwed fathers unconstitutional); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right of parents to educate children as they see fit); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to have children instructed in foreign languages).

168. “We only regard those unions as real examples of love and real marriages in which a fixed and unalterable decision has been taken. If men or women contemplate an escape, they do not collect all their powers for the task. In none of the serious and important tasks of life do we arrange such a ‘getaway.’ We cannot love and be limited.” Alfred Adler, WHAT SHOULD LIFE MEAN TO YOU (1931) available at http://evans_experientialism.freewebspace.com/adler.htm (last visited February 28, 2006). But see CAVELL, TEARS, supra note 11, at 166 (referring to a married philosopher as helping his spouse “sustain illusions that marriage is a sacrament, that in it two are one, that these are metaphysical assureds, not human tasks . . . .”).

169. Id.

170. By comparison, Emerson is said to have generated in his work “costly confirmations.” See HUGHES, supra note 53, at xi.

171. CAVELL, CONDITIONS, supra note 13, at 105.
“good” or “right,” is to be taken seriously and not to be scorned for empty words. In his analysis of remarriage comedies, Cavell provides the critical insight to the meaning of the words as the performance of “the covenant of marriage [as] a miniature of the covenant of the commonwealth . . . .” Tepid words are not sufficient for this enactment of the formative moments of the American commonwealth, yet strong words do not end the meanings that may be constructed by further formative moments and challenges to maintain a covenant that implicates the search for the unattained self. The use of religious ritual, often by those who borrow religion for the day, is not, in the common hold of Americans on the format of wedding days of different traditions, about religious faith. It is more correctly a borrowed language for a densely packed set of aspirations that contain within them a form of claims to duration and to the happiness of the American quest. The commitment to duration is not unqualified, but the commitment to happiness is. When the marriage ends, the day of ritual remains, in memory and in consecration of the moral quest of each day of affirmation. The marriage ceremony succeeds in engaging the moral imagination of the participants and remains significant, individually in memory even when the marriage ends, and collectively.

The option of exit — divorce — is so entwined with marriage that divorce is one of the legal privileges associated with traditional, heterosexual marriage. Only those who swear lifelong fealty to one another may receive the assistance of the state in disavowing their pledge. The state cannot imagine divorce except as a cancellation of the public narrative of marriage. It is not possible except by undoing that which the parties have sworn is permanent. Divorce means the legal dissolution of a something affirmed as permanent. The close connection between the narrative of permanence, afforded by law to traditional married couples only, and divorce suggests that the vow of duration is a marker for something other than permanence — a rite of public consent subject to a test not measured by permanence. Hence, the right both to marry and to

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172. CAVELL, CONDITIONS, supra note 13, at 105.
173. Id.
174. Here, my secretary put in brackets, all caps: “WORDS HAVE NO MEANING.”
175. My secretary disagrees vigorously with this statement, saying, “It makes the marriage vows a lie. The marriage vows are not a good memory because what they said wasn’t true.” Note that, according to Cavell, weddings are marginal in remarriage comedies because the marriage is created by a continuing consent. See CAVELL, CONDITIONS, supra note 13, at 103-4.
divorce is part of an enactment of American liberty as embraced by the traditional American family. The most convincing objection to same-sex marriage, and the greatest barrier to its assimilation to the common ritual of formation, is its persisting failure, for whatever reasons, to generally engage the moral imagination of Americans, rendering it marginal to the public narrative constructing and reconstructing the American covenant. If the argument that heterosexual marriage is a Biblical building block of the American republic is unconvincing, there may yet be some cultural force to the claim that traditional marriage is a central re-enactment of the premises of consent to the political order. On the other hand, the inclusion of same-sex marriage in the re-enactment confirms that the undertaking to create everyday affirmations of consent to the political order, and the quest for engagement, is a common undertaking, played out in domestic experiments of engagement and re-engagement throughout our domestic outposts of tradition and innovation.

The implications of the American approach to love and marriage are heavily contested by the intellectual class. The significance for national character of a disposition to participate in ceremonies in which the critical symbolic statement is honored as much in the breach as in the observance is an issue that has resonance for critics of the culture, but one which makes little impression in a society that has produced the idea of "starter marriages" to go with "starter homes." In fact, cultural critics can be seen to have an echo of Emerson in their advice to married couples, which tends in advice manuals not to be unduly fierce.

