

## **Friends with Benefits?**

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Family law scholars have praised the family law revolution that, beginning in the 1970s, eliminated most official gender role distinctions within the family. Now, 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 husbands and wives or mothers and fathers. Most family law scholars view this revolution as a major step toward gender equality.

Family law scholars have not, however, fully examined how the current boundaries of family law may still serve to perpetuate gender inequality. In other words, although family law has eliminated official gender distinctions within the family, family law's policing of the boundaries of the family could still perpetuate gender inequality. Some scholars have examined this potential with respect to same-sex marriage, arguing that the law's refusal to recognize same-sex marriage means that gender roles are still meaningful to family law even if explicit gender role distinctions have been eliminated.

This Article goes further, arguing that family law's focus on marriage and marriage-like relationships, whether they be opposite-sex or same-sex, serves to perpetuate gender inequality. This existing focus implicitly privileges domesticated sexual relationships over other adult intimate relationships, namely friendships. Legal recognition and support is therefore provided to certain types of caregiving relationships but not others. Although such privileging may be obvious, because marriage is placed within the purview of family law and friendship is placed without, family law scholars have not examined the effects of family law's recognition and support of marriage and marriage-like relationships and its silence about friendship.

This Article examines those effects, concluding that family law's silence about friendship likely impedes the achievement of full gender equality in two related ways. First, the silence maintains a divide between marriage and "mere" friendship, implying that friendship is sufficiently different from marriage and marriage-like relationships to be properly outside of family law's concern. It is unclear whether this view conforms to people's lived experiences, although the very fact of legal recognition is a salient difference between friendship and marriage. Lived experience can thus be shaped by family law's focus on marriage and silence about friendship. Second, this divide is not

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gender neutral, but rather amounts to state support of the types of domestic caretaking that traditionally played a vital role in maintaining state-supported patriarchy and that still largely follow gendered patterns today. Therefore, family law's focus on marriage to the exclusion of other forms of friendship can perpetuate gendered patterns of care by encouraging people to prioritize sexual, domestic relationships over other relationships.

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 non-traditional living arrangements. These critiques have been limited, 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 examines the consequences of family law's failure to consider relationships between friends that do not involve sexual commitment and/or cohabitation.

Part II turns to friendship, first examining how friendship is defined in large part by its placement outside of the law, and then examining the functions often performed by friends, specifically friends who do not otherwise live together or share a sexual commitment. Part II compares these functions to the functions generally assumed to be performed by spouses and other family members, in order to ascertain the values privileged by the law's recognition of family and corresponding silence about friendship. Part II concludes by relying on feminist and queer theory to explore ways that legal recognition of such friendships could begin to disrupt gendered patterns of care.

Part III then examines what legal recognition of friendship could mean. Ending the silence about friendship does not mean that family law must regulate friendship or even extend friendships the same benefits accorded to families. Indeed, such regulation could reinforce, rather than challenge, the privileging of marriage and other family relationships. Conversely, the elimination of marriage is also not required. Instead, family law could consider ways that the law could 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. The Current Construction of Family Law**

Family law has no natural content in the United States. Instead, the states determine who may constitute families and delineate the responsibilities and privileges of those family members. Family law is thus a construction, subject to change and reinvention.<sup>1</sup> Indeed, the content of family law has changed dramatically over time in the United States. Initially called "domestic relations," family law at the nation's beginning

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<sup>1</sup> 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.").

encompassed all of a household's internal relationships, including the master-servant relationship, as well as the relationships between husband and wife and parent and child. The boundaries of family law have obviously changed in multiple ways since that time.

Legal scholars have often played a vital role in this evolving construction of family law, at times challenging state and federal laws affecting families, at other times advocating the maintenance of the law's construction of family. Of particular relevance to the analysis here, in the 1970s family law scholars began to argue that various aspects of family law should be changed in response to grass-roots calls for increased gender equality throughout society.<sup>2</sup> Legislatures and courts responded relatively quickly, eliminating official gender roles within the family.<sup>3</sup> As set forth below, although these changes transformed the legal meanings of husband and wife and mother and father, the extent to which these moves toward gender neutrality have led to gender equality within the family is open to debate.

### **A. The Elimination of Explicit Gender Roles**

Traditionally, family law in the United States mandated a deeply gendered family. As Martha Fineman has summarized: "The 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."<sup>4</sup> This legal conception of the family changed dramatically in the 1970s, in response to feminist activism and scholarship.<sup>5</sup> Responding to such pressure, courts and legislators began to mandate that both men and women be permitted, and at times required, to perform the roles traditionally reserved for (male) husbands or (female) wives or (female) mothers and (male) fathers.<sup>6</sup> Family law thus "moved from a patriarchal structure to a model of formal gender equality with an emphasis on rights of individuals within the family."<sup>7</sup>

Many family law scholars view this elimination of official gender roles as "the most significant and pervasive transformation" of family law.<sup>8</sup> And this transformation is

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<sup>2</sup> Sarah Evans, *PERSONAL POLITICS: THE ROOTS OF WOMEN'S LIBERATION IN THE CIVIL RIGHTS MOVEMENT AND THE NEW LEFT* 18-19 (1979).

<sup>3</sup> See, e.g., Linda McClain, *THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY* 60-61 (2006); Susan Frelich Appleton, *Missing in Action? Searching for Gender Talk in the Same-Sex Marriage Debate*, 16 *STAN. L. & POL'Y REV.* 97, 110-14 (2005).

