Friends with Benefits

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FRIENDS WITH BENEFITS?

Laura A. Rosenbury*

Family law has long been intensely interested in certain adult intimate relationships, namely marriage and marriage-like relationships, and silent about other adult intimate relationships, namely friendship. This Article examines the effects of that focus, illustrating how it frustrates one of the goals embraced by most family law scholars over the past forty years: the achievement of gender equality, within the family and without. Part I examines the current scope of family law doctrine and scholarship, highlighting the ways in which the home is still the organizing structure for family. Despite calls for increased legal recognition of diverse families, few scholars have considered whether family law should recognize care provided outside of the home, and no scholar has considered whether family law should recognize the care provided and received by friends. Part II turns to friendship, considering the practices of people who self-identify as friends and the ways that such practices are already influenced by the law’s maintenance of a divide between friendship and family. That divide amounts to state support of the types of domestic caregiving that traditionally played vital roles in maintaining state-supported patriarchy and that still largely follow gendered patterns today. Family law thereby reinforces traditional gender role expectations rather than alleviating them. Part III then explores how simultaneous legal recognition of friendship and family could lead to greater opportunities to structure life free from state-supported gender role expectations. By supporting more pluralistic personal

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relationships and conceptions of care, family law could transform not just friendship and marriage, but gender itself.

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Introduction

Family law has long ignored friendship. Even recent attempts to expand traditional notions of the family have failed to consider whether friends might serve many of the functions that the law reserves for family. This silence may or may not be good for friendship, which is often thought to thrive outside of the law. But the silence frustrates the accomplishment of
one of the goals embraced by most family law scholars: the achievement of full gender equality, within the family and without.

This Article illustrates how family law’s failure to recognize friendship impedes existing attempts to achieve gender equality through the elimination of state-supported gender role expectations. First, family law’s recognition of marriage and silence with respect to friendship maintains a divide between marriage and “mere” friendship, implying that nonspousal friendship differs sufficiently from marriage and marriage-like relationships to be properly outside the concern of family law. Whether this strict divide between friendship and family conforms to people’s lived experiences is uncertain, although legal recognition is undoubtedly a salient difference between friendship and marriage. Common understandings of both marriage and friendship are thus shaped, at least in part, by family law’s focus on marriage and silence with respect to friendship.

Second, the divide between friendship and marriage is not gender neutral. Rather, it amounts to state support of the types of domestic caregiving that traditionally played vital roles in maintaining state-supported patriarchy and that still largely follow gendered patterns today. Family law’s focus on marriage to the exclusion of other forms of friendship can encourage people to prioritize one comprehensive domestic relationship over other relationships. Indeed, if individuals want the state to recognize their relationships with other adults, they generally must enter into a marriage or, increasingly, a relationship that mirrors marriage. That encouragement can in turn perpetuate gendered patterns of care because extensive amounts of care are expected of such relationships, and women are still more likely than men to be the primary providers of that care. Friendship, in contrast, does not consistently demand the same amount of care, in part because friendships are not presumed to be exclusive or comprehensive and in part because friendships are presumed to embrace norms of equality and autonomy over norms of domestic dependency.

In developing this argument, this Article analyzes the current scope of family law, uncovering several assumptions that silently underlie family law scholarship. Most saliently, the home is still the organizing structure for family. Although family law scholars have called for increased legal recognition of diverse families, including nonconjugal families, few scholars have considered whether family law should recognize care provided outside of the home, and no scholar has considered whether family law should recognize the care provided and received by friends. Instead, family law scholars assume that if individuals do not have a family based in the home, they are essentially alone and have no caregiving obligations. In addition, although family law scholars have focused considerable attention on the law’s construction of the family, they have failed to question the construction of family law, including the effects that law may have on relationships outside
of the family home. These assumptions intersect to place friendship outside of family law's domain, limiting family law's ability to consider forms of care that may lead toward more robust conceptions of gender equality.

This Article then explores what it would mean to change the current construction of family law by bringing friendship into the law's accounting. Whether legal recognition of friendship could disrupt the privileging of comprehensive domestic caregiving relationships depends on one's view of the interplay between law and society in the construction of family law. Many legal theorists argue that the law can never produce social change but rather can only follow and reflect such change. Pursuant to such a view, family law's focus on domesticity within the home reflects the social practices of most individuals. This Article takes a different view, highlighting the ways that the social practices of both friendship and family are already consequences of the law. Changing the law's focus can therefore change understandings of both family and friendship, potentially leading to greater opportunities to structure life free from state-supported gender role expectations.

Part I of the Article briefly reviews family law's commitment to gender equality, beginning in the 1970s, and various scholars' critiques about the limits of that commitment given states' resistance to recognizing same-sex marriage and other nontraditional living arrangements. These critiques have been confined, however, to the question of whether people in certain sexual relationships or cohabitation relationships—or both—are deserving of family law recognition. None of the critiques explores the consequences of family law's failure to consider relationships between friends who do not live together or who do not hold themselves out as sharing a sexual commitment.

Part II turns to friendship, first examining the ways the law already shapes friendship by defining it against state-recognized familial relationships. It then analyzes the functions often performed by people who self-identify as friends, specifically friends who do not live together or who do not define their relationship by reference to a sexual commitment. By comparing these functions to the functions generally assumed to be performed by spouses and other family members, Part II considers and critiques the values privileged by the law's recognition of family and corresponding silence with respect to friendship.

Part III then examines how legal recognition of friendship could begin to disrupt gendered patterns of care. Ending the silence with respect to friendship does not mean that family law must rigidly regulate friendship or even extend friends the same benefits accorded to families. Indeed, such regulation could reinforce, rather than challenge, the privileging of marriage and other family relationships. Nor is the elimination of marriage required. Instead, family law could consider ways that the law might support more, and
multiple, forms of personal relationships between adults, thereby acknowledging diverse conceptions of care and reinventing individuals' options with respect to both marriage and friendship.

I. PAST AND CURRENT CONSTRUCTIONS OF FAMILY LAW

Family law is a state construction, subject to change and reinvention. The states determine who may constitute families recognized by the state, and the states delineate the responsibilities and privileges of those family members. Indeed, the content of family law has changed dramatically over time in the United States. Initially called "domestic relations," family law at the time of the nation's founding encompassed all of a household's internal relationships, including master-servant, master-slave, husband-wife, and parent-child. The boundaries of family law have changed in multiple ways since that time, but spousal and parent-child relationships have consistently remained within the construction of family law.

The state initially recognized these spousal and parent-child relationships as a means to privatize the dependency of both women and children. Men, not the state, assumed responsibility for this dependency and generally received the full range of citizenship rights in return. With the passage of various family law reforms and, ultimately, the Nineteenth Amendment, wives were no longer officially dependent on their husbands. However, the states still recognized families as a means to privatize dependency, particularly the dependency of children on their parents and the financial and emotional dependencies thought to arise when individuals share a household. Because the law no longer mandated much of that dependency, some

1. Jill Elaine Hasday, The Canon of Family Law, 57 Stan. L. Rev. 825, 829 (2004) ("[L]egislatures, courts, and legal scholars have created the family law canon, and the family law canon has in turn shaped how these legal authorities and scholars think about family law, and how they teach their students and successors to view the field.").


3. Martha Minow, "Forming Underneath Everything That Grows:" Toward a History of Family Law, 1985 Wis. L. Rev. 819, 825 (stating that the routine inclusion of master-servant relations in early treatises "itself suggests how the conception of family or domestic life has changed historically").

4. Nancy F. Cott, Public Vows: A History of Marriage and the Nation 7 (2000) ("A man's headship of a family, his taking the responsibility for dependent wife and children, qualified him to be a participating member of a state.").

5. See Martha Albertson Fineman, The Autonomy Myth 35-37 (2004); see also Martha Albertson Fineman, Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency, 8 Am. U. J. Gender Soc. Pol'y & L. 13, 14 (2000) ("The assumed family is a specific ideological construct with a particular population and a gendered form that allows us to privatize individual dependency and pretend that it is not a public problem.").
family law scholars began to describe it as domesticity or care.\(^6\) Justifications for legal recognition of the family soon came to hinge on the provision of nurturance, emotional support, and other life necessities within the family grouping.\(^7\) However, as set forth below,\(^8\) the provision of that care was still deeply gendered, prompting calls for additional reform designed to achieve gender equality within the family.

### A. Eliminating Official Gender Roles

Family law scholars have praised the family law revolution that, over the past forty years, has eliminated most official gender role distinctions within the family. Prior to the revolution, family law in the United States envisioned a deeply gendered family.\(^9\) As Martha Fineman has summarized, “[T]he sexes had distinct and well-defined gender roles: husbands were economic providers, disciplinarians, and the heads of families, while wives were nurturers, caretakers, and subservient to their husbands.”\(^10\) This conception of the family changed dramatically in the 1970s,\(^11\) in large part due to grassroots calls for increased gender equality throughout society.\(^12\) Responding to such pressure, legislators and courts began to eliminate or overturn laws that mandated official gender roles within the family.\(^13\)

Currently, with the exception of opposite-sex marriage requirements, family law does not restrict family functions to one gender or another. Rather, both men and women are permitted, and often required, to perform all of the functions traditionally reserved for (male) husbands and (female)
wives or (female) mothers and (male) fathers. In other words, once a family is recognized by the state, the law no longer assigns legal functions to its members according to restrictive notions of gender roles. Women can now perform the functions traditionally reserved for husbands, men can perform the functions traditionally reserved for wives, and both mothers and fathers are eligible to perform the whole range of parenting functions. Family law has thus “moved from a patriarchal structure to a model of formal gender equality with an emphasis on rights of individuals within the family.”

Many family law scholars view this revolution as “the most significant and pervasive transformation” of family law. And it is tempting, for scholars and the public alike, to equate gender neutrality with gender equality. Indeed, some scholars assume that a gender-neutral family is a just family, at least to the extent that gender-neutral laws permit individuals to make choices about their family roles free from state intervention. Other scholars, however, emphasize that gender-neutral laws have not lead to gender equality within most families.

Concern about the actual effect of gender-neutral laws often turns on diverging views of whether formal equality can lead to substantive equality. Some of these concerns hinge on a sense of timing—the time it will take for formal equality to lead to substantive equality and what should be done in the interim. Others hinge on a concern that formal equality may never be enough to transform many, if not all, aspects of domestic family life. For


15. Linda J. Lacey, Mimicking the Words, but Missing the Message: The Misuse of Cultural Feminist Themes in Religion and Family Law Jurisprudence, 35 B.C. L. REV. 1, 2 (1993); see also Katharine T. Bartlett, Feminism and Family Law, 33 FAM. L.Q. 475, 475 (1999) (“Feminism’s principal contribution to the law of the family in the United States has been to open up that institution to critical scrutiny and question the justice of a legal regime that has permitted, even reinforced, the subordination of some family members to others.”).

16. Appleton, supra note 13, at 110.


instance, both types of questions arise in the context of divorce. At least for several years after the advent of gender-neutral divorce and alimony laws, most middle-class wives continued to forego full-time wage work in order to engage in childcare and other care work, leaving them with limited bargaining power upon divorce. Jill Hasday, among others, has analyzed how these women were harmed by state legislatures' assumptions that divorce law no longer needed to take women's particular status into account upon divorce but simply needed to treat both spouses equally. Hasday uses this example to urge family law scholars to continue to work toward the goal of gender equality instead of assuming that equality has already been achieved through gender-neutral laws.

Other concerns about the effects of gender-neutral laws go beyond debates about formal and substantive equality. These concerns are grounded in a consideration of the power of the existing boundaries of the legal family. Scholars engaged in this type of critique examine how the law's placement of certain relationships and activities outside of the legal family could itself perpetuate gender inequality. Although family law has eliminated official gender distinctions within the family, the law's policing of the boundaries of the family could still perpetuate gender inequality. The rest of this Article will consider these dynamics.

B. Recognizing the Power of Boundaries

Many scholars have emphasized that the current parameters of family law stigmatize various groups. This argument is most frequently made with respect to most states' refusal to extend marriage, and often adoption rights, to same-sex couples. The law's refusal to recognize same-sex couples means that gender roles are still meaningful to family law even if explicit gender role distinctions within the family have been eliminated. If family law had fully embraced gender equality, these scholars contend, there would be no need to mandate that spouses or parents choose opposite-sex partners.


22. Hasday, supra note 1, at 870 (“Social equality is an important goal for family law, yet announcing its achievement is premature. Instead, a crucial question in any family law debate has to be whether the particular proposal at issue is consistent with equality or not.”).

23. See infra Section I.B.


25. Id. at 218–19.

Indeed, such opposite-sex marriage requirements constitute sex discrimination on their face,\footnote{27} in contrast to the commitment to formal equality found within other areas of family law.\footnote{28} In 1993, the Supreme Court of Hawai‘i held that the state’s opposite-sex marriage requirements violated the Hawai‘i constitution’s equal rights amendment.\footnote{29} Other states, however, including those states that have begun to recognize same-sex marriage or other same-sex intimate relationships,\footnote{30} have refused to acknowledge the tension between opposite-sex requirements and the states’ commitment to gender equality within the family.\footnote{31} The gendered prerequisites of marriage are seen as unrelated to family law’s goal of achieving gender equality, thereby permitting the boundaries of the legal family to continue to perpetuate gender inequality.

Other scholars have extended this argument about the boundaries of the legal family to other groups of people, including unmarried opposite-sex cohabitants, unmarried cohabitants whose living arrangements do not involve sex, and single and other unmarried parents. Although formal gender distinctions are not the cause of these groups’ placement outside family law’s privileged family forms, women and their children in these “outsider” family forms tend to suffer disproportionately more than similarly situated men. For example, Martha Fineman has focused much of her work on the ways unmarried mothers are harmed by states’ decisions to allocate many social benefits to married couples instead of to parents.\footnote{32} Vivian Hamilton has similarly argued that family law should not privilege marriage over

\begin{footnotes}
\footnote{27. Appleton, \textit{supra} note 13, at 103 (describing litigation arguments in the 1970s).}
\footnote{28. See \textit{supra} text accompanying notes 14–15.}
\footnote{31. For example, the Supreme Judicial Court of Massachusetts’s decision in \textit{Goodridge}, which ultimately recognized same-sex marriage, did not address whether opposite-sex marriage requirements violated the state’s equal rights amendment. \textit{Goodridge}, 798 N.E.2d at 961.}
\end{footnotes}
other forms of companionate relationships that engage in dependent caregiving, which is generally performed by women. These scholars emphasize that the existing boundaries of the legal family fail to encompass the diverse ways that families function, and therefore states support some families more than others.