Critics cede considerable ground in their treatment of the impact on those who relied on a broken promise: a spouse who believed the words were sincere, children of the marriage taught to believe the words were real and to think themselves secure in the marriage of their biological parents, family members who recognized a marital relative as a family member, and community members who witnessed the marriage and honored the family. Concern about the character of those who make and break weighty promises, concern that goes to the intrinsic good of a society that practices large-scale celebration and abandonment of vows of permanence, is present but not at the forefront. Instead, the impact on others is debated by cultural critics, such as academics and policymakers, as an empirical issue about individual effects on health rather than as a debate over intrinsic good tied to a moral code of obligation that would allow individuals and the rest of society to rely on a promise in a wedding ceremony. Indeed, a pamphlet

177. See Mae Kuykendall, Liberty in a Divided and Experimental Culture: Respecting Choice and Enforcing Connection in the American Family, 12 UCLA WOMEN'S L.J. 251 (2003) for a discussion of the emphasis on liberty in American family formation and dissolution.

prepared by a conservative group sponsored by the Utah Governor’s Commission on Marriage argues for the good health effects of a “stable marriage” by quoting research that concludes:

[O]ne of the most consistent findings [of research on marriage] is that men and women do markedly better in all measures of specific and general well-being when they are married, compared to any of their unmarried counterparts. Married couples are healthier — physically and mentally — and they live longer, enjoy a more fulfilled life, and take better care of themselves (and each other).179

People argue about statistical measures of the impact of divorce on children, with less regard for the immeasurable moral significance of the daily and quite public recitation of vows that are known not to be literal guides to conduct measured by duration of marriages.180 In doing so, they have in some sense conceded that the moral meaning of vows is important but not literal. Moral significance is developed in individual confrontations with the self, with “abandonments and departures” as a core to a quest for individual meaning resistant to a wholesale critique or political veto. The inventory of faithless acts, even the one maintained and published by cultural scolds, is not precisely a moral account. Divorce pamphlets written from a conservative standpoint concede the interior nature of the divorce decision by calling it a “choice”181 and making appeals to a consumerist approach that emphasizes that children will do poorly on objective measures of well-being182 and, implicitly, will be devalued as a source of pleasure for the divorcing parents. While a totalling up of the costs and benefits of divorce may contain a utilitarian moral message, including one relating to the overall good of society, its phrasing as a consumer manual for couples afforded by the pamphleteer a rhetorical grant of self-determination gives it an impoverished quality. Considerable moral ground is ceded in such pragmatic appeals to self-interest, which are


180. This observation finds an interesting parallel in the interpretation offered by Richard Hofstadter of the loss of concern about anti-trust and anti-bigness ideology by the generation of the 1950s: “The young may be losing the concern of their elders with the virile prerogatives of enterprise. Certainly they are now much more disposed to ask of the economic order not whether it is raising a nation of enterprising and hardy men but more matter-of-factly whether it is maintaining an adequate level of employment and producing a sufficient increase in the Gross National Product.” RICHARD HOFSTADTER, THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS 225 (1965).


182. Id. at 7.
augmented by no more than a small appeal to general interest. If moral ground remains in such appeals, and, if indeed, it is moral ground that repels a sterner language of moral reproach, perhaps it is the Emersonian ground occupied by those to whom the appeal is made.

Only an inventory of social effects is imagined to be a manageable input to the moral thinking of Americans intent on self-definition. The steady trickle of individual moral conclusions about the hold of a family life defies assessment, and even public narrative. Law can require financial care for a child or a vulnerable adult, but it cannot adjudicate, in fixed rules or particular cases, the "appropriation for selfish ends" of the Emersonian project of moral perfectionism. Perhaps, however, the abandonment of the effort to keep an inventory of moral conclusions measured by the ideal of unbreakable commitments of literal duration would leave space for a legal world with an ear for Emerson. Such a world might forge a public language of exit better suited to an ideal of engagement in a world of ultimately separate selves bound by high mutual aspiration.