<sup>4</sup> Martha Albertson Fineman, *Progress and Progression in Family Law*, 2004 *U. Chi. Legal F.* 1, 2.

<sup>5</sup> See, e.g., Martha Albertson Fineman, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 1-13, 19-35 (1991).

<sup>6</sup> See, e.g., Jana B. Singer, *The Privatization of Family Law*, 1992 *WIS. L. REV.* 1443, 1517-22; Appleton, *supra* note 3, at 113-14. Specific contexts include the elimination of different rules for women and men for purposes of alimony, child custody, property management and estate oversight.

<sup>7</sup> 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."); Martha Minow, *Foreward: Justice Engendered*, 101 *HARV. L. REV.* 10 (1987).

<sup>8</sup> Appleton, *supra* note 3, at 110.

overwhelmingly viewed as positive.<sup>9</sup> However, the extent to which gender neutrality can lead to gender equality within the family is more contested. Some family law scholars assume that a gender neutral family is a just family,<sup>10</sup> at least to the extent that gender neutral laws permit individuals to make choices about their family roles free from state intervention.<sup>11</sup> Other family law scholars take issue with that assumption on multiple grounds.

## **B. Recognition of Remaining Inequalities**

Even though official gender distinctions have been largely eliminated within family law, most family law scholars acknowledge that equality within the family has not yet been fully realized. First, some scholars emphasize that substantive gender equality has not always followed the formal gender equality that has become the norm within family law. In other words, the gender neutral substance of family law has not transformed all aspects of domestic life. For instance, 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 child care and other care work, leaving them with limited bargaining power upon divorce. Jill Hasday analyzes 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 rather simply needed to treat both spouses equally.<sup>12</sup> Hasday uses this example to urge family law scholars to continue to work toward the goal of social equality, instead of assuming that equality has already been achieved.<sup>13</sup>

Second, some scholars emphasize 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. If family law was committed to gender neutrality, these scholars contend, there would be no need to mandate that spouses or parents choose opposite-sex partners.<sup>14</sup> Indeed, such opposite-sex requirements constitute sex discrimination on their face,<sup>15</sup> in contrast to the commitment to formal equality found within family law. In 1993, the state of Hawaii

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<sup>9</sup> Fineman, *supra* note 4, at 7–8 (“The legal relationship between husband and wife has been completely rewritten in gender neutral, equality aspiring terms. . . . Most women, indeed most people, whether they identify themselves as feminist or not, benefit from and generally approve of such manifestations of gender equality.”).

<sup>10</sup> See Susan Moller Okin, *JUSTICE, GENDER, AND THE FAMILY* 172–82 (1989).

<sup>11</sup> See, e.g., Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 815–16 (1998).

<sup>12</sup> Hasday, *supra* note 1, at 866–70.

<sup>13</sup> *Id.* 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.”).

<sup>14</sup> See, e.g., Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 LAW & SEXUALITY 605 (2004); Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L. J. 145 (1988); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187.

<sup>15</sup> Appleton, *supra* note 3, at 103 (describing litigation arguments in the 1970s).

held that these opposite-sex requirements violated the Hawaii state constitution's equal rights amendment.<sup>16</sup> However, other states, including those states that have begun to recognize same-sex marriage or other same-sex intimate relationships on other grounds,<sup>17</sup> have refused to view opposite-sex requirements as in tension with the states' commitment to gender equality within the family.<sup>18</sup>

Other scholars extend this argument about the boundaries of family law to other groups of people, including unmarried opposite-sex cohabitants, unmarried people in living arrangements not involving sex, and single and other unmarried parents. Although formal gender distinctions are not the cause of these groups' placement outside of family law's privileged family forms, women and their children in these "outsider" family forms tend to suffer disproportionately than similarly situated men. For example, Martha Fineman has focused much of her work on how single mothers are harmed by the states' decisions to allocate many social benefits to marital couples instead of to parents.<sup>19</sup> Vivian Hamilton has similarly argued that family law should not privilege marriage over other forms of companionate relationships that engage in dependent caretaking, generally performed by women.<sup>20</sup> These scholars emphasize that the existing boundaries of family law fail to encompass the diverse ways that families function, and therefore the states necessarily support some families more than others.

The acknowledgment that the state construction and recognition of marriage necessarily privileges some family forms over others has caused some family law scholars to question whether it is wise to advocate for same-sex marriage. 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."<sup>21</sup> Once again, formal gender equality would not necessarily lead to substantive gender equality. But Polikoff is also concerned about how an expansion of marriage to encompass more couples might stigmatize those people who embrace some of the functions of traditional marriage but not other functions. Polikoff is thus concerned about more than supporting same-sex

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<sup>16</sup> *Baehr v. Levin*, 852 P.2d 44 (Haw. 1993), rev'd as moot sub nom., *Baehr v. Miike*, 1999 Haw. LEXIS 391 (1999).

<sup>17</sup> See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003) (recognizing same sex marriage); CAL. FAM. CODE § 297.5 (West 2005) (extending family recognition to registered domestic partners); 2005 CONN. ACTS 10 § 15 (2005) (extending family recognition to couples in registered civil unions); ME. REV. STAT. ANN. tit. 18-A, § 1-201(10-A) (West 2004) (extending family recognition with respect to inheritance rights to registered domestic partners); N.J. STAT. ANN. § 26:8A-10 (West 2004) (extending partial family recognition to registered domestic partners); VT. STAT. ANN. tit. 15, § 1204 (2002) (extending family recognition to couples in registered civil unions).