The acknowledgment that state constructions and recognition of marriage privilege some family forms over others has caused some family law scholars to question whether advocating for same-sex marriage is wise, despite its appeal as a matter of formal gender equality. As Nancy Polikoff has written, an agenda focused on extending marriage to same-sex couples would mean that "[m]arriage would be touted as the solution to these couples' problems; the limitations of marriage, and of a social system valuing one form of human relationship above all others, would be downplayed."34

In making this argument, Polikoff is emphasizing two aspects of the limits of family law's embrace of gender neutrality. First, like Hasday, Polikoff is emphasizing that formal gender equality with respect to who is eligible to marry will not necessarily lead to substantive gender equality because "the limitations of marriage" would likely remain.35 But Polikoff goes further, emphasizing a second point related to gender equality: the possibility that an expansion of marriage to encompass more couples might further stigmatize those who embrace only some of the aspects of traditional marriage.36 As Fineman and Hamilton have emphasized, women are particularly likely to be harmed by a "social system valuing one form of human relationship above all others,"37 because women often perform carework outside of the boundaries of marriage, and that carework is not supported when the state privileges marriage over all other forms of relationship.38

Polikoff is thus concerned about more than supporting same-sex couples who, but for gender, function in the same ways as opposite-sex married couples. Such support could signal the states' view that marriage is a superior way of living, whereas Polikoff emphasizes that she "do[es] not believe that


35. Id.

36. Id. (emphasizing the harm of "valuing one form of human relationship above all others").

37. Id.

38. Instead, much state support currently hinges on marriage, as Fineman and Hamilton emphasize. See supra text accompanying notes 32–33.
marriage is an inherently more valuable relationship than others, including non-conjugal relationships characterized by care and/or interdependence.\textsuperscript{39}

Some queer theorists have made similar critiques of the campaigns for same-sex marriage, emphasizing that the campaigns reinforce existing incentives for individuals to prioritize marriage over other ways of life. As Katherine Franke recently wrote, “the rights-bearing subject of the lesbigay rights movement has now become ‘the couple’—a We. It is a domesticated couple, and it is a couple that seeks a particular location within a genealogical kinship grid that sutures the couple to the nation.”\textsuperscript{40} When same-sex couples argue that they are harmed by their exclusion from marriage, they often reinforce marriage’s privileged status. For example, Franke emphasizes that “[w]hile the zone of the non-married parent is portrayed as a site of pathology, stigma, and injury to children, marriage is figured as the ideal social formation in which responsible reproduction can and should take place.”\textsuperscript{41} Or, as Michael Warner has written, “[m]arriage sanctifies some couples at the expense of others. It is selective legitimacy.”\textsuperscript{42}

Queer theorists have thus argued that the quest for same-sex marriage is not just misguided but also harmful to many people currently living outside of marriage, because calls for same-sex marriage reinforce marriage as “the zone of privacy outside of which sex is unprotected.”\textsuperscript{43} Under these conditions, marriage is not “merely one choice among others;”\textsuperscript{44} nor is it merely an individual choice. Rather, marriage is the privileged choice, and each time that choice is made, it reinforces both the privilege of the couple and the corresponding stigmatization of others.\textsuperscript{45} Sexual pleasure and expression is thereby limited by the state’s encouragement of stable, long-term coupling within the confines of marriage.\textsuperscript{46}

\begin{itemize}
\item\textsuperscript{40} Katherine M. Franke, \textit{The Politics of Same-Sex Marriage Politics}, 15 COLUM. J. GENDER & L. 236, 239 (2006).
\item\textsuperscript{41} Id. at 242; see also Judith Butler, \textit{Undoing Gender} 104 (2004) (emphasizing that the state’s offer of same-sex marriage “might result in the intensification of normalization”).
\item\textsuperscript{42} Michael Warner, \textit{Beyond Gay Marriage, in Left Legalism / Left Critique} 259, 260 (Wendy Brown & Janet Halley eds., 2002).
\item\textsuperscript{43} Id. at 267. Warner further describes reasons why opposition to marriage “lay at the heart of an ethical vision of queer politics.” Id. at 264–65.
\item\textsuperscript{44} Id. at 267; see also Claudia Card, \textit{Against Marriage and Motherhood}, 11 HYPERLIA, Summer 1996, at 1, 7 (describing marriage under current conditions as “not a totally free choice”).
\item\textsuperscript{45} Cf. Warner, supra note 42, at 274 (describing marriage’s consequences for the unmarried).
\item\textsuperscript{46} See id. at 277 (“Marriage, in short, would make for good gays: the kind who would not challenge the norms of straight culture, who would not flaunt sexuality, and who would not insist on living differently from ordinary folk.”); id. at 279 (“Too many activists see marriage only as a way of overcoming the stigma on identity and are willing to ignore—or even celebrate—the way it reinforces all of the other damaging hierarchies of shame around sex.”).
\end{itemize}
Polikoff's work goes beyond these arguments to emphasize that more than sexual freedom—or multiple forms of sexual pleasure—is at stake when the state privileges marriage. Rather, like Fineman and Hamilton, Polikoff emphasizes that the state also signals that it is most willing to support carework performed within marriage.47 Those performing carework outside legal marriage, including in “non-conjugal relationships characterized by care and/or interdependence,”48 are stigmatized both by the current boundaries of the legal family and by proposed boundaries that would extend legal recognition to same-sex couples.

C. Continuing to Privilege Comprehensive Domestic Relationships

Conceptions of family like those embraced by Fineman, Hamilton, and Polikoff go a long way toward acknowledging how the boundaries of family law can maintain hierarchies and inequality, even as the substance of family law attempts to embrace a norm of equality. As Polikoff highlights, the discourse of marriage privileges conjugality and romantic attachment over nonconjugal care relationships. Similarly, Fineman and Hamilton question why states should give more support to caregiving relationships that are linked to marriages than to caregiving relationships that are not tied to ongoing sexual relationships. The work of all three scholars illustrates how the boundaries of family law may encourage individuals to enter certain types of conjugal relationships in order to conform to the way of life privileged by legal recognition.

However, sexual attachment is not the only attribute of family life privileged by the current boundaries of family law. Rather, dependent care and interdependence are also privileged. Fineman, Hamilton, and Polikoff reinforce this privilege by implying that domestic caregiving should be the essential element of the states' definitions of family. Pursuant to their views, sexual or romantic attachment should not be a vital ingredient of family—indeed, sexual relations can be expendable—but care of others within the home should remain vital to our understanding of family. Fineman, Hamilton, and Polikoff thereby reinscribe the boundary of the legal family even as they attempt to expand that boundary beyond marriage and conjugality to include nonconjugal, interdependent caregiving relationships.

Family law scholars have not examined how this focus on caregiving within the home could privilege some family forms over others. This silence could be seen as evidence that most family law scholars would view such domestic caregiving as replacing sexual or romantic attachment as the defining element of the new family. Or the silence could reveal that many family

47. Polikoff, supra note 34, at 1546.
law scholars implicitly believe that domestic caregiving is the most important aspect of even the current sexual family. In any event, no family law scholar has yet considered how a focus on domestic caregiving could stigmatize those individuals living outside of domestic caregiving relationships.

Therefore, individuals not involved in a dependency relationship or not sharing a home, or both, remain outside of even alternative definitions of the family. This construction of family assumes that people living on their own care for no one but themselves. In addition, so-called single parents are assumed to care only for their children, and these parents are assumed to perform that task alone. Other forms of care provided outside of the home are largely ignored.

When viewed in this manner, family law has not changed as dramatically from the days of “domestic relations” as is generally assumed. The home is still the organizing structure for family. Moreover, the law still addresses hierarchies within the home, although those hierarchies are no longer always seen as natural or inevitable but instead are acknowledged as the product of shifting needs throughout the life course. Both existing and proposed constructions of the legal family address how members of households meet those needs by either giving or receiving care, thereby creating and sustaining interdependent ways of life. Individuals outside of the

49. Carol Sanger, arguing against the privatization of marriage, indicates that she has already adopted such a view:

But how customized can a marriage contract be before it falls outside the marital regime altogether? Is there a list of topics or terms that must be included before the arrangement is not marriage but something else, something perhaps closer to an employment contract or a property transfer or a ‘friendship pact’? Must the contracting parties reside together or be economically interdependent? Must there be provision for mutual support?

Carol Sanger, A Case for Civil Marriage, 27 CARDOZO L. REV. 1311, 1316 (2006). Of obvious interest to the argument here is the fact that Sanger leaves sex out of the equation, focusing solely on cohabitation and economic and emotional interdependency. Id. Other family law scholars, in contrast, have continued to analyze marriage as a site of sexual regulation. See, e.g., Carbone & Cahn, supra note 17, at 26 (discussing how much of the country engages in a “continuing celebration of the unity of marriage, sex and procreation”); Ariela R. Dubler, Immoral Purposes: Marriage and the Genus of Illicit Sex, 115 YALE L.J. 756, 763 (2006) (discussing historical and contemporary notion of marriage “as the site where lust was transformed into virtue”).

50. And, indeed, “self care” may not be regarded as “care” at all.

51. A few family law scholars have begun to examine childrearing performed outside of the home by nonparental actors, but that work has not yet been incorporated into family law discourse. See Melissa Murray, The Networked Family, Va. L. Rev. (forthcoming 2008); Laura A. Rosenbury, Between Home and School, 155 U. Pa. L. Rev. 833 (2007).

52. And, indeed, analyses of the household continue to provide much insight into the organization of private life. See, e.g., Robert C. Ellickson, Unpacking the Household: Informal Property Rights Around the Hearth, 116 YALE L.J. 226 (2006). Family law’s focus on the home, however, is not inevitable but rather is a function of the current construction of family law. If the current focus on the home provides insight into private life, so might a focus on activities not tied to the home. This is particularly true if family law scholars wish to construct family law so that it more equally addresses the needs of diverse populations.
household remain invisible, even if they too provide various forms of care and support to those within.

II. THE PLACE OF FRIENDSHIP

Given family law's focus on domestic caregiving within the home, it is not surprising that friendship has been largely ignored by family law scholars. Friendship is generally viewed as utterly distinct from domesticity and hence from family. Friends are assumed to share a home only at times of family limbo, for instance in the years between leaving a childhood home and establishing a home with a sexual partner or one's own children. In addition, dependency is often seen as anathema to friendship. Instead, friendship is often assumed to embody norms of equality and autonomy.

These cultural understandings of friendship and family may explain why family law has overlooked friendship, but they do not answer the question of whether family law should continue to place friendship outside of its domain. Because family law is a state construction, the state could shift away from the current focus on domestic caregiving within the home. There is no reason why the state must maintain a strict divide between family and friends, a divide that places friends, acquaintances, and strangers alike in the nonfamily category, thereby obscuring the ways that friends are more like family than strangers. Indeed, legal scholars in other fields have recognized that friendship and family are not as distinct as many may think. For example, in delineating the elements of intimate associations protected from undue state interference, Kenneth Karst acknowledged that "the idea of intimate association also includes close friendships."\textsuperscript{53} The values underlying state respect of intimate association—identified by Karst as including society, caring and commitment, intimacy, and self-identification\textsuperscript{54}—are present not only in marriages, parent-child relationships, or other groupings of relatives but can also be present in friendships.\textsuperscript{55} Therefore, under our constitutional scheme, the state must permit such friendships to exist.

Permitting relationships to exist is, of course, very different from supporting such relationships. Family law's silence with respect to friendship

\textsuperscript{53} Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624, 629 (1980); see also id. at 629 n.26 ("The law, of course, largely ignores relationships among friends, but it is plain that the values of intimate association may be realized in friendships involving neither sexual intimacy nor family ties. Any view of intimate association focused on associational values must therefore include friendship.").

\textsuperscript{54} Id. at 630-37.

\textsuperscript{55} Id. at 629; cf. Developments in the Law—The Constitution and the Family, 93 HARV. L. REV. 1156, 1216-1218 (1980) ("While the Court has stated that formal marriage and blood relations are factors that aid in the identification of protected family relationships, it has clearly implied that neither of these bonds is necessary to satisfy the state's interest in ensuring that children receive the care and support essential to their healthy development." (footnote omitted)).
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sends potentially conflicting messages about the state’s view of friendship. The silence can signal freedom to enter into diverse relationships, or it can signal that such relationships are unworthy of state recognition. Friendship is thus already regulated by the state in some ways. The construction of family law matters to friendship, and friendship matters to family law, as described below.

A. The Law’s Role in Defining Friendship

Although the law has traditionally placed friendship outside of its domain, the law matters to friendship. In the views of many, the benefits of friendship derive from its “out-law” status. Indeed, when I have mentioned to friends and colleagues that I am writing about friendship, many have instantly recoiled, asking: “You’re not going to call for the regulation of friendship, are you?” Implicit in the question is the belief that friendship thrives outside of legal regulation.

Why is lack of regulation perceived to be good for friendship? On the most basic level, the state does not specify the terms of friendship, leaving it up to individuals to define the interaction. This creates multidimensional freedom. On one level, the state imposes no obligations on friends; therefore, any obligations arise from the parties themselves. On another level, the state does not privilege one definition of friendship over another. Many types of friendships can develop and coexist, and individual friendships can

56. Family law is not alone in undervaluing friendship. See Lillian B. Rubin, Just Friends (1985) (describing how society in general undervalues friendship when it gives priority to romantic and familial bonds).

57. Cf. Anne C. Dailey, Constitutional Privacy and the Just Family, 67 Tul. L. Rev. 955, 956 (1993) (“Far from prohibiting state intervention in a prepolitical social sphere, the ideal of family privacy expresses a particular set of family values by protecting only those social relations that the state deems worth protecting.”).

58. For examples of this inclination, see Marilyn Friedman, What are Friends For? Feminist Perspectives on Personal Relationships and Moral Theory 248 (1993) (“No consanguineal or legal connections formally establish or maintain ties of friendship. As this relationship is widely understood in our culture, its basis lies in voluntary choice.”); Ethan J. Leib, Friendship & the Law, 54 UCLA L. Rev. 631, 663 (2007) (“We tend to think of our friendships as quintessentially voluntary and the law as quintessentially coercive. Allowing the law to penetrate friendship in any way might threaten friendship’s core and undermine its defining characteristic.”)(footnote omitted)).

59. Moreover, the state would probably enforce contractual obligations between friends more readily than intrafamily contracts, viewing friends as strangers before the law. Cf. Jennifer A. Drobac & Antony Page, A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law, 41 Ga. L. Rev. 349, 402-17 (2007) (proposing that family law permit individuals to structure their relationships pursuant to traditional business partnership principles).
be fluid and shifting. This freedom to define friendship pursuant to one's own terms means that definitions of friendship that attempt to be more specific than Karst's are often unhelpful and unduly restrictive. This Article attempts to respect that freedom by focusing on individuals who self-identify as friends.