IV. PARALLEL UNIVERSE: PRIVATE NARRATIVES OF COMMITMENT AND RENEWAL WITH NO PUBLIC FORUM

Against the framework of the paradox embedded in the American approach to marital vows, the parallel universe of gay families brings into sharp focus issues about the duration of family forms in the American private narrative of renewal. What happens to the paradox — the contradictory optimism and affirmation of both union and dissolution — if the social framework that traditionally girded the first part of the moral view of marriage — duration — is lopped off? How are gay unions viewed differently when the public ritual of marriage, celebrating the idea of permanent connection, is present or absent? Is the freedom from the imprimatur of state-sponsored public affirmations of permanence useful to the Emersonian project of renewal and contest of convention, or does such freedom exact costs from the whole undertaking of marital and family bonds? I wish to thank Ruth Mendel for help in formulating this summary of the exposition of issues presented in this essay.

Gay marriage is a laboratory — in its way, a controlled experiment — of the cultural forces of an America willing to make and break promises to one another and to children. Gay relationships, without the schizophrenic apparatus of public ceremony and public exit, grant the impulses of

183. CAVELL, ETUDES, supra note 6, at 178 (comparing Emerson's figure of shunning father and mother and the sayings of Jesus and noting that the saying is "appropriatable for selfish ends.").

184. I wish to thank Ruth Mendel for help in formulating this summary of the exposition of issues presented in this essay.
Americans to embrace the future regardless of the past a mandate to be written with disappearing ink. Gay people can make promises largely unchecked by an official endorsement of an aspiration to permanence — the construction of a parallel public narrative, because not official, is in truth not public. The individualism Americans claim is restrained as little as possible by an aspirational content provided by public devotion to duration and has greater potential to be a debased and merely individualistic adoption of Emersonian moral freedom. The worry over the state of marriage leads many cultural conservatives to oppose gay marriage, and to reject gay divorce as an oxymoron. Conservatives argue that granting gay marriage (and divorce) accelerates the self-involvement of adults, who make marriages for their own gratification instead of for the nurturing of children. But such a view fails to account for the Emersonian explanation of the quest in human bonds of creating recognition and understanding, by a perfectionist magnanimity, and sharing in marriage that feature of our common humanity that Emerson describes as each one’s inner God. The pleasure we take in human bonds is part of our essence. According the social impulse a transcendent mode, through the common rituals of covenant performed in marriage rites, infuses in American individualism the Emersonian moral uplift that our scorned individualism carries within its DNA.

Mixing the love of Americans for self-discovery and new horizons with the liberty to form shadow families, accompanied by insincere avowals to adult partners and to children and a void of state vocabulary to acknowledge there ever was a promise, makes it more likely that the embrace of self will become unreflective and lack the loftier aspiration of Emersonian moral perfectionism. Instituting gay marriage would validate concern for the moral stature of citizens and the participation in a process of Emersonian dignitary respect for adult recipients of promises of commitment — a matter with moral significance. It would give children of gay couples a recognition and a claim, weak though the culture makes it for us all, to accountability.

Divorce casts many children into a netherworld of impermanence, in which adult declarations are cancelled as though never made. Heterosexual divorce may be reckless, with words seemingly dishonored by their speakers. Heterosexual married couples have the liberty to breach a promise that the state has honored. Gay couples have, as the norm provided by the state, license to be not merely insincere, but to write and erase family narratives. The egoism that critics believe they find in Emerson has no public check for gay families to channel them toward the

185. One reader insisted that I add a note clarifying that the conservative view that marriages are made for the nurturing of children has no empirical basis. Rather, people marry out of optimism and in pursuit of personal fulfillment.

186. See CAVELL, CONDITIONS, supra note 13, at 112.
form of Emersonian moral perfectionism that is the most realistic formula for American moral elevation in domestic life. For those who marry, this realistic moral formula is for a life in which one honors one's self in the midst of a circumstance involving both the creation of and the response to public meaning.