<sup>18</sup> For example, the Massachusetts Supreme Judicial Court's decision in *Goodridge*, which ultimately recognized same-sex marriage, did not address whether opposite-sex marriage requirements violated the state's equal rights amendment. *Goodridge*, 798 N.E.2d at 961–62.

<sup>19</sup> See, e.g., Martha A. Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 252-53 (2001).

<sup>20</sup> Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 368–70 (2004).

<sup>21</sup> Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1546 (1993).

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 "I do not believe that marriage is an inherently more valuable relationship than others, including non-conjugal relationships characterized by care and/or interdependence."<sup>22</sup>

### **C. Privileging Sexual and Domestic Relationships**

A theoretical tension exists 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.<sup>23</sup> 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.<sup>24</sup> This debate, however, generally obscures the fact that any legal recognition of family – even recognition that reflects how many 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.

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 non-conjugal care relationships. Similarly, Fineman and Hamilton question why states should give more support to caregiving relationships that are linked to marriages or marriage-like relationships, both of which are assumed to be sexual, than to caregiving relationships that are not tied to ongoing sexual relationships. The work of all three scholars illustrate how the boundaries of family law may encourage individuals to enter certain types of conjugal relationships, in order to conform with 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 is also privileged. Fineman, Hamilton and Polikoff reinforce this privilege by implying that domestic caretaking should be the essential element of the states' definitions of family.

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<sup>22</sup> Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step In the Right Direction*, 2004 U. CHI. LEGAL F. 353, 366.

<sup>23</sup> See, e.g., *id.* at 362 (discussing how "family law has a history of adapting to changing families, most notably in the recognition currently provided to children born out of wedlock").

<sup>24</sup> See, e.g., Milton C. Regan, Jr., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993); Margaret F. Brinig, *Domestic Partnership: Missing the Target*, 4 J. L. & FAM. STUD. 19, 24–25 (2002); Lynne Marie Kohm, *How Will Proliferation and Recognition of Domestic Partnerships Affect Marriage?*, 4 J. L. & FAM. STUD. 105, 107–10 (2002); Elizabeth Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 252; Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L. REV. 1189, 1222–23; Lynn D. Wardle, *Is Marriage Obsolete?*, 10 MICH. J. GENDER & L. 189, 214–19 (2003). Two of these scholars, Milton Regan and Elizabeth Scott, support same-sex marriage, whereas the others do not. All of the scholars are united in their belief that marriage is superior to other forms of adult intimate relationships.

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.

Family law scholars have not examined how this focus on domestic caretaking could privilege some family forms over others, particularly if, in accordance with the proposals of Fineman, Hamilton and Polikoff, the boundaries of family law were not tied to marriage or conjugality but rather were expanded to include non-conjugal caretaking relationships. This silence could be seen as evidence that most family law scholars would view such domestic caretaking as in fact replacing sexual or romantic attachment as the defining element of the new family. Or, the silence could reveal that family law scholars implicitly believe that domestic caretaking is the most important aspect of even the current sexual family.

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, and outside of the context of sexual relationships, are 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. Existing constructions of the 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 household remain invisible, even if they too provide various forms of care and support to those within.

## **II. The Place of Friendship**

Given existing constructions of family law, 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. Therefore, if state recognition of family hinges on domesticity, friendship need not be considered.

The state need not maintain such a strict divide between friends and family, however. 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.”<sup>25</sup> The values underlying state respect of intimate association – identified by Karst as including society, caring and commitment, intimacy, and self-identification<sup>26</sup> – are present not only in marriages, parent-child relationships, or other groupings of relatives, but can also be present in friendships. Therefore, the state must permit such friendships to exist.

Permitting relationships to exist is very different from supporting such relationships. Family law’s silence about friendship can signal freedom to enter into diverse relationships as well as disapproval of those relationships. The construction of family law thus matters to friendship in several ways.

### **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 the lack of regulation 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 terms of the interaction. Thus, freedom flows from the lack of regulation. This freedom is multi-dimensional. 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 therefore develop and coexist, and individual friendships can be fluid and shifting, changing over time in informal ways.

Of course, this freedom is not divorced from the law. The placement of friendship outside of the law is a decision of the state. This is one way that the law matters to friendship, by leaving it alone. But the law leaves friendship alone only to a point.

#### **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

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<sup>25</sup> Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L. J. 624, 629 (1979–80); *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.”).

<sup>26</sup> *Id.* at 630–37.

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, to visit each other in the hospital or to make decisions about medical care, to bring suit for infliction of emotional distress when the other is harmed, or to inherit each other's estates under state intestacy rules. In this way, friendships are not supported by the states in much the same way that same-sex romantic couples have traditionally not been supported by the states. Of course, not all friends would want such state support, but those who do 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 of a trust directs her trustee to distribute property to the settlor's "family" or "relatives," the states honor the trust. 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. As one court stated: "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."<sup>27</sup> 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 the settlor's friends.<sup>28</sup>

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 think state inheritance laws should expand 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 decedents' estates. 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. In the view of many of my students, friendship is too amorphous to be subjected to a functional test.

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<sup>27</sup> Clark v. Campbell, 133 A. 166, 170 (N.H. 1926). This is obviously 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."