Although the freedom to define friendship in diverse ways is attractive and powerful, it is incorrect to view it as flowing from lack of state regulation. Instead, as discussed below, the placement of friendship outside of the legal family is a decision of the state. Some individuals may choose to embrace friendship in an attempt to escape the power of the state, but such escape can be only partial because the state has created the very divide sought to be exploited. Friendships are thus not intrinsically free relationships; rather, their freedom derives in part from the state, and that freedom is limited by various state decisions.

1. The Limits of Friendship's "Out-Law" Status

The law currently intervenes in friendships in multiple ways. First, the law intervenes by refusing to recognize the desires of friends in various contexts. The most obvious context is in the denial of various benefits that the law reserves for family. Even if friends are performing many, or all, of the functions traditionally ascribed to spouses, parents, or children, friends are not eligible, for example, to take leave to care for each other pursuant to the Family and Medical Leave Act ("FMLA"), to require hospitals to allow them to visit each other or to make decisions about each other's medical care, to bring a viable suit for negligent infliction of emotional distress when they witness the other being harmed, or to inherit each other's estates.

60. This does not mean, however, that friendship is free from all cultural influences. Most notably, as set forth infra Section III.C, most friendships are believed to be shaped at least to some degree by the gender of their participants.

61. For more discussion of the danger of definitions of both friendship and family, see infra text accompanying note 185.


63. Of course, friends can engage in private contracting (most commonly in the form of health care proxies or durable powers of attorney) that is generally respected by medical professionals. In the absence of formal private agreements, however, states rarely permit friends to make medical care decisions for each other when one of them is incapacitated; instead, states generally designate family members to make such decisions. ALAN MEISEL & KATHY L. CERMINARA, THE RIGHT TO DIE: THE LAW OF END-OF-LIFE DECISION MAKING § 8.01 (3d ed. 2005). Some jurisdictions recognize the ability of a friend to stand in for family members for those purposes, but friends become eligible for that recognition only if no members of the immediate family are available or willing to take on such duties. See, e.g., D.C. CODE § 21-2210(a) (2007).

64. See, e.g., Kallstrom v. United States, 43 P.3d 162, 165 (Alaska 2002) (stating that a "blood relationship" is required for such claims); Kately v. Wilkinson, 195 Cal. Rptr. 902, 903 (Cal.
under state intestacy rules. Thus, friendships are not supported by the states in much the same way that same-sex couples have traditionally lacked support. Of course, not all friends would want state recognition, but those who would are denied benefits that the states bestow on other types of intimate adult relationships.

In addition to the denial of these public or quasi-public benefits, states also intervene in friendships by refusing to recognize certain private agreements that hinge on notions of friendship. An example can be found in the context of private express trusts. In order for such a trust to be valid, the beneficiaries of the trust must be identifiable and ascertainable. When the settlor directs her trustee to distribute property to the settlor’s “family” or “relatives,” the states honor the trust because the beneficiaries are viewed as clearly identifiable. When the settlor instead directs her trustee to distribute property to the settlor’s “friends,” the trust fails for lack of an identifiable and ascertainable beneficiary:

The word “friends,” unlike “relations,” has no accepted statutory or other controlling limitations, and in fact has no precise sense at all. Friendship is a word of broad and varied application. It is commonly used to describe the undefinable relationships which exist, not only between those connected by ties of kinship or marriage, but as well between strangers in blood, and which vary in degree from the greatest intimacy to an acquaintance more or less casual.

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65. Instead, if the decedent leaves no kin, her estate escheats to the state. See, e.g., Mo. Rev. Stat. § 474.010 (2000). Friends can execute wills leaving property to each other, but in the absence of validly executed wills, friends are not entitled to any part of their deceased friends’ estates.

66. In contrast, courts have recognized other agreements between friends even when those agreements did not contain all of the formalities required of contract. See Leib, supra note 58, at 687-92.


68. See, e.g., Clark v. Campbell, 133 A. 166, 170 (N.H. 1926).

69. Id. at 170. This is an old case, but its age provides support for the phenomenon I describe: the bias against friendship is so established that no competent lawyer would draft a trust leaving property to a settlor’s “friends.” Instead, the lawyer would specifically list the names of the friends in question. However, competent lawyers still regularly draft trusts that leave property to a settlor’s “family” or “relatives.”
As a general matter, states will not honor such a trust even if the settlor had provided instructions to the trustee (outside of the trust document) about the friends to be included in the class, or if the trustee otherwise had knowledge of who should be considered the settlor's friends.\(^7\)

When I teach cases about this issue in my Trusts and Estates class, most of my students agree with the states' decisions to reject such trusts, even my students who otherwise support expanding state inheritance laws' definitions of spouse and child in order to permit individuals who function as family, but do not enjoy the legal status of family, to share in a decedent's estate. When I push back and ask why the trustee could not use a functional test to determine the identity of the settlor's friends (as well as to make distinctions among friends that would justify the distribution of variable amounts and types of property), my students respond that such a test is impossible. They argue friendship is too amorphous to be subjected to a functional test, because there are too many types of friends, and it is too easy for an individual to claim she is a friend when she in fact is not. Family is a simple category, whereas friendship is incapable of definition.

The instincts of my students point to a paradox of friendship. Friendship thrives on lack of state recognition, but that lack also makes friendship suspect.\(^7\) The placement of friendship outside the law gives individuals the freedom to experience multiple forms of friendship and to create new forms of friendship, but that freedom also means that individuals can view friendship as more open to fraud than those intimate adult relationships recognized by the state. The state, by omission, defines friendship as a relationship with no legally enforceable obligations, and that definition necessarily shapes the benefits, risks, and experience of friendship for all.

However, friendships are not permanently outside of the realm of legally enforceable obligations. Instead, the law also intervenes in friendships by setting outer boundaries: marriage and, increasingly, marriage-like relationships. If friends obtain a marriage license or, in some states, if a friendship (generally opposite-sex) takes on the qualities of a marriage-like relationship through sexual cohabitation, then it is no longer a friendship in the law's eyes. Rather, a friend in such a friendship can appeal to the state and often receive benefits reserved for parties in marriage and marriage-like relationships.\(^7\)

\(^7\) Id. at 171.

\(^7\) Cf. Peta Bowden, Caring: Gender-sensitive Ethics 60 (1997) (describing friendship as "a sphere of social activity that is both exhilaratingly free from regulation and profoundly fragile").

\(^7\) Wilbur v. DeLapp, 850 P.2d 1151, 1153 (Or. App. 1993) (exercising equitable powers to divide the property of a non-married, formerly cohabitating opposite-sex couple pursuant to marital partnership principles); Vasquez v. Hawthorne, 33 P.3d 735, 737 (Wash. 2001) (extending default rules governing marital property division to cohabiting opposite-sex couples); Connell v. Francisco, 898 P.2d 831, 834–36 (Wash. 1995) (extending default rules governing marital property division to
Given the law’s role in creating the distinction between friendship and marriage, friendship has been experienced differently by straight and gay communities. Because gay men and lesbians have traditionally been denied same-sex marriage, the line between friendship and romance or between friendship and family is not as stark in many gay and lesbian communities as it is in straight culture. In addition, friendship is less likely to be implicitly devalued by comparisons to marriage. Sociologist Sasha Roseneil has summarized these phenomena:

For some lesbians and gay men the boundary between friends and lovers is not clear and shifts over time—friends become lovers, and lovers become friends—and many have multiple sexual partners of varying degrees of commitment (and none). These practices de-centre the primary significance that is commonly granted to sexual partnerships and the privileging of conjugal relationships, and suggests to us the importance of thinking beyond the conjugal imaginary.

In contrast, straight culture has, at least until recently, perpetuated a strict divide between individuals who are viewed as dating and those who are “just friends.” This distinction implies that the dating relationship may lead to the privileged state of marriage, whereas the friendship will not. Recently, the distinction has been blurred somewhat with the popularity of the cohabitating opposite-sex couples. The American Law Institute has proposed that states intervene in such friendships more often, unless the parties explicitly contract out of the states’ involvement. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS & RECOMMENDATIONS §§ 6.01–6.06 (2002) (proposing that its model family dissolution default rules be extended to all couples cohabitating for a specified period, barring agreements to the contrary).

73. For discussions of the importance of friendship in the lives of lesbians and gay men, see PETER M. NARDI, GAY MEN’S FRIENDSHIPS: INVINCIBLE COMMUNITIES (1999); JEFFREY WEEKS, INVENTED MORALITIES: SEXUAL VALUES IN AN AGE OF UNCERTAINTY (1995); JEFFREY WEEKS ET AL., SAME SEX INTIMACIES: FAMILIES OF CHOICE AND OTHER LIFE EXPERIMENTS (2001); and KATH WESTON, FAMILIES WE CHOOSE: LESBIANS, GAYS, AND KINSHIP (1991).

74. For a (most likely unconscious) devaluation of friendship in comparison to marriage, see Leib, supra note 58, at 681 n.260 (“The fact that many friendships dwindle is well known, and it is not necessarily the symptom of a flawed friendship. People move away, get married, have kids, get rich, become poor, change jobs, change interests—and all of these circumstantial changes can affect our friendship networks.” (emphasis added)).

75. Sasha Roseneil, Why We Should Care About Friends: An Argument for Queering the Care Imaginary in Social Policy, 3 SOC. POL’Y & SOC’Y 409, 411 (2004).

76. Id. at 410–15. Ethan Leib continues to perpetuate this divide in his recent work on friendship and the law. Leib, supra note 58, at 639 (“Friendship is not kinship, and if a relationship is one of kinship, it cannot also be classified as a friendship. Friends may not be related by blood or marriage, and they may not engage in any ongoing sexual relationship.”); id. at 640 (“Romantic love, familial love, and sex might confound an analysis of friendship proper.”). Leib’s ten criteria for friendship, however, id. at 642–47, are all criteria that are commonly used to describe lovers and that have been employed to argue for legal recognition of functional families.
term "friends with benefits." In contrast to "just friends," this term implies that the relationship embodies at least one of the attributes of marriage, namely sex. In many ways, this term devalues friendship even more than the term "just friends" because it implies that friendship has no benefits unless sex is involved. At the same time, the term also safely maintains the privileging of marriage and dating relationships that might lead to marriage. After all, "friends with benefits" are still "just" friends, implying that sex alone does not place a relationship on the path to marriage.

These differences in the experiences of friendship in turn reinforce the fact that friendship is not inherently free. Instead, freedom is conferred, and limited, by the decision of the state to recognize some relationships and not others. The state's distinction between friendship and legal marriage affects friendship as well as marriage, by defining marriage in opposition to other adult intimate relationships, including friendship. The next Sections examine the functions of friendship and compare them to legal marriage in order to ascertain what the state privileges, and what it overlooks, when it recognizes family to the exclusion of friendship.

B. The Functions of Friendship

Family law potentially has much to gain by considering friendship at this point in time. Family law has long embraced two additional goals beyond the goal of achieving individual autonomy and gender equality within the family. One of those additional goals is to reflect and support the ways people actually live their lives. The other is to foster pluralism by permitting individuals to explore diverse ways of living in our society. An analysis of the functions of friendship reveals that family law could more

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77. The term gradually became widely used in various social settings after it appeared in Alanis Morissette’s song "Head over Feet," released as a single in 1996.


79. E.g., Dailey, supra note 57, at 958–59 (discussing the role families play “in maintaining the diverse moral values and traditions that comprise the pluralist foundation of our liberal political order, values and traditions that in turn serve to counter the threat that unmediated state power poses to moral diversity”); Peggy Cooper Davis, Contested Images of Family Values: The Role of the State, 107 HARV. L. REV. 1348, 1371 (1994) (“People are not meant to be socialized to uniform, externally imposed values. People are to be able to form families and other intimate communities within which children might be differently socialized and from which adults would bring different values to the democratic process.”).
fully achieve these goals, as well as the goal of gender equality, if it considered friendship. As set forth below, friendship is an increasingly important aspect of many people's lives. In addition, many of these people prefer to experience personal connection, and give and receive care, through friendship rather than family. Finally, friends are often capable of sustaining such connections while simultaneously maintaining aspects of individual autonomy and equality that can be elusive in domestic coupling. Accordingly, family law has much to gain by considering friendship.

Sociologists have long studied friendship, but recent sociological research shows the increased importance of friendship, particularly among "those at the cutting edge of processes of individualization." These scholars emphasize that friendship, like many categories of experience, including family, is a social construction that shifts over time. In the mid-twentieth century, the apex of friendship was embodied in the "companionate intimate heterosexual couple," which was viewed as the "primary arena of intimacy." Recently, this model has shifted. "A smaller proportion of the population is living in the heterosexual nuclear family of idealized mid-twentieth century form, and fewer people are choosing or able to construct their relations of cathexis according to the symmetrical family, intimate couple model." More people are thus living outside of domestic coupling, which necessarily changes their notions of intimate connection. Instead of relying on family within the home, people are relying on friends outside of the home.

For example, in her study of individuals in England who, as of 2000, did not live with a sexual partner, sociologist Sasha Roseneil found "a high degree of reliance on friends, as opposed to biological kin and sexual partners,


81. Roseneil, supra note 75, at 409; see also Michel Maffesoli, The Time of the Tribes: The Decline of Individualism in Mass Society (Don Smith trans., 1996); Ethan Watters, Urban Tribes: A Generation Redefines Friendship, Family, and Commitment 40–69, 184–95 (2003). Writing outside of sociology, Andrew Sullivan has made a similar connection between friendship and the desire for autonomous living:

[F]riendship is for those who do not want to be saved, for those whose appreciation of life is here and now and whose comfort in themselves is sufficient for them to want merely to share rather than to lose their identity. And they enter into friendship as an act of radical choice. Friendship, in this sense, is the performance art of freedom.


82. Roseneil, supra note 75, at 411.

83. Id. at 412. However, social scientists, much like family law scholars, have been slow to respond to this shift. Id. at 413 (concluding that the study's findings suggest "that social researchers have often failed to see the extent to which, often as a matter of preference, people are substituting the ties of friendship for those of blood, particularly in terms of everyday care and emotional support").
particularly for the provision of care and support in everyday life, and friendship operated as key value and site of ethical practice for many.\textsuperscript{84} In contrast to perceptions that individuals are increasingly isolated and “bowling alone,”\textsuperscript{85} this study reported that the participants “were enmeshed in complex networks of intimacy and care, and had strong commitments and connections to others.”\textsuperscript{86} Within these networks, the participants deemphasized the couple relationship, explicitly choosing to live separately from their primary sexual partners and centering their lives instead around friends.\textsuperscript{87} The participants were therefore able to maintain adult connection while simultaneously living alone or living only with their children.