For heterosexuals, divorce confirms there was a vow of permanence and admits it was spoken with insufficient care. The state helps maintain a narrative of commitment and cancellation, providing the children a public record of family commitment. The state's imprint on the vows of duration give them a standing as an element in the reflections of those who make them and who attempt to understand the purpose of looking past the flaws they find in their chosen. Wishing for at least the lure of public promise granted to children of heterosexual marriages, children in intact gay families crave the validation of the front end of commitment. They wish their families to participate in the public narrative of aspiration and community affirmation of their family bonds. They understand that, without the public narrative of commitment, the bonds of their families are evanescent in every way: their saying is private, plainly provisional while intact, and, finally, subject to complete erasure. Children recognize the betrayal delivered by the improvisations and compromises of the culture.

The American public narrative about family is complex and subject to critique for traditional families and supplanted for gay families by an unmediated, private narrative told and disavowed — erased — at will. A parallel world of entirely private narrative flows back to our public narrative of family, deepening rather than limiting the American infatuation with self. The intensification of the American drift to an entirely private narrative affects gay families and influences the balance in the larger culture between “Emerson family values” and inferior imitations.

V. AMERICAN BELIEF IN RENEWAL: THE EMERSON THREAD IN AMERICAN PRIVATE NARRATIVE

Emerson believed in the courage of seeking, in the importance of experiment: “I simply experiment, an endless Seeker, with no past at my back.” In nature every moment is new; the past is always swallowed and forgotten; the coming only is sacred. Nothing is secure but life, transition, the energizing spirit. No love can be bound by oath or covenant to secure it against a higher love. No truth so sublime but it may be trivial to-morrow in the light of new thoughts. People wish to be settled; only as far as they are unsettled is there any hope for them. Life is a series of

188. EMERSON, Self-Reliance, supra note 17.
189. Id. at 413.
surprises. We do not guess to-day the mood, the pleasure, the power of to-
morrow, when we are building up our being. Of lower states, of acts of
routine and sense, we can tell somewhat; but the masterpieces of God, the
total growths and universal movements of the soul, he hideth; they are
incalculable."

Emerson was writing of the generation of ideas, the abandonment of
the old for the insight of a present moment, the time when we rise above
the self of a former day and cast away the past for the “greater possibility”
of the moment, the “residuum unknown, unanalyzable.” Yet our lives
are themselves ideas, with each marriage constituting a small state with an
ideology and an idea of truth. Emerson is deeply American, telling us
that our truths are only experiments. Americans do not invariably know
the texts Emerson wrote, but his deep beliefs about the claim of the present
and the experimental quality of our lives is theirs from him.

The American romantic believes the future will yield permanence and
casts away as impermanent and confining past promises in pursuit of the
perfect held forth in the future. By contrast, Emerson said that all truth is
provisional. The new man is simply the man who breathes today. “The
new position of the advancing man has all the powers of the old, yet has
them all new. It carries in its bosom all the energies of the past, yet is itself
an exhalation of the morning. I cast way in this new moment all my once
hoarded knowledge, as vacant and vain. Now, for the first time, seem I to
know any thing rightly.” Americans may well adopt Emerson’s
statement regarding the psychology of insight and belief without his
awareness of the vaporous nature of each renewed state of being. Emerson
embraces the flux of human insight for the principle that “incessant
movement and progression . . . labors to create a life and thought as large
and excellent as itself, but in vain, for that which is made instructs how to
make better.” Americans thus aspire to reach the resting point in their
lives by following Emerson’s lessons of change, which recognize “the
eternal generator” that makes “all things renew, germinate, and spring,”
but which they apply in their personal lives in each moment of new

190. EMERSON, Self-Reliance, supra note 17, at 413.
191. Id. at 406.
192. In fact, Emerson wrote in his journal, “Do you love me? means at last Do you
see that same truth I see?” RICHARDSON, supra note 12, at 330.
193. “Emerson’s beliefs are of central importance in the history of American
culture.” THE ACADEMY OF AMERICAN POETS, Emerson, at http://www.poets.org/poets/poet.php/prmPID/201 (last visited June 11, 2004). Note the complications of writing as
communication, however. CAVELL, ETUDES, supra note 6, at 95 (“. . . the idea of
communicating as emitting a breath every moment . . . means that with every word you utter
you say more than you know you say . . . which means in part that you do not know in the
moment the extent to which your saying is quoting.”).
194. See BUell, EMERSON, supra note 9, at 413.
195. Id. at 412.
196. Id.
recognition as the final insight.