<sup>28</sup> Clark, 133 A. at 171 ("No sufficient criterion is furnished to govern the selection of the individuals from the class. The assertion of the testator's confidence in the competency of his trustees 'to wisely distribute some portion' of the enumerated articles 'by reason of familiarity with the property, my wishes and friendships' does not furnish such a criterion.).

The students argue that 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.

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.<sup>29</sup> The placement of friendship outside of 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 less trustworthy, and more open to fraud, than other 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 an outer boundary: the boundary of marriage and marriage-like relationships. If a friendship takes on the qualities of a marriage-like relationship, then it may no longer be a friendship in the law's eyes. Rather, in several states, a friend in such a friendship can appeal to the law and often receive benefits reserved for parties in marriage and marriage-like relationships.<sup>30</sup>

## **2. Consequences of the Law's Role**

Given the law's role in creating the distinction between friendship and marriage, it is not surprising that, at least until recently, friendship has been experienced differently by straight and gay communities. Because gay men and lesbians have traditionally had no access to same-sex marriage, the line between friendship and romance, between friendship and family, is not as stark in many gay and lesbian communities as it is among heterosexuals. In addition, friendship is less likely to be implicitly devalued by comparisons to marriage.<sup>31</sup> Sociologist Sasha Roseneil has summarized these phenomena by writing: "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."<sup>32</sup>

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<sup>29</sup> 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").

<sup>30</sup> And the American Law Institute has proposed that states intervene in such friendships more often, unless the parties explicitly contract out of the states' involvement.

<sup>31</sup> For discussions of the importance of friendship in the lives of lesbians and gay men, see Kath Weston, *FAMILIES WE CHOOSE: LESBIANS, GAY MEN AND KINSHIP* (1991); Jeffrey Weeks, *INVENTED MORALITIES: SEXUAL VALUES IN AN AGE OF UNCERTAINTY* (1995); Weeks, Heaphy & Donovan, *SAME SEX INTIMACIES: FAMILIES OF CHOICE AND OTHER LIFE EXPERIMENTS* (2001).

<sup>32</sup> Sasha Roseneil, *Why We Should Care About Friends: An Argument for Queering the Care Imaginary in Social Policy*, 3 *SOCIAL POL'Y & SOC'Y* 409, 411 (2004).

In contrast, straight culture has, at least until recently, perpetuated a strict divide between individuals in dating relationships and those who are “just friends.” Implicit in this distinction is the notion 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 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” does, implying 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 an intimate relationship make.

So what distinguishes friendship from the path to marriage? One feminist family law scholar emphasizes that “[c]ompanionship is the core good of marriage, not procreation or sex.”<sup>33</sup> Pursuant to this ideal, friendship and marriage are more alike than different. However, given that the states, and family law, make such a strict distinction between friendship and marriage, marriage must involve something more than companionship. And it must involve something more than companionship plus sex, or else the term “friends with benefits” would have no content.

Given existing constructions of family law, the necessary additional ingredient is likely domesticity. In the minds of many, marriage involves the daily, and stable, provision of care, comfort and support. Of course, friendships also provide care, comfort and support. But domesticity provides this care in a particular form.<sup>34</sup> Among other things, cohabitation is crucial to domesticity in order to ensure the stable, daily provision of care, and to symbolize the primacy of the relationship. This is not enough, however, or else roommates could be the equivalent of spouses. A crucial additional element is sexual care through both sexual availability and monogamy (to once again symbolize the primacy of the relationship). Finally, although marriage law has undergone a radical transformation, eliminating official gender roles within the family, the care of domesticity is still gendered, with wives more often than husbands sacrificing their individual desires for the good of the unit. In these ways, the practice of marriage plays a vital role in maintaining gender inequality.

By privileging this form of marital 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

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<sup>33</sup> 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).

<sup>34</sup> Cf. Shelly Budgeon & Sasha Roseneil, *Editors' Introduction: Beyond the Conventional Family*, 52 CURRENT SOCIOLOGY 127, 129 (2004) (describing the “expectations within the heterosexual relationship order” as including “co-residence, romantic love, monogamy and the primacy of the conjugal couple”). Another way to view this domesticity is to see it as the opposite of the “transgressive caregiving” identified by Laura Kessler. See Laura Kessler, *Transgressive Caregiving*, 33 FLA. ST. U. L. REV. 1 (2005).

paradoxically?) leading to more freedom than that derived from friendship's placement outside of the law.<sup>35</sup>

## **B. The Functions of Friendship**

One of the goals of family law is to reflect and support the ways people actually live their lives. An additional goal is to foster pluralism by permitting individuals to explore different ways of living the good life, free from state intervention. By ignoring friendship, family law necessarily fails to fully achieve these goals because friendship is an increasingly important aspect of many people's lives.

Sociologists have long studied friendship, but recent sociological research shows "the increasing importance of friendship to those at the cutting edge of processes of individualization."<sup>36</sup> 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."<sup>37</sup> 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."<sup>38</sup>

For example, a study in England of individuals who did not live with a romantic or sexual partner found "a high degree of reliance on friends, as opposed to biological kin and sexual partners, particularly for the provision of care and support in everyday life, and friendship operated as a key value and site of ethical practice for many."<sup>39</sup> In contrast to reports that individuals are increasingly isolated and "bowling alone,"<sup>40</sup> this study reported that the people in the study "were enmeshed in complex networks of intimacy and care, and had strong connections to others."<sup>41</sup> In addition, "[a] great many, both of those with a partner and of those without, were consciously placing less emphasis on the importance of the couple relationship. Instead, they were centring [sic] their lives on their friends. Of those with partners, almost all had *chosen* not to live together. Very few saw cohabitation as the inevitable and desirable next stage of their relationship."<sup>42</sup>

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<sup>35</sup> In this way, friendship could be viewed as an additional form of "transgressive caregiving."