Studies in the United States reveal similar trends. For example, sociologist Kay Trimberger interviewed forty women between the ages of thirty and sixty who were living outside of marriage. Her interviews revealed that the women primarily relied on large networks of friends, rather than family, for both emotional and material support, including when faced with health or financial emergencies.\textsuperscript{88} Other studies have found that single mothers\textsuperscript{89} and older women\textsuperscript{90} similarly rely on extended friendship networks. Indeed,
studies of friendship among older adults "find that friendships are more im-
portant than family relations for morale and well-being in old age."91

These studies, and others,92 address some of "the ways in which the
category of the family is increasingly failing to contain the multiplicity of
practices of intimacy and care which have traditionally been its prerogative
and its raison d’etre."93 Therefore, if family law scholars want family law to
reflect the reality of intimate life, and to allow diverse conceptions of inti-
macy to flourish, family law must begin to consider the role of friendship in
people’s lives. In addition, family law scholars interested in promoting indi-
vidual agency and autonomy within the family can benefit from a
consideration of the ways that friendship is practiced. Much of the revolu-
tion in marriage law over the past decades can be traced back to the policy
decision to treat spouses as individuals rather than as a unit.94 However, by
confining this process of individualization to marriage, family law contrib-
utes to a societal emphasis on coupledom. Although spouses are individuals,
the law confers benefits to them solely because they are in a couple recog-
nized by the state; if they presented themselves “merely” as friends, they
would not be eligible for state recognition. The individuals in the couple are
therefore dependent on each other for the continuance of state benefits and
legal recognition.

This state-induced dependence is at odds with recent processes of indi-
vidualization,95 a conflict which has led to increased rejection of “the
romantic dyad and the modern family formation it has supported.”96 This
does not mean, however, that people are living completely autonomous
lives. Rather, as discussed above, they are relying on networks of friends not
recognized by the state. As such, both attachment and autonomy are valued
simultaneously, divorcing care from dependency and domesticity in many
contexts.

91. Trimberger, supra note 88, at 6.

92. E.g., Peter Willmott, Friendship Networks and Social Support (1987); Graham Allan,
Friendship, Sociology and Social Structure, 15 J. SOC. & PERS. RELATIONSHIPS 685 (1998);
Sue Heath, Peer-Shared Households, Quasi-Communes and Neo-Tribes, 52 CURRENT SOC. 161


94. See supra text accompanying notes 4–15.

95. For discussions of this trend toward individualization, see Zygmunt Bauman, The
Individualized Society (2001); Ulrich Beck & Elisabeth Beck-Gernsheim, Individualiza-

96. Budgeon & Roseneil, supra note 87, at 127.
C. The Role of Marriage and Domesticity

Given that friendship increasingly serves many of the functions traditionally reserved for family, friendship could easily fall within family law's domain. Indeed, some sort of recognition of friendship could further family law's goals of reflecting lived experience, fostering pluralism and promoting autonomy and equality within the family. Instead of such recognition, however, the state continues to play a large role in creating the divide between family and "mere" friendship.

Family law's silence about friendship necessarily implies that the state views the attachment and care embodied in many friendships as sufficiently different from that provided within the family to warrant no explicit legal attention. Indeed, by refusing to view friendship as within its orbit of concern, family law lumps friendship with all other "transactions" between adults. Family law's silence is thus more than silence. It also labels friendships as insufficiently intimate, thereby implicitly privileging relationships other than friendship as the preferred form of attachment and connection.

This silence does more than potentially stigmatize friendship. Rather, the silence can also perpetuate gender inequality, because the preferred form of attachment and connection is marriage and, increasingly, relationships that embrace many aspects of traditional marriage by providing care within the home. Elevating such relationships over friendships contributes to gender inequality by encouraging individuals to engage in domestic coupling rooted in a history of patriarchy and then stigmatizing those who live outside of that coupling.

1. The Gendered History of Marriage and the Home

Even as scholars attempt to find ways for the law to recognize diverse relationships within the home, relationships outside of the home that do not qualify for traditional familial status, either through legal marriage or parenthood, have been ignored. This focus on caregiving within the home, to the exclusion of other forms of caregiving, such as friendship, likely per-
Friends with Benefits

petuates gender inequality for two reasons related to the gendered history of marriage.

First, as illustrated by Rachel Moran’s recent summary of the history of the single woman in the United States, middle-class white women traditionally experienced extreme pressure to marry, given their economic and political subordination and the widely held view that “[m]arital status defined women’s worth.”102 This worth was intimately tied to women’s care of men within the home. Some of this care was sexual, as marriage was the only legitimate site for sexual activity.103 However, most of the care was nonsexual domestic care.104 Indeed, even before marrying, women were encouraged, and at times required,105 to attach themselves to a household so that “regardless of marital status, they could live under the authority of a male head of household, do productive work that would contribute to his advancement, and rely on his representation in public meetings.”106

Second, as mentioned earlier,107 once married, women were legally required to provide domestic care to their husbands and children, and they had no right to ask their husbands to provide similar care in return. Instead, husbands were legally required to provide financial support only, and that support did not need to be commensurate to the levels of domestic care provided by their wives. The state neither recognized nor mandated any other forms of caregiving or support between adults.

Over twenty-five years ago, Adrienne Rich relied on this history of marriage to describe the various ways that “women have been convinced that marriage, and sexual orientation toward men, are inevitable, even if unsatisfying or oppressive components of their lives.”108 Rich emphasized the myriad social forces that pressured women into marriage:

102. Moran, supra note 32, at 229–30. For a brief discussion about the ways black and working-class women were often denied access to marriage, see id. at 226–29.

103. Id. at 238 (“The colonies applied formal and informal pressure to keep sex and procreation within the confines of marriage.”); see Stephen J. Pope, Sex, Marriage, and Family Life: The Teachings of Nature, in FAMILY TRANSFORMED: RELIGION, VALUES, AND SOCIETY IN AMERICAN LIFE 52, 65 (Steven M. Tipton & John Witte Jr. eds., 2005).


105. Id. at 236 (“To preserve the social order, New England colonies banned ‘solitary living.’ . . . Whether living at home or apprenticed to other households, single women performed traditional domestic tasks, such as housekeeping, child care, and nursing of the sick and elderly.”).

106. Id.

107. See supra text accompanying note 10 (briefly discussing the gendered nature of the legal family prior to the 1970s).

108. Adrienne Rich, Compulsory Heterosexuality and Lesbian Existence, 5 SIGNS 631, 640 (1980); see also id. at 643 (“Women turn to marriage as a form of hoped-for-protection, while bringing into marriage neither social or economic power, thus entering that institution also from a disadvantaged position.”).
Women have married because it was necessary, in order to survive economically, in order to have children who would not suffer economic deprivation or social ostracism, in order to remain respectable, in order to do what was expected of women because coming out of "abnormal" childhoods they wanted to feel "normal," and because heterosexual romance has been represented as the great female adventure, duty, and fulfillment.  

Because even the so-called "modern" marriages of the 1970s often reinscribed this gender hierarchy and replicated past gendered divisions of care, Rich called on women to place less priority on marriage so that they could instead embrace more fully other forms of relationships along her "lesbian continuum," including friendships. 

Many people, and maybe even most feminists, believe that much has changed since the time of Rich's writing. First and foremost, the dignity of lesbians and gay men has been partially affirmed by the U.S. Supreme Court and other institutions. In addition, women's increased access to education and employment has meant that economic survival outside of marriage is less of an issue for many women. Large cohorts of women therefore have the means to delay marriage or long-term domestic commitment until they find the partner of their choice. Marriage, once chosen, is thus more likely to be viewed as satisfying for women.

Despite this belief, many gendered and heteronormative aspects of marriage remain. Immense value is still given to romantic coupling, whether it be opposite sex or same sex. Although many of the historically oppressive aspects of marriage have been softened, or even eliminated, the privileging

109. Id. at 654.
110. See id. at 647-48. The power dynamics of such hierarchy can exist even in same-sex relationships, particularly when scholars advocate that those relationships should be acknowledged by the state because they embrace a domesticity similar to opposite-sex relationships. Same-sex coupling can thus take on a specific meaning rooted in the history of female sacrifice and dependency. See, e.g., Polikoff, supra note 34, at 1539-40.
113. For example, eighteen states and the District of Columbia now prohibit employment discrimination on the basis of sexual orientation. HUMAN RIGHTS CAMPAIGN FOUNDATION, STATE OF THE WORKPLACE FOR GAY, LESBIAN, BISEXUAL AND TRANSGENDER AMERICANS: 2005-2006, at 12 (2006), available at http://www.hrc.org/documents/SOTW20052006.pdf (listing seventeen states with nondiscrimination laws as of 2006); Jason Clayworth, Rights bill protecting gays set for signing, DES MOINES REG., May 25, 2007, at 1B ("Today, Iowa is expected to become the 18th state to offer civil rights protection to gay and lesbian residents."). Even outside of these states, many large private employers have voluntarily adopted policies that prohibit discrimination and harassment on the basis of sexual orientation.
of conjugal, domestic coupling persists. Indeed, raising children is so tied to married conjugal identity that it is often hard to imagine individuals outside of such a relationship having or raising children together. Instead, mothers are labeled as either partnered or single, even if those so-called single mothers have friends and extended family members supporting them in their childrearing duties. Women today thus continue to be pressured to prioritize domesticity and conjugal identity over other relationships that do not share a similar history of gendered dependence and hierarchy. And once in domestic relationships, women continue to perform most of the carework for the family.

This pressure does not emanate from a single source, nor is it necessarily the result of bad, or good, motivations. Rather, the messages in support of coupling come from many sources, often unwittingly. Feminists, among others, are not exempt. As Moran has pointed out, "the second-wave feminist reform agenda often emphasized the importance of enabling women to balance marriage, motherhood, and work, an approach that implied that singlehood was a mere way station on the way to a committed relationship." This focus remains today, as "liberal feminists often have presumed that women will marry and have children, so that the central dilemma to be addressed is how to reconcile work and family responsibilities." Legal scholars, writing within family law and within other subject areas, have similarly perpetuated norms of domestic coupling by focusing on the ways the state can help women balance work and family. Despite claims that

115. See, e.g., Hertz & Ferguson, supra note 89, at 204–06.


118. For example, one study designed to determine what makes women happy during marriage has concluded that married women are happier if they eschew gender equality and instead embrace traditional expectations of marriage. See W. Bradford Wilcox & Steven L. Nock, What’s Love Got To Do With It? Equality, Equity, Commitment & Women’s Marital Quality, 84 SOC. FORCES 1321, 1324–28 (2006).

119. Moran, supra note 32, at 226; see also id. at 261 ("In contrast to first-wave feminists who ultimately embraced political individualism through the quest for universal suffrage, liberal second-wave feminists made economic individualism the centerpiece of their reform efforts. Contemporary feminists insisted on improved access to education, equal rights in the workplace, and comparable access to government benefits and private credit. At the same time, liberal reformers presumed that women would marry and have children, forcing them to juggle a career and responsibilities at home."); id. at 267–68 ("Organizations like NOW could not envision an agenda that would explicitly enable women to pursue satisfying lives outside the confines of a traditional couple.").

120. Id. at 226; see also id. at 228 ("Despite the possibility that political and economic individualism can transform women’s emotional make-up and ethical values, feminists have been reluctant to relinquish the advantage that women’s unique role as the guardian of domestic life confers.").

121. For some examples, see WILLIAMS, supra note 6, at 14–39; Mary Becker, Care and Feminists, 17 WIS. WOMEN’S L.J. 57, 97–109 (2002); Tonya L. Brito, Spousal Support Takes on the
this focus acknowledges the "care work" performed by women, these scholars generally consider only a certain type of care: that provided within the home to spouses (generally men) and children.\footnote{See, e.g., Martha T. McCluskey, Caring for Workers, 55 Me. L. Rev. 313, 317–20, 326–29 (2002).}

This focus on domestic coupling ignores the fact that many women give and receive other types of care at multiple locations throughout their daily lives. For example, Lucie White has explored how some of the mothers in Head Start support one another, not just as parents, but also as friends.\footnote{Lucie E. White, Raced Histories, Mother Friendships, and the Power of Care: Conversations with Women in Project Head Start, 76 Chi.-Kent L. Rev. 1569, 1575 (2001).}

Other scholars, including Patricia Hill Collins and Laura Kessler, have similarly explored how "other mothering" in African American communities involves much more than childcare and can create friendship networks with "different purposes—for example, socialization, reproduction, consumption, emotional support, economic cooperation, and sexuality."\footnote{Laura T. Kessler, Transgressive Caregiving, 33 Fla. St. U.L. Rev. 1, 19 (2005); see also PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT 178–83 (2d ed. 2000); CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY (Basic Books 1997) (1974).}

The legal scholars interested in state support of caregiving have largely ignored the care provided through such relationships. This silence betrays not only a class and race bias\footnote{For a similar critique of feminism in general, see Moran, supra note 32, at 229 ("Insofar as feminists equate female difference and moral superiority with women's domestic role, they have a blind spot about women who live outside the boundaries of traditional home life, whether those women identify themselves by race, sexual orientation, or unmarried status.").} but also a bias in favor of a certain type of care, namely domestic care.

Family law's silence about friendship and other types of nondomestic care similarly contributes to the pressure of coupledom that many women experience. By providing recognition and support to the caregiving provided within marriage but not to other forms of caregiving, existing family law signals that the care provided through one comprehensive domestic relationship is superior to the care provided by relationships that are not primarily defined by their sexual or domestic nature. Alternative visions of the family also signal that domestic care is superior to friendship given the prominence those visions give to caregiving within the home.\footnote{See supra text accompanying notes 32–39, 48–49.}
Given these forces, Rich’s call for women to explore multiple relationships other than marriage still resonates today. Embracing friendship, either in addition to or instead of coupling and other forms of domestic relationships, can open up opportunities to explore what it would mean to resist the presumed superiority of domesticity. Increased opportunities to experience freedom from gender role expectations may result.\textsuperscript{127} If family law is committed to gender equality, it must consider how legal recognition of friendship could enhance the ability of women to experience more robust notions of agency and equality in everyday life.