An Emersonian belief in experimentation is not a long way from an evolution to sexual markets in the American city. According to a study in Chicago, many Americans have adopted an approach to sexual coupling that operationalizes an Emersonian belief in the validity of present insight. They need not divorce, because they do not marry. Rather, they participate in a market with a set of local ground rules for signaling availability for temporary sexual alliances. Thus, if those who believe Emerson is more misread than read by Americans are correct, the recitation of vows of permanence in the broader culture could be a temporary way station in the evolution of American optimism about change. The aspiration to permanence, or future perfection, could be abandoned by Americans who instead turn to a coarsened deployment of Emerson's insight that perfection is not to be attained, only the full realization of one’s insights at the moment and the ideal of solitude. An appreciation of the link of Emerson’s moral perfectionism to the constitution of political consent serves as a check on the appropriation of Emerson for no greater meaning than license in personal family lives.

VI. CAVELL ON THE REMARRIAGE COMEDIES

A consideration of the moral thinking of Emerson as it may influence family practices, a consideration not previously undertaken, offers a moral framework for analyzing forces affecting the family. The Emerson heritage provides a basis for better describing, understanding, and evaluating the moral flaws and strengths in American family life than do standard contrasts between individualism and traditional family regulation. Emerson embodies the contradictions and provides the moral complexity against which to judge American family life.

197. In his journal entries on marriage, Emerson comments: “[P]lainly marriage should be a temporary relation, it should have its natural birth, climax, and decay, without violence of any kind, — violence to bind, or violence to rend.” RICHARDSON, supra note 12, at 331. By contrast, see Zernicke, supra note 154 (describing the inclination of the super rich to remarry repeatedly).

198. See LENA ELDOND, ET AL., WOMEN, MARRIAGE AND POLITICS: THE POLITICAL SALIENCE OF CHANGING FAMILY FORM IN EUROPE, (May 2, 2003) (noting that “marriages have actually become more stable as fewer people marry” in “high divorce” countries such as the United States, Denmark, and Sweden).

199. Sacvan Bercovitch provides a nuanced and quite useful distinction concerning the difference in Emerson’s thinking between “individualism” and “individuality,” particularly in a political context relating to European ideas of socialism. SCAVAN BERCOWITCH, THE RITES OF ASSENT: TRANSFORMATIONS IN THE SYMBOLIC CONSTRUCTION OF AMERICA 350-51 (1993). Emerson had a utopian belief in individuality which was not the same as individualism and in an ideal rather than actual America of a union of individuality. Hence, the simple conflation of Emerson with individualism to describe American dispositions as only egoistic is problematic. Emerson declares the individual’s freedom from constraints yet seeks forms of boundary, or, in Bercovitch’s terms, the simultaneous location of frontier and boundary. Id.
Thus, the persisting schizophrenia of public narratives of family duration and private narratives of renewal affecting individual lives and family forms\textsuperscript{200} bears an imprint of Emersonian complexity. Understanding how the moral complexity in Emerson applies to and affects family life provides a coherent narrative of moral aspiration in family life. Unbending moral precepts that support permanence in family life and form, rather than a blending of duration and renewal, are, in truth, not founded in the American moral understanding. Doomed to perpetuate either a sense of failure or attempts at a literal but unwise form of duration, moral interpretations that take the marriage vows as literal promises of permanence fail in their purpose of fostering moral conduct and do not provide a credible narrative for family law.

The aspirations and mysteries in Emerson's moral philosophy render inapt the debates about "self-centered individualism" and contrasting "family values."\textsuperscript{201} The apparent contradictions in the dual narrative of family law celebrating permanence and renewal become less stark if considered in light of the Emerson influence. Americans, acting at least in part upon the Emersonian strain in their character, seek personal renewals and reinventions that signify aspirations to making a world, renewals built on endings and justified by a sense of quest to form deepened bonds that are recognized for a transcendent community value nourished by individual enrichment and marked by the aspiration to permanence. The critique of Emerson for influencing Americans to adopt an individualism that is unreflective and harmful in a variety of arenas\textsuperscript{202} is overstated. Emerson's

\textsuperscript{200} The Internet and books of advice abound with both narratives, sometimes interwoven in one statement. A website called Second Chances advises: "None of us get married with the intention of divorcing. We all think, this is forever. I will spend the rest of my life with this person. But the reality is that divorce rates are high, and there is a good chance that your life will be touched by divorce." Second Chances, at http://www.secondchances.net/divorce/ (last visited August 27, 2005).