<sup>36</sup> Roseneil, *supra* note 32, at 409 (2004); *see also* M. Maffesoli, *THE TIME OF THE TRIBES: THE DECLINE OF INDIVIDUALISM IN MASS SOCIETY* (1996).

<sup>37</sup> Roseneil, *supra* note 32, at 411.

<sup>38</sup> *Id.* at 412.

<sup>39</sup> *Id.* at 413.

<sup>40</sup> Robert Putnam, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* (2000); Henry Fountain, *The Lonely American Just Got a Bit Lonelier*, *N.Y. TIMES*, July 2, 2006.

<sup>41</sup> Roseneil, *supra* note 32, at 413.

<sup>42</sup> *Id.* Another article summarizes the study by stating: "Our research found that friends give and receive care and support in a wide range of situations of emotional, physical and practice need, and that traditional demarcations of domestic and private space are reconfigured in the process. In a related process, sexual partnerships are deprioritized in a way which runs counter to dominant discourses about the overwhelming importance of romantic love." Budgeon & Roseneil, *supra* note 34, at 129. For detailed discussions of

The study concluded that their research suggests “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.”<sup>43</sup>

Sociologists, and others, connect these changes in friendship to processes of individualization and a desire for autonomous living. As Andrew Sullivan has stated: “Friendship 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.”<sup>44</sup>

Such studies<sup>45</sup> address some of “the ways in which the category of family is increasingly failing to contain the multiplicity of practices of intimacy and care which have traditionally been its prerogative and its *raison d’être*.”<sup>46</sup> Therefore, if family law scholars want family law to reflect the reality of intimate life, and to allow diverse conceptions of intimacy to flourish, we must begin to consider the role of friendship in people’s lives.

In addition, family law also cares about promoting individual agency and autonomy, as witnessed by family law’s commitment to gender neutrality within the family. Indeed, much of the revolution 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. However, by confining this process of individualization to marriage, family law contributes to an ongoing “cult of coupledness.” Although spouses are individuals, the law confers benefits to them solely because they are in a couple recognized by the state. If the couple were “merely” friends, they would not be eligible. 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 individualization,<sup>47</sup> a conflict which has led to increased rejection of “the romantic dyad and the modern family formation it has supported.”<sup>48</sup> This does not mean, however, that

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some of the study’s findings, see Sasha Roseneil & Shelley Budgeon, *Cultures of Intimacy and Care Beyond “The Family”*: *Personal Life and Social Change in the Early 21<sup>st</sup> Century*, 52 CURRENT SOCIOLOGY 135 (2004).

<sup>43</sup> Roseneil, *supra* note 32, at 413.

<sup>44</sup> Andrew Sullivan, LOVE UNDETECTABLE: REFLECTIONS ON FRIENDSHIP, SEX AND SURVIVAL 212 (1998).

<sup>45</sup> Other examples include Sue Heath, *Peer-shared Households, Quasi-communes and Neo-tribes*, 52 CURRENT SOCIOLOGY 161 (2004); Ray Paul, *Friendship: The Social Glue of Contemporary Society?*, in THE POLITICS OF RISK SOCIETY (J. Franklin, ed. 1998); Peter Willmott, FRIENDSHIP NETWORKS AND SOCIAL SUPPORT (1987); Graham Allan, *Friendship, Sociology and Social Structure*, 15 J. SOC. & PERSONAL RELATIONSHIPS 685 (1998).

<sup>46</sup> Budgeon & Roseneil, *supra* note 34, at 127.

<sup>47</sup> For discussions of this trend toward individualization, see Z. Bauman, THE INDIVIDUALIZED SOCIETY (2001); Ulrich Beck & Elisabeth Beck-Gernsheim, INDIVIDUALIZATION (2002).

<sup>48</sup> Budgeon & Roseneil, *supra* note 34, at 127.

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.

Family law's silence about these informal friendship networks necessarily devalues this form of attachment. Indeed, by refusing to view this type of attachment as within its orbit of concern, family law lumps friendship with other "transactions" between adults.<sup>49</sup> Therefore family law's silence is more than silence; it also serves to label friendships as not sufficiently intimate, thereby implicitly privileging marriage as the preferred form of attachment and connection. This privileging has consequences, leading to feelings of stigmatization and even loneliness and fear, particularly among some who exist outside of marriage by circumstance rather than choice. Such loneliness has recently lead Drucilla Cornell to urge feminists "to find alternative ways of being together outside of the structure of private houses ordered by heterosexual coupling."<sup>50</sup>

### **C. The Potential of Friendship**

Over 25 years ago, Adrienne Rich described 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."<sup>51</sup> Many women, and maybe even most feminists, believe that much has changed since that time. First and foremost, the dignity of lesbians and gay men has been affirmed by the United States Supreme Court<sup>52</sup> and other social institutions. In addition, women's increased access to education and employment has meant that most women have the means to delay marriage until they find the partner of their choice. Marriage is thus less likely to be viewed as unsatisfying or oppressive for women.