2. Maintaining the Divide Between Marriage and Friendship

Family law’s privileging of marriage and domesticity over friendship has consequences beyond the encouragement of domestic coupling. It can also lead to feelings of stigmatization and even loneliness and fear, particularly among some who exist outside of marriage by circumstance rather than choice.\textsuperscript{128} Such loneliness has recently led Drucilla Cornell to urge feminists “to find alternative ways of being together outside of the structure of private houses ordered by heterosexual coupling.”\textsuperscript{129}

Feelings of stigmatization result from the maintenance of a clear line between marriage and friendship, so that friendship cannot take the place of marriage and domesticity. This line is constructed in part by family law’s focus on caregiving within the home,\textsuperscript{130} but more is necessary to draw an accurate distinction between the law’s constructions of marriage and friendship. One feminist family law scholar emphasizes that “[c]ompanionship is the core good of marriage, not procreation or sex.”\textsuperscript{131} Pursuant to this ideal, friendship and marriage are more alike than different. Marriage must therefore provide companionship in a particular form in order to justify the state’s stark distinction between friendship and marriage.\textsuperscript{132} Cohabitating

\textsuperscript{127} Cf., Friedman, supra note 58, at 248–49 (“Friendship among women has been the cement not only of the various historical waves of the feminist movement but also of numerous communities of women throughout history who defied the local conventions for their gender and lived lives of creative disorder.”); Nancy J. Hirschmann, Toward a Feminist Theory of Freedom, 24 Pol. Theory 46, 59–62 (1996) (exploring how female friendship can help women explore gendered constraints on agency).

\textsuperscript{128} See, e.g., Trimberger, supra note 88, at 13 (“By assimilating all unpaid care into family, we reinforce the continued invisibility of care provided by friendship networks and contribute to the insecurity felt by those with weak family ties.”).


\textsuperscript{130} See supra Section I.C.

\textsuperscript{131} Mary Becker, Family Law in the Secular State and Restrictions on Same-Sex Marriage: Two Are Better Than One, 2001 U. Ill. L. Rev. 1, 31 (2001).

\textsuperscript{132} Cf. Budgeon & Roseneil, supra note 87, at 129 (describing the “expectations within the heterosexual relationship order” as including “co-residence, romantic love, monogamy and the
companionship could be the defining aspect of marriage, but that too does not adequately distinguish marriage from friendship, or else roommates would be the equivalent of spouses. Sex could be the decisive additional aspect, but that also proves inadequate because friends may have sex with one another (whether they refer to themselves as friends with benefits or not) and large numbers of married people have sex with people who are not their spouses\(^1\) (and who may, presumably, be their friends in some cases).

The difference between marriage and friendship instead appears to revolve around the powerful notions of stability and comprehensiveness that marriage evokes.\(^2\) Once marriage is chosen, people assume the relationship will persevere even through difficult times.\(^3\) Exit, although increasingly exercised, is seen as an onerous endeavor. Indeed, some spouses feel stuck in their marriages, and other spouses want their partners to feel that way in order to reinforce the stability of the relationship. This experience of stability, whether it is viewed as desirable or oppressive, often leads to the expectation that marriage will be a comprehensive relationship, meeting all needs for intimacy and care. Anything less than comprehensiveness could threaten the stability of the relationship, and spouses often expect robust returns on their decision to stick things out.

Of course, neither stability nor comprehensiveness is an innate part of marriage. Rather, both aspects of marriage are created by state support.\(^4\) Stability may not be a core good of marriage but for the state regulation of entrance and exit. Similarly, it would be difficult for marriage to be a comprehensive relationship but for the state’s decision to bestow a whole range of benefits, obligations, and protections to married couples.

This work of the state creates the distinction between friendship and marriage. It’s not just that friendship is outside of the law: it’s also that the state creates marriage to be like no other relationship. Therefore, although


\(^3\) See, e.g., Bruce C. Hafen, The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests, 81 Mich. L. Rev. 463, 476–84 (1983) (emphasizing that the commitment of marriage increases the likelihood that couples will work through difficult times instead of exiting).

\(^4\) Cf. Sanger, supra note 49, at 1317 (“Civil marriage bestows status and respect precisely because it is created by law.”).
friends may serve many of the functions of spouses, and may at times do so in a way that better achieves at least some of the goals of family law.\textsuperscript{137} Friendships pale in comparison to marriage. This comparison leads some people existing outside of marriage to feel stigmatized and alone, even if they have friends in their lives. Similarly, it encourages some people to prioritize dating that could lead to marriage over other forms of relationship.

In addition to minimizing friendship, the glorification of marriage as the ultimate relationship masks problems with marriage, most importantly the fact that marriage law in the United States was created to solidify men’s position as the head of their households. Historically, marriage had to be the ultimate relationship because women lost their legal identity upon marriage and had to rely on their husband’s financial and political support.\textsuperscript{138} Wives in turn provided the domestic support that made that participation in the market and political realm possible.\textsuperscript{139}

Although marriage law has undergone a radical transformation since that time, marriage law has been irreparably shaped by this history. Indeed, given its roots, the law of marriage may be more about gender than about intimate relationship or companionship.\textsuperscript{140} Given this history, as well as other social and legal forces that continue to construct gender by delineating narrow gender roles,\textsuperscript{141} it is unsurprising that the care provided within many marriages is still gendered, with wives more often than husbands sacrificing their individual desires for the good of the unit.\textsuperscript{142}

In all of these ways, the practice of marriage, as shaped by the state, plays a vital role in maintaining gender inequality. By privileging marital and domestic care over the care provided by friends, family law, too, continues to play a role in the maintenance of gender inequality. Bringing friendship into the scope of family law could disrupt this pattern, potentially (and paradoxically?) leading to more freedom than that derived from friendship’s placement outside of the law.

\textsuperscript{137} See supra Section II.B.

\textsuperscript{138} See supra text accompanying notes 102–106.

\textsuperscript{139} See supra text accompanying notes 10, 107.

\textsuperscript{140} See COTT, supra note 4, at 3 (describing how state laws concerning marriage “can shape the gender order”); Herma Hill Kay, “Making Marriage and Divorce Safe for Women” Revisited, 32 Hofstra L. Rev. 71, 89–91 (2003) (arguing that the law of marriage is “a codification of a society’s attitudes about women”).


Family law has sustained marriage as the ultimate personal relationship by maintaining strict divisions, not only between marriage and other sexual relationships, but also between marriage and friendship. As set forth in the previous Part, this division between marriage and friendship contributes to the social pressure to marry by positing friendship as insufficiently like marriage to take its place. Once people marry, the division also places pressure on the marital relationship itself by constructing marriage as the site for all caregiving functions, even functions that can be, and are, performed by friends.

Recent reform proposals within family law have failed to challenge this division between marriage and friendship. Instead, those proposals hinge on the presence of marriage-like domesticity within the home, thereby reinforcing the view that the type of care traditionally provided within marriage is both distinct from the care provided by friends and more worthy of state support. Family law thus continues to affect experiences of friendship, but family law scholars and reformers have failed to consider friendship explicitly. That silence reveals just how rigid some of the boundaries of family law have become. Such rigidity is not required, given that family law is a construction, and the existing construction already indirectly influences friendship. Moreover, rigid boundaries are undesirable if they thwart the achievement of the stated goals of family law, including the promotion of gender equality within the family and without.

This Part examines how explicit consideration of the role of friendship in people’s lives could help family law better achieve its goals, in large part by modifying some of the signals sent by the current construction of family law. The first Section discusses the two most obvious ways that the law could begin to recognize friendship: either by treating friends as family or by treating family as friends. Although these approaches have considerable strengths, they both risk reinforcing the line between friends and family instead of challenging it. The second Section therefore goes beyond the two approaches to examine how family law could begin to blur the legal binary between friends and family by recognizing the various ways that the functions performed by the relationships are often fluid and overlapping. Although a comprehensive scheme for law reform is premature, the Section sets forth two principles that should guide family law’s simultaneous recognition of family and friendship and provides some examples of how that recognition could be achieved. The last Section theorizes how such recogni-

143. See supra text accompanying notes 34–52.
144. See supra text accompanying notes 1–3.
145. See supra text accompanying notes 56–76.
tion of friendship could help family law further its goal of achieving gender equality within the family and without. The goal would be furthered not because gender is irrelevant to friendship—in fact friendship, like marriage, is deeply gendered at this time—but because a simultaneous recognition of friendship and family may create more opportunities for both women and men to engage in relationships free from gender-role expectations. In the process, relationships between women, between men, and between women and men could be transformed.

A. Changing the Content of Family or Friendship

What would it mean to construct the boundaries of family law so that they include friendship? One obvious approach would be to call for more recognition of friendship as family. Conversely, one could call for less legal recognition of family, treating coupling between adults more like friendship. Both approaches would change the content of legal conceptions of family and friendship, thereby potentially lending more support to the diverse ways that individuals might structure their personal relationships. However, because both approaches rely on the maintenance of a firm line between family and friendship, they are unlikely to disrupt the privileging of domestic caregiving at the core of current constructions of family law.

1. Friends as Family

The most obvious way for the state to begin to recognize friendship is to provide friends with state recognition and benefits if their relationships sufficiently mirror traditional definitions of family. This approach, derived from functional approaches to marriage and family, has already been embraced in both Canada and France. France has created the legal status of Pacte Civil de Solidarité ("PACS"), available to any two people who share a home and wish to provide each other with mutual assistance and support. Similarly, Canada has adopted the reforms proposed in a report entitled Beyond Conjugality, extending domestic partnership benefits to any two people in a relationship of "economic interdependence," regardless of

146. See infra Section III.C.
147. See supra note 78 (citing sources arguing that state recognition of family should hinge on the performance of family functions instead of the attainment of legal status).
conjugality. Under these approaches, friends can literally become friends with benefits, but in contrast to the colloquial term, sex need not always be involved. Instead, cohabitation and the sharing of financial resources distinguish the friendships recognized by the state from those that exist outside of the law’s domain.

Such a functional approach would broaden the law’s reach, but it is unlikely to disrupt the privileging of marriage and domesticity. Instead, friendships are recognized by the law only to the extent they mirror, at least in respects deemed important by the state, the traditional nuclear family. Sex is expendable, but other aspects of domesticity are required. Therefore, the way of life known as marriage is largely affirmed, not challenged. Of course, domesticity divorced from sex could change some aspects of the domestic life that is embodied by marriage, but it also could not. Most saliently, domestic interdependence is still privileged over more autonomous relationships, including relationships outside the home.

Moreover, because these approaches require individuals to specify one primary, comprehensive relationship in their lives, they fail to challenge the privilege of coupling. Under both approaches, individuals may seek state recognition only if they are not married or in a marriage-like relationship. These friends-as-family approaches thus encourage individuals to focus time and energy on one interdependent relationship rather than pursuing a


150. In Canada, conjugality is explicitly not a requirement. In France, it is unclear whether a known nonconjugal relationship could be eligible for PACS recognition. Compare Borillo, supra note 148, at 91 (emphasizing that the PACS contract is not available for a partnership with “your parent, grandparent, child, grandchild, parent-in-law, brother, sister, uncle, aunt, nephew or niece”), with Marie A. Failinger, A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to its Proper Place, 10 WM. & MARY J. WOMEN & L. 195, 208 (2004) (“[PACS] permits any two unmarried adults to enter into a legal relationship regardless of gender or perhaps even without a sexual relationship . . . ”).

151. For a more developed critique of functional approaches to the family along these lines, see Hamilton, supra note 33. For a partial defense of these approaches, see Brenda Cossman, Contesting Conservatisms, Family Feuds and the Privatization of Dependency, 13 Am. U. J. Gender Soc. Pol’y & L. 415, 507 (2005) (discussing the “unique nature of the economic and emotional dependency that characterizes” marriage and other domestic relationships).

152. See Butler, supra note 41, at 26 (arguing that “it is crucial to expand our notions of kinship beyond the heterosexual frame” and that “[i]t would be a mistake . . . to reduce kinship to family, or to assume that all sustaining community and friendship ties are extrapolations of kin relations”).

153. Indeed, a recent New Yorker cartoon suggests that marriage is defined, in large part, by the lack of sex within domesticity. An older woman wraps her arms around a younger, opposite-sex couple and states: “You fight, you don’t have sex—isn’t it time you two tied the knot?” C.A.J., New Yorker, June 19, 2006, at 36.

154. See Borillo, supra note 148, at 91; Polikoff, supra note 149, at 221 & n.116.
range of intimate relationships with multiple friends. Friendships may re-
place family, but the state's role in privileging stable coupling remains in 
full force.

A similar primacy requirement is found in David Chambers's proposal 
of a new legal status called "designated friends," which he believes should 
be available to all nonmarried adults, particularly after states provide same-
sex couples with the option of marrying. Under this approach, friends 
would be available for some state recognition even if their relationships do 
not mirror traditional definitions of family. In particular, the new status 
would not require conjugality or cohabitation, nor would it require a rejec-
tion of conjugality or cohabitation. However, like the Canadian and 
French approaches, this new legal status would not be available to individu-
als who have already entered into marriage. In addition, Chambers's 
proposal permits unmarried individuals to have only one "designated 
friend." Stable coupling is therefore privileged in Chambers's proposal 
much like it is in the French and Canadian approaches.

Unlike the French and Canadian approaches, however, Chambers sup-
ports a clear hierarchy between marriage and his proposed status:

> [D]esignated friends[, unlike spouses,] would have no financial obligations 
> to each other, or derivatively, to others—no obligations to third parties re-
> garding the other's debts, even for necessaries; no automatic 
> disqualification for medical or other welfare benefits because of the in-
> come or resources of the other; no obligation to divide financial assets 
> between them if the relationship ends.

The status of designated friends could therefore be described as a "mar-
nage-lite" approach. Although this approach is designed to permit more 
autonomy and independence within the relationship, the primacy require-
ment limits much of that autonomy. The status of "designated friends" 
would therefore reinforce much of the existing privileging of marriage and 
marriage-like relationships.

155. David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, A Status Other 

156. See id. at 1352 (making the status "available to any unmarried pair with a close relation-
ship"); see also id. at 1357 ("[O]ne reason for lumping the unmarried lovers with the divorced or 
widowed sisters is to make clear that becoming designated friends has nothing necessarily to do 
with sex, romance, or babymaking.").