\textsuperscript{201} Professor Naomi R. Cahn summarizes the rhetorical tension in family law as between "self-centered individualism" and "family values." Naomi R. Cahn, The Moral Complexities of Family Law, 50 STAN. L. REV. 225, 225 (1997). The transcendental notion of renewal associated with Emerson redirects our attention to the idea of reinvention, with overtones of a moral quest that is not captured by the phrase, "self-centered individualism." While, as discussed above, critics of Emerson have associated him with the idea of a heedless or an unrealistic creed of self, deeper readings confirm that Emerson sets a demanding course for the moral life of the individual in whom God is immanent.

\textsuperscript{202} A provocative contemporary critique is provided by Christopher Newfield, who argues that Emerson's individualism is absorbed into a collective agency that results in corporate conformity (phrase provided by BUELL, supra note 9, at 69, to characterize Newfield) and is a justification for political passivity. CHRISTOPHER NEWFIELD, THE EMERSON EFFECT: INDIVIDUALISM AND SUBMISSION IN AMERICA 76-77 (1996). See id. at 7 ("Rather than rejecting submission in the name of freedom, as we'd expect, his individualism defines freedom as submission to unmodifiable law."). Newfield further argues that Emerson's approach to friendship, see supra notes 108-20 and accompanying text, reflects the middle class nineteenth century heterosexual male's fear of Whitmanesque homoerotic friendship, which represented the dangers of control by the masses. Id. Standard concerns, unguided by a theory of the needs of the middle class nineteenth century
views on the individual had consequences, but they are not as simple as the standard treatment might suggest, and they are embedded in a context of social connection and maintenance of political bonds that makes American ambition about marriage a sign of the political system. Reaffirmations of consent are at the core of the dual narrative of duration and renewal.

Cavell’s analysis of the remarriage comedies of the 1930s helps to capture the reasons why the simple view of Emerson individualism (and hence of American marital practices) misses the mark. An understanding of Emerson as a bold individualist are deficient because they fail to describe the rich moral context that Emerson gave to individual self-reliance in his view that all individuals have an inner god and that such individuals, in claiming their moral independence, might nurture both self and community in engagement and ultimate distance. As discussed, Cavell explains that the remarriage comedies explored the necessity of consent in a marriage by a standard of transcendental engagement captured in the term “moral perfectionism” and assuming characters with an inner heterosexual male, that Emerson has been the prophet of American greed, capitalism, and expansionism, as well as personal irresponsibility.

In assessing Newfield’s “revisionist” view of Emerson as a typically defended heterosexual male of the nineteenth century, one might bear in mind the emotionally elegant assessment of Emerson’s unusual temperament offered by Firkins, supra note 34, at 15 (referring to “Emerson’s peculiar social temper, markedly gregarious but only half companionable”). A standard critique has been that Emerson’s individualism is unrealistic, the product of a dreamer, see, e.g., More, supra note 1.

203. See Buehl, supra note 9, at 2 (stating that “Emersonian ‘Self-Reliance,’ as [Emerson] preferred to call his theory of individuality, is indeed the single best key to his thought; but it is not so simple as it is often made to seem.”). In response to the critique offered by Newfield, Buehl defends Emerson by describing the constraints on the Emerson idea of self-reliance.

204. Buehl’s book is a nuanced and very helpful defense of the nature of Emerson’s concept of self-reliance, describing the import of Emerson’s message that “self-reliant behavior may make a public contribution beyond whatever it does for you personally . . . . It prescribes not insular withdrawal but more robust coexistence.” Id. at 77-78. Further, Emerson exhorted his readers to distinguish self-interest from inner divinity. “Beneath and within the ‘private’ is a ‘public’ power on which anyone can potentially draw . . . Emerson believed both that right perception and right conduct hinge on feats of personal integrity and that achievement of such integrity required drawing on an inner resource deeper than self-preoccupation.” Id. at 65.