However, the "ideology of heterosexual romance" is still "beamed" at women "from childhood out of fairy tales, television, films, advertising, popular songs, wedding pageantry."<sup>53</sup> And lesbians now have access to the wedding pageantry at least. Immense value, and pressure, is placed on romantic coupling, whether it be opposite-sex or same-sex. Therefore, feminists can still benefit from asking why women place greater priority on marriage and marriage-like relationships instead of more fully embracing other forms of relationships along Rich's "lesbian continuum," including friendships.

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<sup>49</sup> For a (most likely unconscious) example of this effect, see Martha Albertson Fineman, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 228–30 (1995). For a similar critique of mainstream sociology, see Roseneil & Budgeon, *supra* note 42, at 137 ("Sociology continues to marginalize the study of love, intimacy, care and sociology beyond the 'family,' even though it has expanded the scope covered by this term to include a wider range of 'families of choice.'").

<sup>50</sup> Drucilla Cornell, *The Solace of Resonance*, 20 *HYPATIA* 215, 218 (2005).

<sup>51</sup> Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631, 640 (1980); *see also id.* at 643 (discussing how 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").

<sup>52</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>53</sup> Rich, *supra* note 51, at 645.

In 1980, Rich emphasized that “[w]omen 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.”<sup>54</sup> Today, economic survival outside of marriage is less of an issue for many women (although the Bush Administration is spending millions of dollars to encourage poor women to marry<sup>55</sup>), but the other incentives toward marriage remain. Indeed, raising children is so tied to married conjugality that it is often hard to imagine friends having or raising children together. Instead, mothers are labeled as either partnered or single, even if they also have friends and extended family members supporting them in their childrearing duties.

The campaigns for same-sex marriage often reinforce these incentives for individuals to prioritize marriage and marriage-like relationships. As Katherine Franke recently wrote, “the rights-bearing subject of the lesbian 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.”<sup>56</sup> 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 “while 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.”<sup>57</sup> Or, as Michael Warner has written, “[m]arriage sanctifies some couples at the expense of others. It is selective legitimacy.”<sup>58</sup>

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.”<sup>59</sup> Under these conditions, marriage is not “merely one choice among many,”<sup>60</sup> nor is it merely an individual choice. Rather, marriage is the privileged choice, and each time that choice is made, it reinforces the privilege and stigmatization of

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<sup>54</sup> *Id.* at 654.

<sup>55</sup> Hamilton, *supra* note 20, at 309–10, 366–68; Susan Lerner, *The Bush Administration’s Misguided Poverty Cure: Marriage on the Mind*, THE NATION, July 5, 2004, at 40.

<sup>56</sup> Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 239 (2006).

<sup>57</sup> *Id.* at 242.

<sup>58</sup> Michael Warner, *Beyond Gay Marriage*, in LEFT LEGALISM/LEFT CRITIQUE 259, 260 (Wendy Brown & Janet Halley, eds. 2002).

<sup>59</sup> *Id.* at 267; *see also id.* at 264–65 (describing reasons why opposition to marriage “lay at the heart of an ethical vision of queer politics”).

<sup>60</sup> *Id.* at 267; *see also* Claudia Card, *Against Marriage and Motherhood*, 11 HYPATIA 7 (1996) (describing marriage under current conditions as “not a totally free choice”).

others.<sup>61</sup> Sexual pleasure and expression is therefore limited by the state's encouragement of stable, long-term coupling.<sup>62</sup>

But more than sexual freedom, or multiple forms of sexual pleasure, is at stake when the state privileges long-term, stable coupling. Rather, as Rich emphasizes, marriage often also reinscribes gender hierarchy and the gendered division of care.<sup>63</sup> 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. Coupling thus takes on a specific meaning rooted in a history of female sacrifice and dependency.

Given the role of coupledness in regulating both sexual expression and forms of intimate support and caregiving, Rich's call for women to explore relationships other than marriage still resonates today. Although many of the oppressive aspects of marriage identified by Rich have been softened, or even eliminated, the privileging of conjugal, domestic coupling still exists. Women therefore are often encouraged to prioritize domesticity and conjugality over other relationships that do not share a similar history of gendered dependence and hierarchy. Resisting the privileging of marriage by embracing friendship, in addition to coupling and other forms of intimate relationships, can open up more opportunities to explore what it would mean to experience gender equality to the fullest.<sup>64</sup> Moreover, if family law is committed to gender equality, it too must consider how its silence about friendship may limit the ways women could begin to explore ways to experience fuller agency and equality in everyday life.

### **III. Challenging Family Law's Construction**

What would it mean to construct the boundaries family law so that they include friendship? One approach would be to call for more recognition of friendship; another approach would be to call for less recognition of family. However, such calls could still implicitly privilege family over friendship, or friendship over family. Although friendship does not share marriage's history of gendered dependence and hierarchy, it is unlikely that friendship will always embody norms of equality or be able to serve as the sole source of emotional support and care in many people's lives. Therefore, the task is to go beyond the friend/family binary to explore ways that family law could begin to support individuals' choices about how to structure their lives, regardless of how those choices fall within or without the current construction of family law.

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<sup>61</sup> Cf. Warner, *supra* note 58, at 274 (describing marriage's consequences for the unmarried).

<sup>62</sup> 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.").