157. Id. at 1353.

158. J. Thomas Oldham has used this term in a similar way, but not to describe Chambers's 
of Heterosexual Cohabitants or, Can't Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409, 1430–33 

159. See Chambers, supra note 155, at 1357 ("[T]hey appreciate their own economic inde-
pendence and do not want to assume financial responsibility for the other.").
In the end, each of these friends-as-family approaches similarly maintains a hierarchy between family and friends by recognizing friendship only when it functions like a family. Legal notions of family are thus expanded, but the construction of family law remains the same: family is in and friendship is out. The line between family and friend may move, but the line is then reinforced by the inclusion of a small subset of friendships and the exclusion of all others. Family law thereby continues to signal that domestic relationships are the only relationships worthy of state recognition and support, ignoring friendships outside of the home and, in doing so, likely perpetuating gendered patterns of domestic care.

2. Family as Friends

Instead of extending benefits to friends, family law could narrow the concept of family supported by the state. In contrast to treating friendship like family, family law could instead treat certain family relationships like friendship. Specifically, neither marriage nor marriage-like relationships would be entitled to state support, just like friendships are not entitled to state support. All adult personal relationships would exist outside of the law.

Family law scholars have already made similar proposals, but not in response to an acknowledgment of friendship. Martha Fineman and Vivian Hamilton have both proposed that the states stop allocating benefits to adults in marriage and marriage-like relationships, because such relationships are rarely a good proxy for the states’ interest in supporting the private care provided to dependents.160 Fineman in particular argues that the state should instead support such caregiving directly, by providing benefits only to “family units that are caring for children, the elderly, or the ill.”161 Other scholars have similarly proposed that the state get out of the marriage business, but they have done so for more strategic reasons, namely to avoid debates about the legitimacy of same-sex marriage.162

These approaches are important because they explicitly recognize the state’s interest in privatizing dependency and emphasize that marriage, standing alone, no longer necessarily involves dependency, or at least the type of dependency that should be facilitated by the state. This acknowledgment could help family law achieve its goal of gender equality in at least

160. See supra text accompanying notes 32–33.
161. Fineman, supra note 10, at 4; see also Fineman, supra note 32, at 230–36 (recommending that the state support childrearing by focusing on caregivers themselves); Martha Albertson Fineman, The Meaning of Marriage, in Marriage Proposals: Questioning a Legal Status 29, 43–57 (Anita Bernstein ed., 2006) (recommending similar state support of caregiving).
two ways. First, the state definition of marriage would no longer hinge on dependency, thereby creating a greater possibility that spouses could create relationships that escape the patriarchal history of marriage. Second, the state would no longer differentiate between marriage and friendship, thereby reducing some of the incentives for individuals to prioritize marriage over friendship.

This assessment of the potential benefits of these family-as-friends approaches relies on the insights of queer theory. Queer theorists have emphasized that blurring the line between friends and family could promote individual liberty by better enabling individuals to structure their lives free from state-supported heteronormativity, including the very categories of homosexuality and heterosexuality. If private ordering is thought to free individuals from restrictive sexual norms, then private ordering could also be employed to free individuals from restrictive gender norms, including gendered notions of who should engage in domestic care work.

This focus on individual freedom exposes a flaw inherent in family-as-friends approaches, however, namely that the approaches are unlikely to greatly disrupt the gendered notions of care and domesticity that have historically defined marriage. These approaches separate dependency from marriage, but they do little to challenge the historical assignment of dependent caregiving to women as opposed to men. Family-as-friends approaches may therefore continue to place dependent caregiving within women’s domain, whether in the context of marriage or not.

For example, under Fineman’s approach, although the state would no longer recognize marriage, it would recognize and support dependent caregiving. This dependent caregiving would be prioritized over other forms of caregiving, which would be left to the realm of private ordering. Although dependent caregiving is particularly worthy of state support, that support does nothing to challenge, and in fact could reinforce, cultural norms that assume women should engage in such caregiving. Legal recognition of dependent caregiving to the exclusion of other forms of caregiving could therefore encourage women to prioritize dependent caregiving over

163. For examples of this argument, see BUTLER, supra note 41, at 109, and Carl F. Stychin, “Las Vegas is not where we are”: Queer readings of the Civil Partnership Act, 25 POL. GEOGRAPHY 899, 917 (2006). For examples of the general emphasis on individual freedom in queer theory, including freedom from identity categories, see LEO BERSANI, HOMOS 3–4, 113–81 (1996), Janet Halley, Sexuality Harassment in LEFT LEGALISM/LEFT CRITIQUE 80 (Wendy Brown & Janet Halley eds., 2002), and supra text accompanying notes 40–46.

164. See supra text accompanying note 161 (emphasizing that under Fineman’s approach, the state would continue to provide benefits to “family units that are caring for children, the elderly, or the ill,” all of which involve dependent caregiving).

165. FINEMAN, supra note 32, at 226–36.

166. FINEMAN, supra note 5, at 44–53 (delineating why the state should support dependent caregiving).
other caregiving, including the emotional care that is at the heart of many friendships. Women would therefore continue to engage in more carework than men do and to give more care than they receive.

In addition, a regime of private ordering between adults risks reinforcing forms of private power that are rooted in a history of patriarchy. Although the state would leave both marriage and friendship alone under these approaches, that equal treatment would not necessarily change ingrained patterns. Societal norms supportive of the sexual family may be sufficiently strong that individuals would continue to order their lives around the form of domestic caregiving embodied in marriage even if the state no longer endorses that domesticity. Private ordering might even strengthen these societal norms, because family law would no longer signal its commitment to gender equality within marriage.\(^6\) The state’s exit from marriage and marriage-like relationships would not automatically posit friendship as a viable alternative, or addition, to domesticity. Rather, the status quo could be frozen in place, reducing the likelihood that more robust opportunities for gender equality would result.

B. Recognizing Pluralistic Personal Relationships and Conceptions of Care

Although potentially useful as an interim strategy, changing the legal content of either family or friendship will likely not do enough to alter the incentives that push women to prioritize domestic relationships over other relationships. Instead, such approaches risk reinforcing the line between friends and family, thereby strengthening the existing hierarchies of care instead of challenging them. In order to alleviate these risks, family law scholars must move beyond the construction of the family in order to examine the construction of family law as a whole.

1. The Power of Recognition

A focus on the construction of family law, as opposed to the construction of family, highlights the ways that the state supports certain aspects of personal life over others. As discussed earlier, state support was initially tied to women’s economic and political dependency on men and the state’s desire to privatize that dependence so that women and children would not seek direct financial support from the state.\(^16^8\) Now that such dependency is no


\(^{168}\) See supra text accompanying notes 4–5.
longer legally mandated, family law scholars generally justify state support of, and intervention in, private life by invoking three overlapping principles. As discussed earlier, family law scholars hope that family law helps people live the lives they are already living,\(^\text{69}\) permits individuals to develop conceptions of life free from undue state indoctrination,\(^\text{70}\) and provides individuals with the tools to overcome the potential inequalities of the private sphere, including gender inequality.\(^\text{71}\)

These principles intersect to create a theoretical tension, existing throughout family law, about whether the law should reflect or shape family life. Most scholars considered to be within the mainstream of the field have come to agree that the law should adapt to changing family life, and family law reform has largely followed that course.\(^\text{72}\) This approach contrasts with those family law scholars who believe the law should channel individuals into certain, superior ways of life, particularly marriage and childrearing within wedlock.\(^\text{73}\) This debate, however, generally obscures the fact that any legal recognition of family—even recognition that reflects the ways that most people live their lives—privileges that way of life over other ways of life. Therefore, the law can never simply reflect family life but is also always shaping it.\(^\text{74}\)

The previous Part emphasized that this dynamic shapes not just family life but friendship as well.\(^\text{75}\) Friendship is thus already implicitly regulated by the state. Family law scholars have not acknowledged this regulation because they have focused solely on the construction of the family. Even the

169. See supra note 78.
170. See supra note 79.
171. E.g., McClain, supra note 13, at 5–6, 73–79, 134–54; see also supra text accompanying notes 11–15 (describing reforms designed to foster gender equality within the family).
172. See, e.g., Polikoff, supra note 39, at 362 ("[F]amily law has a history of adapting to changing families, most notably in the recognition currently provided to children born out of wedlock . . . .").
174. This phenomenon is often referred to as the expressive power of family law. E.g., Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va. L. Rev. 1901, 1926 (2000).
175. See supra text accompanying notes 62–72.
friends-as-family and family-as-friends approaches discussed above rely on the simple expansion or contraction of the legal family. Each approach leaves friendship unrecognized—but regulated nevertheless.

By moving beyond the construction of the family to the construction of family law, family law scholars could begin to consider explicitly how the existing boundaries of family law affect personal relationships both in and beyond the legal family. The boundaries of the legal family would remain significant to this consideration because they are currently constitutive of both family and friendship. Once that work of family law is acknowledged, however, family law scholars would not be confined to considerations of the boundaries of the family. Rather, scholars could consider how family law might explicitly recognize friendship, at least in some contexts.

Explicit legal recognition of friendship could soften the effects of the state’s current, implicit regulation of friendship by signaling that friendship is worthy of state support. Such signaling might eliminate some of the stigma experienced by people living outside of state-sanctioned coupling, because other personal relationships would be recognized by the state. In addition, such signaling would begin to blur the legal binary between friends and family. That blurring could in turn disrupt the hierarchy of care produced by the current construction of family law, creating greater possibilities for gender equality.

Although legal recognition of friendship has the potential to disrupt existing hierarchies of care produced by the current regulation of both friendship and family, legal recognition of friendship also carries the risk of reinscribing new hierarchies of care. Like any form of legal recognition, recognition of friendship would signal that certain forms of care are more worthy of state support than others. Such signaling could frustrate family law’s goal of gender equality if legal recognition of friendship was substituted for legal recognition of family. Although friendship does not share marriage’s history of gendered dependence and hierarchy, it is still deeply gendered, as described below. Therefore, simply substituting friendship for family is unlikely to produce greater freedom from gender role expectations.

A simultaneous recognition of friends and family could address this risk while also emphasizing the overlapping nature of friendship and family. Such simultaneous recognition would go beyond the binary of friends and family to support individuals’ choices about how to structure their lives, choices mediated less by legal definitions of family than is currently permit-

176. See supra Section III.A.

177. Cf. BUTLER, supra note 41, at 55 (“[R]egulation is thus bound up with the process of normalization.”).

178. See infra Section III.C.
Friends with Benefits

This new construction of family law would not ask individuals to substitute family for friendship or friendship for family. Rather, it would focus on the care provided and received by multiple individuals throughout one's life course. Instead of channeling personal relationships into recognized forms, the state would provide individuals with more freedom to embrace diverse personal relationships and conceptions of care.

2. Guiding Principles

The specific contours of any new construction of family law will likely be subject to much debate. This Article leaves proposals for law reform to other scholars. Instead, my primary goal has been to illustrate the various ways our imaginations have been limited by the current construction of family law. That construction limits our ability to envision legal recognition of networks of care outside of the home, thereby also limiting our ability to conceive of more substantive forms of gender equality. Once the extent of these limitations has been recognized, scholars can begin to explore comprehensive reforms that are not so limited.

However, the analysis above does suggest some guiding principles for family law reformers. Most obviously, this Article calls for explicit state recognition of friendship, and that recognition must go beyond a simple proclamation that friendship is important to many people's lives. Instead, state recognition of friendship must be sufficiently robust to match, or counter, the signals currently sent by state recognition of marriage and family. But that does not mean that the state must necessarily extend friends the same benefits accorded to families. Instead of embracing simple norms of equality, new constructions of family law can better recognize friendship by embracing the principles of nonexclusivity and fluidity.

Nonexclusivity is vital to new constructions of family law because exclusivity risks reinforcing the primacy of one comprehensive relationship over others and the corresponding importance of domestic caregiving over other forms of care. Such reinforcement would likely continue to channel women into domestic caregiving roles. Simultaneous recognition of family and friendship would go a long way toward combating that channeling. Indeed, simultaneous recognition, by its very definition, is incompatible with the current emphasis on exclusivity found in legal marriage.

Indeed, the forms of relationship recognized by this new construction of family law may not look like marriage, family, or even friendship. Such difference does not place these relationships outside family law's concern, however. As Sasha Roseneil reminds us, "[a] lesson of queer theory is that we should resist the tendency to trivialize, infantilize and subordinate relationships which are not clear parallels of the conventional, stable, long-term, cohabitating heterosexual couple." Roseneil, supra note 75, at 411.
For example, one way to begin to think about new constructions of family law would be to consider what would happen if the law made it relatively easy for individuals to legally designate both a spouse and a "best friend." This approach would still permit individuals to prioritize domestic coupling, and, given the popularity of marriage, many individuals may continue to do so, eschewing a legal best friend and embracing only a spouse. However, others might choose both to marry and to maintain connection apart from the marriage through the support of a best friend. The option of having a state-recognized best friend in addition to or instead of a spouse would send the message that close personal relationships come in diverse forms and that individuals care for multiple people in multiple ways, even when married. The state would not assume that individuals want to, or should, prioritize domestic relationships over other forms of friendship or, conversely, that individuals want to privilege friendship over marriage.

However, dual recognition is not enough, by itself, to eliminate the signal that individuals should privilege certain relationships over others. Recognizing a legal best friend is not the same as recognizing friendship. Why should individuals be forced to choose one friend over others for purposes of legal recognition? Multiple friends can perform multiple functions in different contexts. These functions are currently ignored within family law, and a legal best friend proposal would likely ignore them as well, privileging exclusivity in the realm of friendship as in the realm of marriage.

New constructions of family law would be more promising if they considered ways to more fully reject exclusivity. In thinking about such possibilities, it may be useful to examine how nonexclusivity relates to the principle of fluidity that is also embodied in simultaneous recognition of friendship and family. Fluidity challenges the notion that the functions of family so far recognized by family law are performed only within the legal family. Rather, the functions are not confined to the legal family or to the home, nor need they be. Instead, they can be performed by multiple people both within and without the legal family, and, in addition to this multiplicity, the functions can shift from one person to another, from inside the family to out.

In order to recognize that people can and do rely on multiple people to perform different functions in their lives, and that these people and functions can shift over time, family law would have to go well beyond proposals permitting individuals to name one designated friend or even a spouse plus a best friend. For example, one relatively aggressive approach would gather all of the benefits, default rules, and obligations attaching to marriage and

180. This approach is therefore different from Chambers's proposal because individuals would not have to choose between marriage and other legal statuses like designated friends. For discussions of Chambers's proposal, see supra text accompanying notes 155–159.

permit individuals to assign some or all of those forms of legal support to the individuals of their choice. For example, an individual could choose for default property division rules to apply to the person with whom they are living, joint health insurance benefits to be shared with a noncohabitating friend or lover, hospital visitation rights to be given to yet another person, and protections under the FMLA to be available to care for a sibling.