205. Ralph Waldo Emerson, Self-Reliance, in Essays and Lectures 259, 272 (Joel Porte ed., 1983) (advising “us” to “stun . . . the intruding rabble of men and books and institutions, by a simple declaration of the divine fact . . . for God is here within.”).

206. Cavell, Tears, supra note 11, at 9 (“The comedies envision a relation of equality between human beings that we may characterize, using favorite terms of Emerson’s, as a relation of rightful attraction, of expressiveness, and of joy.”).

207. Id. at 165 (saying that “the remarriage comedies describe a structure of relationships that seems intuitively to satisfy features of moral perfectionism — in their willingness and capacity for mutual education, for transformation, for conversation, intellectual adventure, improvisation, devotedness, for a certain perversity or incestuousness, and for presenting, and being the cause of presenting, in unpredictable circumstances, the lineaments of satisfied desire, say happiness”).
divinity. These comedies, linked by Cavell to transcendentalism, provided an affirmation of the public tradition of marriage as lasting in combination with an openness to the insight of one’s present day which Emerson, in his strongest articulation, identified with moral freedom.\textsuperscript{208} The commitment to attain a higher meaning in the medium of marital ties, illustrated in the comedies, has a moral component that makes marriage, empirically and in deep conception, provisional\textsuperscript{209} yet meaningfully associated with duration. The element of duration in marriage vows is the pledge to serious moral engagement, and the option of exit is the recognition that moral engagement can fail if it is not mutual. Renewal is the continuing aspiration to individual engagement with a collective search for meaning.

Hence, the efforts to shore up the public meaning of marriage with a restricted definition that captures its essence in indissolubility\textsuperscript{210} of a union and consistency in gender format run headlong into a strong articulation of Emersonian perfectionism as manifested in the remarriage comedies: “[i]hose who cannot inspire one another to... an education [to provide a transformation of existence] are not married; they do not have the right interest for one another.”\textsuperscript{211} The notion that moral standards in marriage

\begin{quote}
\textsuperscript{208} See supra notes 183-94 and accompanying text; Emerson, supra note 14, at 412; Whicher, supra note 3, at 139; Kirn, supra note 5 (regarding American reinvention); Bellah, supra note 5.
\end{quote}

\begin{quote}
\textsuperscript{209} Cavell suggests that the remarriage comedies illustrate how, on a transcendent basis, it is provisional. Cavell, Tears, supra note 11, at 117 (“The melodrama signaled in the tainted male of the comedies suggests that there is a structure of unhappiness that the happiness of the comedies is lucky to escape, even temporarily, even (and always partially by happenstance) partially.”); see also id. at 116 (explaining how remarriage comedies echo A Doll’s House by imposing a requirement on marriage of the ability of the male to educate the woman and describing a moral cloud in the remarriage comedies posed by how a woman attains independence by creating herself after the need to be created by a male and “happiness achieved in remarriage comedies is not uncontaminated, not uncompromised.”). Cavell explains that both movies about “the unknown woman” and remarriage comedies have as their subject metamorphosis, a concern drawn from transcendentalism. For a statement about the provisional character of marriage, see Friedman, supra note 5, at 178 (“To stay married is a matter of individual choice; it cannot be forced on anyone; thus marriage is emphatically no longer a status, a permanent state.”).
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\textsuperscript{211} Stanley Cavell, Philosophy the Day After Tomorrow 122 (2005) [hereinafter Day After Tomorrow]. It should be noted that Cavell grounds his treatment of the remarriage comedies, and the understanding of marital engagement in them, in the biblical story of Adam and Eve. Id. See also Friedman, supra note 5, at 176 (describing the heavy expectations of marriage as a form of self-fulfillment in which “[e]ach partner had to satisfy and enrich the life of the other.”). Friedman relates the forms of family life to the key value in America of choice and what he calls “expressive individuality.” Id.
\end{quote}
derive primarily from permanence and gender are refuted by a deep American attachment to an even loftier vision of marital bonds — with Emerson at its inception. Without an appreciation of the deeper context of Emersonian thought about such matters as the individual, friendship, and love, provisionality in marital empirics and, under the pressure of narratives of renewal pegged to moral freedom, contingency joined to flux in marital moral logic is thought to belie a core public meaning of duration of bond\textsuperscript{212} and form. In fact, it is a feature of the marital quest for engagement marked as constitutive of political significance by vows of permanence and engagement.