<sup>63</sup> Rich, *supra* note 51, at 647.

<sup>64</sup> Cf., Nancy J. Hirschmann, *Toward a Feminist Theory of Freedom*, 24 *POLITICAL THEORY* 46, 59–62 (1996) (exploring how female friendship can help women explore gendered constraints on agency).

### **A. 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 PACS, available to any two people who share a home, regardless of conjugality, and who wish to provide each other with mutual assistance and support.<sup>65</sup> Similarly, the Law Commission of Canada issued a report entitled “Beyond Conjugalit,” which urged the extension of domestic partnership benefits to any two people in a relationship of “economic interdependence.”<sup>66</sup> Under both approaches, friends can literally become friends with benefits, but in contrast to the colloquial term, no sex need 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 marriage-like relationships. 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.<sup>67</sup> Sex is expendable, but other aspects of domesticity are required.<sup>68</sup> 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 domestic interdependence is still privileged over more autonomous attachments.

Moreover, these approaches also require individuals to specify a primary relationship in their lives. For example, under the Canadian approach, individuals may seek recognition of a non-conjugal relationship only if they are not married or in a marriage-like relationship. These approaches thus encourage individuals to focus time and energy on one interdependent relationship rather than pursuing a range of intimate relationships with multiple friends. Friendships may replace family, but the state’s role in privileging stable coupling remains in full force.

A similar primacy requirement is found in David Chambers’ 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

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<sup>65</sup> See, e.g., Carl F. Stychin, *GOVERNING SEXUALITY: THE CHANGING POLITICS OF CITIZENSHIP AND LAW REFORM* 50–57 (2003).

<sup>66</sup> Law Commission of Canada, *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (2001).

<sup>67</sup> For a more developed critique of functional approaches to the family along these lines, see Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307 (2004).

<sup>68</sup> 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, heterosexual couple and states: “You fight all the time, you don’t have sex, isn’t it time to tie the knot?”.

marrying.<sup>69</sup> 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 rejection of conjugality or cohabitation.<sup>70</sup> However, like the Canadian and French approaches, this new legal status would not be available to individuals who have already entered into marriage. In addition, nonmarried individuals may have only one “designated friend.” Therefore, stable coupling is privileged in Chambers’ proposal much like it is in the French and Canadian approaches.

Unlike the French and Canadian approaches, however, Chambers supports a clear hierarchy between marriage and his proposed status. “Designated friends,” unlike spouses, “would have no financial obligations to each other, or derivatively, to others – no obligations to third parties regarding the other’s debts, even for necessities; no automatic disqualification for medical or other welfare benefits because of the income or resources of the other; no obligation to divide financial assets between them if the relationship ends.”<sup>71</sup> The status of “designated friends” could therefore be described as a “marriage-lite” approach. Although this approach is designed to permit more autonomy and independence within the relationship,<sup>72</sup> the primacy requirement necessarily limits much of that autonomy. The status of “designated friends” would therefore reinforce much of the existing privileging of marriage and marriage-like relationships.

## **B. Family as Friends**

Instead of extending benefits to friends, family law could question why spouses are entitled to state benefits when friends are not. Therefore, in contrast to bringing friendship into the construction of family law by treating friendships like family, family law could instead treat certain family relationships like friendships. Specifically, family law could decide that neither marriage nor marriage-like relationships should be entitled to state support, just like friendships are not entitled to state support. All adult relationships would therefore exist outside of the law.

Family law scholars have already made similar proposals, but not in response to an acknowledgment of friendship. Rather, 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 caretaking of dependents. Fineman in particular argues

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<sup>69</sup> David L. Chambers, *For the Best of Friends and For Lovers of All Sorts, A Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1348–49 (2000–2001).

<sup>70</sup> *Id.* at 1352 (making the status “available to any unmarried pair with a close relationship”); *see also id.* at 1357 (“one 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 baby-making”).

<sup>71</sup> *Id.* at 1353.

<sup>72</sup> *Id.* at 1357 (describing individuals who would be attracted to the “designated friend” status as those individuals who “appreciate their own economic independence and do not want to assume financial responsibility for the other”).

that the state should support such caretaking directly by providing benefits to “family units that are caring for children, the elderly, or the ill.”<sup>73</sup>

Such an approach would certainly treat marriage and friendship more alike. However, it is unlikely that such an approach would disrupt the gendered notions of care and domesticity that have historically defined marriage. Although marriage and marriage-like relationships would no longer be privileged under this approach, dependent caretaking would take their place. Moreover, this dependent caretaking would be prioritized at the expense of other forms of caretaking, including the emotional care that is at the heart of many friendships, a form of care that often does not involve cohabitation or dependency but nonetheless plays an important role in many people’s lives.

In addition, a regime of private ordering between adults, without any state guidance or support, risks reinforcing forms of private power that are also rooted in a history of patriarchy. Indeed, the approach would not necessarily change the ways that many people live their lives if societal norms supportive of the sexual family are sufficiently strong that individuals continue to order their lives around that form of domestic caregiving. It is also conceivable that private ordering might even strengthen this private power, since family law would no longer be signaling its commitment to gender equality within marriage. Therefore, although all personal relationships between adults would be treated alike under this approach, it is unclear whether more robust opportunities for gender equality would result.