Such an approach would be difficult to implement, given the complexity of the current regulatory regime of marriage. The benefits, default rules, and obligations attaching to marriage are a patchwork of federal, state, and local law. However, despite the fragmented nature of marriage recognition and regulation, all levels of government are united in their silence with respect to friendship. Permitting individuals to assign certain benefits, obligations, or default rules to friends would therefore be an innovation throughout the entirety of the complex regulatory regime of marriage, minimizing conflicts among the levels of government. Moreover, the complexity of the regime could permit experimentation at the various levels of government and with respect to the specific benefit, obligation, or default rule in question. For example, a state could initially provide individuals with the flexibility to designate friends as eligible for certain benefits, obligations, or default rules but not other benefits, obligations, or default rules.

Individuals can currently achieve some of this flexibility through private contracting (for example through living-together agreements, prenuptial agreements, or health care proxies), but not all of the consequences of marriage can currently be assigned by contract (including, most importantly, health insurance benefits, social security benefits, and rights under the FMLA). Therefore, such a proposal would change the current substance of the law to a great extent but not radically. The more radical aspect of this type of proposal would be its rejection of private contracting to readjust the current consequences of marriage determined by the state. Instead, some or all of the benefits, obligations, and default rules currently reserved for spouses would be available alike to spouses, friends, or the other individuals designated. Such a proposal would therefore allow all individuals, not just married couples, to decide how they would like the state to support their personal relationships, if at all. Unlike the current state of the law,

182. This approach is inspired in part by the Short Term Paid Leave plan proposed by Steve Sugarman in the employment context. See Stephen D. Sugarman, Short Term Paid Leave: A New Approach to Social Insurance and Employee Benefits, 75 CAL. L. REV. 465, 466–73 (1987). Like that plan, the approach described above shifts control from the state to individuals, permitting individuals to decide how to use their benefits outside of state-approved categories. See id. at 470–71.

183. See Bernstein, supra note 142, at 146–52

184. Of course, specific implementations of this approach could also lead to various abuses and perverse incentives. Future proposals for law reform would need to weigh the benefits of such
marriage or a marriage-like relationship would not be a prerequisite for taking on the packages of benefits, obligations, and default rules provided by federal, state and local governments. Instead, individuals could choose to apply those packages to other types of personal relationships without engaging in private contracting. In addition, individuals would not be required to take or leave entire packages but rather could divide the packages among multiple individuals, also without engaging in private contracting.

Such an approach could go a long way toward supporting the diverse forms of care performed by multiple individuals in many people's lives and encouraging other people to consider new ways to live their lives. State support would no longer hinge on the performance of types of domestic caregiving rooted in a history of state-supported patriarchy. The care and support provided and received outside of that framework would no longer be ignored or negated. The boundaries of family law would be expanded, making them much less likely to constrain individual preferences and practices. Unlike other proposals, however, friendship would not be pushed to take on the defining aspects of family in order to be let into family law's domain. Rather, individuals could choose how they would like the state to support and recognize both their friendships and family relationships.

In addition, such an approach would not necessitate a legal definition of friendship or family, thereby acknowledging the potential fluidity of family and friendship. Individual preference, rather than legal definition, would control which relationships are supported by the state and which are not. The only necessary limitation would seem to be one of mutuality: individuals could not unilaterally expect those in their proposed "caring network" to either take on caregiving responsibilities or receive caregiving benefits. Rather, some sort of acceptance would be required. Unlike current registration systems, however, individuals would not have to agree to a comprehensive package of benefits and obligations. Moreover, different people could play different roles in each other's lives. For example, an individual could choose to use FMLA-type leave to care for a friend, but that friend could later use her own leave to care for someone else.

an approach against those risks. This Article seeks first to imagine new approaches outside of the existing constructions of marriage and friendship.

185. In this way, such an approach might avoid some of the dangers of categorization identified by queer theorists. See supra text accompanying notes 40-46, 163; see also Lauren Berlant & Michael Warner, Sex in Public, in Queer Studies: An Interdisciplinary Reader 170, 178 (Robert J. Corber & Stephen Valocchi eds., 2003) ("Queer social theory is committed to sexuality as an inescapable category of analysis, agitation, and refunctioning."); Stacey Young, Dichotomies and Displacement: Bisexuality in Queer Theory and Politics, in Playing with Fire: Queer Politics, Queer Theories 51, 61 (Shane Phelan ed., 1997) (emphasizing the need to "challenge both the notion that identity categories represent epistemological certainties, and the notion that the uncertainties that do exist are located primarily at what we think of as the boundaries that demarcate one category from another"); cf. Elsie Clews Parsons, Friendship, A Social Category, 21 Am. J. Soc. 230, 233 (1915) ("[F]riendship makes an implicit criticism of category as category.").
Potential constructions of family law like the one described above illustrate some of the ways that the state could begin to recognize personal relationships without reinforcing existing hierarchies of care or producing new ones. When guided by the principles of nonexclusivity and fluidity, new constructions of family law can begin to blur the line between friends and family, providing individuals with more freedom to structure their personal lives in diverse ways. In the process, existing notions of both family and friendship could be transformed. This transformation has particularly strong implications for gender equality, as set forth below.

C. Transforming Gendered Relationships

Legal recognition of the diverse functions of friendship, including those functions that resemble and overlap with the functions of family, could transform the gendered nature of both family and friendship. First, as discussed above, recognition of friendship in addition to marriage could alleviate some of the pressure placed on marriage and other domestic relationships to serve all caregiving functions. This repositioning of marriage and domesticity could potentially promote gender equality by reducing the amount of care expected to be provided within the home, care that is still generally provided by women. Second, legal recognition of friendship would also signal that friendships are an integral part of life, not merely a break from domestic life or work. As discussed below, this repositioning of friendship could lead to even more gender equality by changing the nature of friendships between women, between men, and between women and men. Women might receive more care in female friendships, men might receive more care in male friendships, and men and women might come to experience opposite-sex friendships free from many of the constraints of heteronormativity. In the process, the very nature of gender could be transformed, freeing both women and men from many gender role constraints.

1. Relationships Between Women

Women have long been assumed to have close friendships with other women. Indeed, given the domestic care that women have traditionally provided within the home, women are often thought to receive more emotional care from their female friends than from their spouses and children.


187. This assumption is borne out in some of the sociological literature. See, e.g., Kirsten Voss et al., *Friendship, Marriage and Self-Esteem*, 16 J. SOC. & PERS. RELATIONSHIPS 103, 117 (1999)
Female friendships create a space where women are thought to receive and provide care in more equal doses, instead of primarily providing care. Friendship with other women can also provide the opportunity for women to focus on the needs of women rather than the needs of men or children. Friendships between women are therefore already assumed to be robust and fulfilling.

Despite these positive views of female friendship, many women treat friendship as secondary to their dating or domestic family lives. This approach to friendship can be unconscious, as women are increasingly overwhelmed by work and family responsibilities. However, many women consciously prioritize domestic family life—or potential domestic family life in the case of dating—over friendship. These choices are not surprising given that they are reinforced by various social forces that value family over friendship, including the current construction of family law.

Simultaneous legal recognition of family and friendship could begin to disrupt these patterns, creating conditions under which women could more explicitly contemplate why they might prioritize domestic family life, particularly married life, over friendship. As discussed earlier, Adrienne Rich

188. See Bowden, supra note 71, at 62. ("The revaluation of women's friendships and women's lives becomes, then, the site of enquiry into the alternative ethical significance of chosen, reciprocal relations.").


190. See, e.g., Terri Apter & Ruthellen Josselson, Best Friends: The Pleasures and Perils of Girls' and Women's Friendships 251-59 (1998) (describing how female friendships are the first thing to go when women become overly busy with work and family); Stacey J. Oliker, Best Friends and Marriage: Exchange Among Women 112-21 (1989) (describing how the women in the author's studies consistently placed family first, although they reported more closeness with their female friends than with their husbands).

191. See, e.g., Hochschild with Machung, supra note 117, at 149-66 (describing the increasingly common situation where wives earn as much as their husbands in the workplace yet also do most of the housework and childcare coordination); Amy L. Wax, Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?, 84 Va. L. Rev. 509, 519-24 (1998).

192. See, e.g., Oliker, supra note 190, at 113-14, 117-18.

193. See, e.g., Pat O'Connor, Friendships Between Women 102 (1992) (discussing the possibility that the "cultural primacy attached to coupledness means that friendships between single women, whether individual or group-based, and regardless of their provisions, will never be seen as satisfactory").

194. See supra text accompanying notes 50-52, 121-126 (discussing family law scholars' presumption that women will ultimately marry or otherwise engage in caregiving that takes place within the home).

195. See supra text accompanying notes 108-111.
called on women to engage in such contemplation over twenty-five years ago. Her goal was to challenge compulsory heterosexuality by creating opportunities for women to question why they have embraced marriage with men over relationships with other women. Legal recognition of friendship could serve a similar function by presenting women with a socially recognized way of living outside of marriage or domesticity. Some women who are not currently living a lesbian life might gain sufficient strength from such legal recognition to prioritize relationships with women—whether the relationships be sexual or friendly in nature, or both—over interactions with men.

Other women might still continue to interact with men, as lovers or friends, or both, but legal recognition of friendship could create additional opportunities for these women to live outside marriage. Rachel Moran has criticized feminists for assuming that all women live within marriage, or at least want to, instead of acknowledging that many women are single and cherish the “emotional individualism” created by living outside marriage. This critique is important, as feminists’ focus on family care work can essentialize women as caregivers, obscuring the constructed nature of women’s caregiving roles and ignoring the women who have chosen to reject those roles. But women need not make a choice between marriage and solitude. Rather, women can live outside marriage while enjoying the connection, care, and support of friendship. Such connection can be achieved with both male and female friends, but given current gender norms, women might feel more inclined to discuss with other women why

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196. Cf. O’Connor, supra note 189, at 132 (describing female friendship as “undermin[ing] the idea that women’s only source of identity and pleasure lies in a relationship with a man”).

197. Moran, supra note 32, at 228; see also supra text accompanying notes 119–120 (elaborating Moran’s critique).

198. The term “emotional individualism” could be read as implying such a choice, but individualism can mean many things beyond solitude. Indeed, at no point does Moran describe such individualism as similar to isolationism. Thus, Moran’s critique appears to be similar to mine, in that she advocates individual freedom to structure life outside of marriage. However, Moran does not explicitly discuss the ways that women could engage in relationships outside of marriage. That silence, combined with Moran’s focus on “single women,” could lead readers to interpret “emotional individualism” more narrowly than Moran intended.

199. Single women have created similar social networks in the past, as evidenced by the literature about “single blessedness” during the nineteenth century. See, e.g., Carter, supra note 186; Lee Virginia Chambers-Schiller, Liberty, A Better Husband: Single Women in America: The Generations of 1780–1840 (1984); Ruth Freeman & Patricia Klaus, Blessed or Not? The New Spinster in England and the United States in the Late Nineteenth and Early Twentieth Centuries, 9 J. Fam. Hist. 394 (1984). Moran discusses this literature, but she implies that individualism constituted, or should constitute, the core of such single existence. Moran, supra note 32, at 228, 251–56. I propose instead that women might cherish their single status in part because of the rich social network that it permits.

200. For a discussion of how legal recognition of friendship might change such norms, see infra text accompanying notes 213–224.
they are prioritizing friendship over marriage, and they may receive more support as a result of that sharing. Legal recognition of friendship would reinforce that being unmarried does not have to mean being alone. Instead, the law would acknowledge that women can live robust personal lives apart from traditional notions of marriage and domesticity.

Finally, legal recognition of friendship could facilitate women's simultaneous embrace of both marriage and friendship. Legal recognition of both marriage and friendship would signal that marriage need not involve the sacrifice of a woman's other relationships once she becomes a wife. This in turn could encourage married women to rethink the role of both marriage and friendship in their lives. For example, some women could feel empowered to reallocate caregiving responsibilities to their spouses in order to free up more time for friendship. In the process, both marriage and friendship might be transformed.

2. Relationships Between Men

Traditionally, friendships among men constituted the most revered form of social interaction. Philosophers such as Aristotle and Montaigne posited friendship as the ultimate human relationship, emphasizing that it could be achieved only between men. Well into the nineteenth century, men continued to rely on one another for intellectual stimulation, moral guidance, and emotional support.

This history has led one legal scholar to voice concern that legal recognition of friendship could reinforce patriarchy by furthering the power of male networks such as fraternities and business associations. Beyond

201. Scholars in the past have illustrated how female friendships have helped sustain marriage by providing an emotional closeness that was absent from many patriarchal marriages. See, e.g., Olker, supra note 190, at 38; Smith-Rosenberg, supra note 186, at 22-24. Here, in contrast, I envision both friendship and marriage providing women with fulfillment and support.


204. See also Karen Walker, Men, Women, and Friendship: What They Say, What They Do, 8 GENDER & SOC'y 246, 261 (1994) (“Earlier ideologies of friendship represented women as incapable of loyalty and true friendship and men as noble friends.”). For an analysis of how Mill broke with this tradition and advocated friendship within marriage, see Mary Lyndon Shanley, Marital Slavery and Friendship: John Stuart Mill's The Subjection of Women, in FEMINIST INTERPRETATIONS AND POLITICAL THEORY 164 (Mary Lyndon Shanley & Carole Pateman eds., 1991).

205. See, e.g., DAVID HERBERT DONALD, "WE ARE LINCOLN MEN": ABRAHAM LINCOLN AND HIS FRIENDS (2003); see also GRAHAM ALLAN, FRIENDSHIP 65 (1989) (“Nearly all the great friendships from literature and history discussed in more philosophically oriented analyses are friendships between men.”).

206. See Leib, supra note 58, at 667-69. For a similar discussion from a nonlegal perspective, see O'Connor, supra note 189, at 123-25.
denying the power of female friendships, this concern reveals just how impoverished notions of male friendship have become. Friendships between men are presumed to be motivated by the accumulation of power in the realms of work and civic engagement as opposed to the sharing of confidences and provision of emotional support in all aspects of life.\textsuperscript{207}

This limited view of male friendship could be motivated, in part, by family law’s role in the division between marriage and friendship. Under the current construction of family law, marriage and marriage-like relationships are assumed to fulfill all private caregiving needs. Moreover, given gendered patterns of care, straight men might receive more care within these relationships than straight women do. These factors could intersect to shape men’s views of friendship in multiple ways.