The combination of Americans' marital practices and the strain of Emersonian aspiration in marital logic necessarily calls forth criticism and concern. Numerous writers have characterized Emerson as exercising a baleful influence in American society\textsuperscript{213} and have raised alarms about the unmooring of American families from the hold of tradition. Such critical views raise questions about the value implicit in the public rituals of American marriage. Some critical observers are prompted to ask whether public recitals of duration are evidence of insincerity and not of moral conviction. Of public amnesia? A friendlier and perhaps more empirical reading of the text of American domestic life prompts the question, whether the continuing fervor in avowals signifies meanings not measured by quantified results?

What then is the moral weight of American marriage rituals? What significance do they have in constituting our common life and in setting our

\textsuperscript{212} A conservative writer concerned with the contradiction between the civil reality of divorce as a factor in shaping cultural understandings and the continuing force of religious teachings that marriage is indissoluble captures the view that divorce alters the meaning of marriage: "On the other hand, even if it is, to a considerable extent, an epiphenomenon of deeper cultural changes, once ensconced in the law, divorce becomes part of the "moral ecology" of our culture and shapes the attitudes and expectations of many citizens about marriage. The free terminability of marriage changes the definition of marriage, just as there is an essential difference between a contract terminable at will by either party and a contract terminable only after ten years. Such laws promote a certain image of marriage, with terminability as one of its features." Christopher Wolfe, \textit{The Marriage of Your Choice}, FIRST THINGS 50, Feb. 1995, at 37-40. From the other side of the political spectrum, it is argued that divorce changes the meaning of marriage more significantly than does same-sex marriage: "Whether marriage is a lifetime commitment, or just a temporary arrangement seems to me to be a much bigger difference in the definition of marriage than viewing one's spouse as a human being without reference to gender." Posting of Gabriel Rosenberg to http://gabrielrosenberg.typepad.com/galois/2004/05/nofault_divorce.html (last visited August 27, 2005). \textit{But see} CAVELL TEARS, supra note 11, at 125 (suggesting that the remarriage comedies demonstrate the feature of marriage involving "a background of pain between men and women that the woman of the comedies is willing to include (since the man does not deny it) in a mutually meet and happy conversation committed to turn that pain aside" and hence suggesting that change and metamorphosis are embedded in the meaning of marriage and an irreducible requirement of a marriage).

\textsuperscript{213} Among the mildest of his critics is Howe, supra note 23.
moral course? Might broken promises of duration create forms of meaning that construct an enduring moral quest informed by Emerson family values?

VII. CONCLUSION

In America, marriage is a basic right, and so is divorce. There is no reversing the American embrace of complexity in the matter of love, marriage, and divorce. Reformist sentiment in law that defines divorce or change in family form as the critical problem facing American families and proposes to make divorce more difficult,214 to create the option of covenant marriage, or to maintain a strict boundary against same-sex marriage is a misconceptualization of the meaning of marriage and of the public narrative of marriage. The effort to make promises of duration unbreachable by re-establishing a strict meaning of duration as permanence as through marriages called “covenant” marriages, because they deepen the pledge of permanence, only dilute the common meaning of the community covenant of consent in marriage vows. The vow of duration is a promise of engagement in a marriage and in the community; the common property in the term “marriage” is damaged by its specialized use for constricted forms of promise that undermine the American premise of marital engagement as a marker for political consent and for the “conversation of living.” Marital duration and renewal stand for the conversation of intimate connection and for consent in marriage and in the American scheme of political legitimacy. Their common ownership by Americans as public conversation and their private possession as a “willingness for marriage” confers on American marital practice, law and narrative, both public and private, the honorable purpose of infusing into our domestic lives Emerson’s moral balance between “freedom and fate.”