### **C. Promoting Pluralistic Personal Relationships & Conceptions of Care**

Would it be possible to develop an alternative approach to friendship that reinforced neither the primacy of one relationship over others, nor the importance of dependent caretaking over other forms of care? The question reveals how much exclusivity and domestic interdependence has come to define family, even so-called alternative families. As such, one might be tempted to conclude that family and friendship are entirely different beasts, with friendship rightly outside of the construction of family law. However, Sasha Roseneil reminds us that “[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.”<sup>74</sup> Therefore, even though friendships have often operated in radically different ways than many family relationships, those differences do not mean that friendship should be outside of family law’s concern. Indeed, the importance of friendship in people’s lives need not be parallel to the importance of marriage in order to be worthy of study, and legal recognition.

The question, of course, is what type of recognition of friendship could best further family law’s goals of better reflecting the reality of people’s lives; permitting individuals to develop conceptions of the good life free from undue state indoctrination;

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<sup>73</sup> Fineman, *supra* note 4, at 4; *see also* Fineman, *supra* note 49, at 226–36.

<sup>74</sup> Roseneil, *supra* note 32, at 411.

and enhancing individual agency and equality within family groupings. All three of these goals are compromised by an emphasis on marriage, or dependent caretaking, to the exclusion of other forms of personal relationships and care. Recognizing friendship could therefore be an important next step toward broadening legal notions of care and supporting individuals engaged in diverse ways of life.

One way to begin to think about new possibilities would be to consider what would happen if the law to make it relatively easy for individuals to legally designate both a spouse and a “best friend”. This approach would still permit individuals to prioritize a romantic/sexual/domestic relationship and, given the popularity of marriage, many individuals may continue to do so, eschewing a legal “best friend” and embracing only a spouse. However, the option of having a “best friend” in addition to 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 sexual and/or domestic relationships over other forms of friendship or, conversely, that individuals want to privilege friendship over marriage. Implementation of such a proposal would, of course, be complex given limited state resources and individuals’ differing claims to property division depending on the scope of their interactions with their spouse, best friend or both. Such complexity is likely the reason why scholars like David Chambers have proposed solutions that require individuals to choose between spouses and other legal statuses like “designated friends.” But family law scholars should be wary of permitting fears of complexity to trump the goals of family law.

Such a proposal may be undesirable for reasons other than complexity, however. Recognizing a “best friend” is not the same as recognizing friendship. Why should individuals be forced to choose one friend over others for legal recognition? Multiple friends can perform multiple functions in different contexts. These functions are currently ignored within family law, and a “best friend” proposal would likely ignore them as well, privileging exclusivity in the realm of friendship like in the realm of marriage.

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.<sup>75</sup> Other scholars, including Patricia Hill Collins and Laura Kessler, have similarly explored how “other mothering” in African-American communities involves much more than childcare but instead can create friendship networks with “different purposes--for example, socialization, reproduction, consumption, emotional support, economic cooperation, and sexuality.”<sup>76</sup> However, other family law scholars and feminists interested in state support of caregiving have largely ignored the care provided through such friendships, suggesting that they believe such care is the product of unique circumstances rather than a common

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<sup>75</sup> 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 (2000–2001).

<sup>76</sup> Kessler, *supra* note 34, at 18; *see also* Patricia Hill Collins, BLACK FEMINIST THOUGHT 178–83 (2d ed. 2000).

phenomenon in women's lives. This silence betrays a class and race bias, as well as a bias in favor of certain types of caregiving, primarily domestic care, but also emotional care not linked to work, community organizations or physical survival. A "best friend" proposal would likely reinforce that bias.

If family law wanted to recognize the fact that many people rely on multiple types of friends, including their spouses or other romantic friends, to perform multiple functions in their lives, it would have to go well beyond proposals permitting individuals to name one "designated friend" or even a spouse plus a best friend. Indeed, to achieve the goal of supporting pluralistic personal relationships and conceptions of care, family law would have to develop an approach that no longer assumed that all individuals rely on one, or even two, people for all of their emotional and caregiving needs or that all individuals provide support and care to only those people within their immediate domestic sphere. Such an approach could lie at the other end of the spectrum from proposals like Chambers' "designated friend" status or proposals permitting individuals to designate both a spouse and a best friend, or it could lie somewhere in between.

Perhaps the most aggressive approach to achieving such a goal would be to gather all of the benefits, default rules, and obligations attaching to marriage and permit individuals to assign 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 non-cohabitating friend or lover, hospital visitation rights to be given to yet another person, and protections under the Family and Medical Leave Act be available to care for a sibling. Some of this type of flexibility can currently be achieved 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 (most particularly, 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.

More radical would be the fact that the proposal would not require onerous private contracting in order to readjust the consequences of marriage determined by the state. Rather, such a proposal would be designed to make it relatively easy for all individuals, not just married couples, to decide how they would like the state to support their personal relationships, if at all. Therefore, unlike the current state of the law, marriage or a marriage-like relationship would not a prerequisite for taking on the complete package of benefits and obligations provided by the state. Instead, individuals could chose to apply that package to other types of personal relationships without engaging in private contracting. In addition, individuals would not be required to take or leave the entire package, but rather could divide the package of benefits 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

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the performance of types of domestic caretaking rooted in a history of state-supported patriarchy. The care and support provided and received outside of that framework would therefore 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 the process, existing notions of both family and friendship would likely be transformed.

I look forward to exploring the potential and risks of this proposal, and others, as I further develop and expand all aspects of this draft.