For example, married men could view friendship outside of business or civic associations as unnecessary given the care they receive within marriage.\textsuperscript{208} Alternatively, because of the care they receive within marriage, married men could view emotional friendships with other men as disloyal to their partners.\textsuperscript{209} Similarly, because of the connection between care and the sexual relationship of marriage, straight men could view robust friendships with other men as potentially impugning their sexual orientation or masculinity.\textsuperscript{210} Or single men of all sexual orientations could interpret the law’s

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  \item \textsuperscript{207} This presumption is borne out in various social science literature. See, e.g., ALLAN, supra note 205, at 71 (“Men . . . are likely to be involved in a set of relationships whose basis is sociability and enjoyment, often arranged around specific tasks and activities. However, the majority, though not all, of these relationships are likely to be relatively shallow in terms of the degree to which personal worries, anxieties and other matters of consequence to the self are discussed.”); LARRY MAY, MASCULINITY & MORALITY 130 (1998) (“Male friendships with other men, at least in Western societies, tend to be based on shared activities, such as sports events, rather than shared stories of life experiences. As a result, it is quite common for men to say that they really don’t know the other men in their lives, even their best friends.”); RUBIN, supra note 56, at 61 (“Generally, women’s friendships with each other rest on shared intimacies, self-revelation, nurturance and emotional support . . . . In contrast, men’s relationships are marked by shared activities.”) (footnotes omitted)); Walker, supra note 204, at 246 (“[T]he notions that women share intimate feelings whereas men share activities in their friendships are more accurately viewed as cultural ideologies than as observable gender differences in behavior.”).
  \item \textsuperscript{208} See ALLAN, supra note 205, at 73 (“It could be argued that men are more likely to meet whatever needs they have for intimacy within their families, rather than with their friends and peers . . . . To the extent that men do use their relationships with their wives to express their more personal feelings, anxieties, and worries . . . . they are simply endorsing traditional marital roles.”).
  \item \textsuperscript{209} Of course, this concern about disloyalty could also extend to friendships between men and women. See infra text accompanying notes 213–223.
  \item \textsuperscript{210} For examples of this fear, see RUBIN, supra note 56, at 103–05 (discussing how some straight men respond to the potential homoeroticism of male friendship); Barbara J. Bank & Suzanne L. Hansford, Gender & friendship: Why are men’s best same-sex friendships less intimate and supportive?, 7 PERS. RELATIONSHIPS 63, 65 (2000) (concluding that homophobia partially explains why most male friendships are less intimate and supportive than female friendships); Jennifer 8. Lee, The Man Date: What do you call two straight men having dinner?, N.Y. Times, Apr. 10, 2005, § 9, at 1 (“Anyone who finds a date with a potential romantic partner to be a minefield of unspoken rules should consider the man date, a rendezvous between two straight men that is even
recognition of marriage and silence about friendship as creating a choice between coupling and individualism, with friendship serving a minor role at best.\textsuperscript{211}

Simultaneous legal recognition of family and friendship could begin to transform these limited views of male friendship. Such recognition would signal that friendship can be a site of care and support in addition to marriage or marriage-like relationships instead of a threat to or an inadequate substitute for such relationships. Men might be more willing to expand their notions of male friendship beyond accumulations of power or simple recreation in order to include emotional connections with other men. In addition, legal recognition of friendship would signal that such emotional connection need not always be attached to sex, potentially reducing the frequency with which male friendship is thought to suggest sexual connection. Such signaling could create more possibility that nonsexual male friendships would be acknowledged and accepted as such.\textsuperscript{212} That acknowledgment could lead to more diverse and fulfilling male friendships, as well as reduce some of the pressure currently placed on sexual relationships to serve all caregiving functions. Men could ultimately give and receive more care from each other, disrupting gendered patterns of care and alleviating the inequality that can flow from such patterns.

3. Relationships Between Women and Men

Family law’s recognition of friendship could also create more opportunities for diverse friendships between women and men. Such friendships are currently limited by the suggestion that the relationship is simply a preview for coupling or is motivated by at least one of the parties’ desire to have sex.\textsuperscript{213} As discussed above in Part II, this suggestion is furthered, in part, by more socially perilous.”); \textit{Matt’s Action Off-Screen}, \textit{US WEEKLY}, Aug. 13, 2007, at 82 (interviewing the actor Matt Damon, who refers to his male friend Ben Affleck as “my hetero lifemate”). This fear could also explain why some men value their cross-gender friendships more than their male friendships. See, e.g., William M. Bukowski et al., \textit{A Test of Aristotle’s Model of Friendship for Young Adults’ Same-Sex and Opposite-Sex Relationships}, 127 J. SOC. PSYCHOL. 595, 595–603 (1987); Sandra Parker & Brian de Vries, \textit{Patterns of Friendship for Women and Men in Same and Cross-sex Relationships}, 10 J. SOC. & PERS. RELATIONSHIPS 617, 623 (1993); John M. Reisman, \textit{Intimacy in Same-Sex Friendships}, 23 SEX ROLES 65, 80 (1990).

\textsuperscript{211} In this way, friendships between men could be limited in much the same way that friendships between women are limited when women prioritize marriage or dating over friendship. See \textit{supra} text accompanying notes 190–194.

\textsuperscript{212} Of course, such friendships already exist, including between gay and straight men, but they are often considered suspect or otherwise constrained by homophobia. See, e.g., \textit{JAMIE PRICE, NAVIGATING DIFFERENCES: FRIENDSHIPS BETWEEN GAY AND STRAIGHT MEN} 5 (1999).

\textsuperscript{213} See, e.g., \textit{ALLAN, supra} note 205, at 82 (“Because of the intrusion of aspects of sexuality... cross-gender friendships tend to be rather different from same-gender ones.”); \textit{RUBIN, supra} note 56, at 149 (“[W]hen I asked about their friendships with the opposite sex, most people’s thoughts turned quickly to the ways in which sex, whether acted on or not, both gives the relation-
family law’s recognition of marriage as the ultimate relationship and its corresponding silence about friendship. That construction positions all opposite-sex friendships as mere vehicles designed to achieve the friendship of marriage. These dynamics are particularly present in friendships between straight women and men, but the dynamics can influence other opposite-sex friendships as well.

For example, straight women who develop friendships with gay men are often assumed to hold out hope of converting the men, or they are assumed to gravitate toward such friendships because they are afraid of, or unable to maintain, dating relationships with straight men. Gay men in such relationships are not similarly assumed to want to convert their friends, but the specter of straight marriage still looms: the men in these relationships are often assumed to crave womanly influence and the type of care that only a woman is expected to provide. There are generally not similar myths about friendship between lesbians and straight men, at least not outside of the pornography-based fantasy that women who claim to be lesbians just need to find the right straight man. Instead, friendships between lesbians and straight men are presumed not to exist, reflecting once again the power of straight marriage: straight men are assumed to have no interest in women if dating potential is absent, and lesbians are assumed to be lesbians because of their dislike of straight men.

214. Such assumptions can be shared by members of both straight and gay communities. See, e.g., Dawne Moon, *Insult and Inclusion: The Term Fag Hag and Gay Male "Community"*, 74 SOC. FORCES 487, 491–92, 494–95 (1995). Despite these assumptions, sociological studies reveal that straight women and gay men value their friendships with one another and even anticipate growing old together. E.g., Anna Muraco, *Intentional Families: Fictive Kinship Between Cross-Gender, Different Sexual Orientation Friends*, 68 J. MARRIAGE & FAM. 1313, 1318–19 (2006). However, in one study gay men expressed anxiety that plans for the future will change after their straight female friends marry. Id. at 1319–20, 1322.

215. Cf. Rubin, supra note 56, at 173 (“For gay men and straight women . . . the alliance seems a natural one, their friendships bringing a kind of comfort and companionship that neither can find easily in the world of heterosexual men where both have been devalued so consistently and for so long.”). In addition, gay men report that they view their straight female friends “as potentially providing access to a family life that involves children.” Muraco, supra note 214, at 1319.

216. This fantasy positions lesbians as always ready for a threesome with a willing straight man, particularly the pornography viewer. See, e.g., Linda Williams, *Hard Core: Power, Pleasure and the "Frenzy of the Visible"*, 127, 139–40 (1989).

217. See, e.g., Rubin, supra note 56, at 170–71 (discussing the “paucity of lesbian/straight men friendships”). This presumption is not borne out in reality, however. Muraco, supra note 214, at 1318–19 (discussing several friendships between lesbians and straight men).
Of particular interest to the analysis here is the assumption that lesbians and gay men can have friendships with each other that are entirely devoid of these dynamics. But that assumption is too influenced by family law's focus on marriage to the exclusion of friendship: friendship can be embraced as friendship in this context because marriage or marriage-like relationships are seen as impossible. In all other male-female interactions, heterosexual sex or marriage are viewed as possibilities, however remote, thereby coloring the friendships that develop between men and women who are not married to one another.

Simultaneous legal recognition of family and friendship would not completely eliminate the suspicion that friendships between men and women are motivated by sexual desire. However, legal recognition could alter the view that such friendships are simply poor substitutes for marriage and marriage-like relationships. By recognizing both marriage and friendship, family law would signal that marriage need not be the only site for emotional care and support. Rather, friendships could also serve similar functions and need not be seen as in direct competition with marriage.

This recognition of friendship could ultimately create more opportunities for diverse friendships between women and men by reducing the perceived threat of friendship to marriage. Given the exclusivity and comprehensiveness of current notions of marriage, spouses often resist the attempts of their partners to develop or sustain friendships outside of the marital relationship. Such resistance might be motivated by a desire to maintain emotional exclusivity, a desire that can affect same-sex and opposite-sex friendships alike. But the resistance might also be motivated by a desire to maintain sexual exclusivity, which most affects the opposite-sex friendships that straight spouses seek to have with individuals other than their cospouse. The existence of such resistance can be tied, in part, to

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218. Although, of course, the marriage laws in every state would permit such marriages because they would be opposite sex. In the straight imagination, however, marriage is still tied to romantic passion and conjugality, rendering marriage in this context a cultural impossibility. Cf. BUTLER, supra note 41, at 141 (discussing "what happens when a gay male and a lesbian who are friends start to sleep with one another").

219. However, concerns about "emotional infidelity" are often most intense when the extramarital emotional connection is forged with a potential sexual partner. See, e.g., Emily B. Russell & Helen C. Harton, The "Other Factors": Using Individual and Relationship Characteristics to Predict Sexual and Emotional Jealousy, 24 CURRENT PSYCHOL. 242, 248-49 (2005); Virgil L. Sheets & Marlow D. Wolfe, Sexual Jealousy in Heterosexuals, Lesbians, and Gays, 44 SEX ROLES 255, 256 (2001). Therefore, the desire for emotional exclusivity is likely intertwined with the desire for sexual exclusivity. See infra text accompanying note 220.

220. For examples of the perceived threat of such friendships, see BRENDA COSSMAN, SEXUAL CITIZENS: THE LEGAL AND CULTURAL REGULATION OF SEX AND BELONGING (forthcoming 2007); Shirlan A. Williams, Jealousy in the Cross-Sex Friendship, 10 J. LOSS & TRAUMA 471, 473-78 (2005). I use the term spouse here for ease of reference, but the same dynamics apply to the parties in unmarried opposite-sex relationships who seek to develop or sustain friendships with members of
family law’s role in creating the division between marriage and friendship and then attaching benefits and obligations only to marriage (or, in some states, marriage-like relationships). As discussed earlier, because the state has traditionally denied lesbians and gay men access to marriage, sexual couplings and friendships in gay communities have often been more fluid and shifting than those in straight communities. This fluidity does not eliminate the resistance described above, but it does change its nature by creating more opportunities for couples to discuss what may be motivating their desires for emotional and sexual exclusivity.

Simultaneous legal recognition of family and friendship would similarly not eliminate all desires for exclusivity, but it could change the dynamics that currently envelop many opposite-sex marriages and couplings. By explicitly recognizing friendship, family law would signal that marriage is not the sole vehicle for sustaining personal relationships between adults. Marriage would thus no longer need to be viewed as a comprehensive or exclusive relationship. Instead, marriage could be viewed more like childrearing: parents can raise many children without anyone thinking their relationship with one of those children is unimportant. This perspective on marriage could provide couples with more freedom to discuss how their emotional, or even sexual, needs could be satisfied both within their relationship and without, creating more potential for diverse and robust opposite-sex friendships outside of coupling.

These changing dynamics between men and women could ultimately lead to a time when friendships between men and women are not viewed

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221. See supra text accompanying notes 73–76.
222. See, e.g., Sheets & Wolfe, supra note 219, at 270.
223. See, e.g., Elizabeth F. Emens, Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 354–61 (2004) (exploring the legal and social presumption of monogamy and proposing legal recognition of alternatives to monogamy, relying in part on analogies to the non-exclusivity of friendship). Of course, some, if not most, married couples may decide to remain monogamous, and that decision can lead to sexual jealousy from time to time. Because the decision would be a decision, however, instead of an assumption or a matter of course, couples would likely be in a better position to discuss issues of jealousy as they arise. See, e.g., Elizabeth F. Emens, Just Monogamy?, in JUST MARRIAGE 75, 79 (Mary Lyndon Shanley ed., 2004) (“[Polyamorists] tend to think that jealousy can and should be overcome by open honest communication and self-interrogation about the source of the jealousy.”). Legal recognition of friendship could therefore lead to more diverse conceptions of both friendship and marriage between women and men.
as fundamentally different from same-sex friendships.224 Rather, oppositesex friendships could come to be viewed as performing the same diverse range of functions performed by same-sex friendships. The needs of men and women would no longer be viewed as radically different, intelligible to the other sex only in the bedroom. Instead, women could form close relationships with both women and men, even in the absence of sex, and men similarly could form close relationships with both men and women. Gender would no longer be a dispositive component of friendship. Greater opportunities for gender equality would likely result, as neither women nor men would be constrained by narrow gender role expectations. Family law's recognition of friendship could therefore transform not just friendship and marriage, but gender itself.

CONCLUSION

Constructions of family law have long shaped notions of both family and friendship, often to the disadvantage of women. By explicitly placing friendship within the law, family law scholars can begin to more fully examine the ways that facially neutral constructions of family law contribute to gender inequality. The law of marriage was originally designed to privatize women's dependency. Current constructions of family may generate that dependency instead of reflecting it. By focusing on the construction of family law instead of the construction of family, family law scholars can dissect domestic dependency, exposing its constructed nature. In the process, the diverse roles of friendship in people's lives can be acknowledged, supported, and even encouraged. Women and men may then experience more freedom to structure their lives, both in families and in the world at large.

224. Indeed, the subsections of this section could become irrelevant or even unintelligible. At present, however, sociological studies reveal that friendships are still greatly shaped by gender norms. Muraco, supra note 214, at 1321; see also text accompanying notes 186–218.