

FRIENDSHIP & THE LAW

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This Article's central argument is that the law needs to do a better job of recognizing, protecting, respecting, and promoting friendships. The law gives pride of place to other statuses—family and special professional relationships are obvious ones—but the status of the friend is rarely relevant to legal decisionmaking and public policymaking in a consistent way. After defining the concept of the friend, I offer a normative argument for why the law should promote a public policy of friendship facilitation and for why the law ignores friendships only at its peril. I highlight how the law already finds friendship relevant in certain issue areas without any self-conscious or systematic understanding of it, and I recommend other issue areas where friendship could matter more to legislators, courts, and legal scholars. We are regulating friendships without even recognizing that we are doing so, and friendship commands more attention from legal scholars and legal decisionmakers. I offer a framework to show how the law could exact certain duties from friends and confer certain privileges upon them as well.

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INTRODUCTION

The lawyer may have to utter with Montaigne (himself once a lawmaker), “O my friends, there is no friend.”¹ To be sure, there are lawyers who advocate for their clients as friends.² There are those who sue as “next friends” on behalf of incompetents with whom there is no real or current friendship.³ And lawyers sometimes submit amicus briefs, as “friends” of the court.⁴ Countries even enter “friendship” treaties with one another.⁵ Yet, the status of the friend—the true friend that is not merely a friend by analogy—seems nearly absent from the law. We build within our legal system all sorts of preferences for family members—for example, the recognition of marriage in our tax law, spousal

1. MICHEL DE MONTAIGNE, *Of Friendship*, in *THE COMPLETE ESSAYS OF MONTAIGNE* 140 (Donald M. Frame trans., 1958). This aphorism is attributed to Aristotle and is the source of a long set of reflections by Jacques Derrida. See JACQUES DERRIDA, *POLITICS OF FRIENDSHIP* (George Collins trans., Verso 1997) (1994); Jacques Derrida, *The Politics of Friendship*, 85 J. PHIL. 632 (Gabriel Motzkin trans., 1988). My own take on Aristotle and Montaigne’s theories of friendship can be found in Ethan J. Leib, *The Politics of Family and Friends in Aristotle and Montaigne*, 31 INTERPRETATION 165 (2004).

2. See Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976). But Fried acknowledges that “the ordinary concept of friendship provides only an analogy.” *Id.* at 1071. For thoughtful discussions of Fried’s thesis, see DANIEL MARKOVITS, *TRAGIC VILLAINS* ch. 3 (forthcoming 2007); Stephen R. Morris, *The Lawyer as Friend: An Aristotelian Inquiry*, 26 J. LEGAL PROF. 55 (2002).

3. “‘Next friend’ status is a jurisdictional grant of standing to a third party. The third party is allowed to pursue the legal rights of the real party-in-interest. The grant of next friend status historically has been limited to cases where, because of incapacity, incompetence or unavailability, the real party in interest is unable to advocate his or her position.” Paul F. Brown, *Third Party Standing—“Next Friends” as Enemies: Third Party Petitions for Capital Defendants Wishing To Waive Appeal*: Whitmore v. Arkansas, 110 S. Ct. 1717 (1990), 81 J. CRIM. L. & CRIMINOLOGY 981, 981 n.3 (1991). I discuss more about next friend standing *infra* Part III.B.4.

4. See David Gossett, *Friendship: Amicus Briefs in the Supreme Court*, 8 GREEN BAG 2d 363 (2005).

5. See, e.g., Treaty of Peace and Friendship, U.S.-Morocco, Jan. 1787, 8 Stat. 100.

testimonial privileges and immunities, and whole areas of criminal law that privilege family members⁶—but we appear not to furnish the status of friend with any clear legal recognition of consequence.⁷ Other relationships of trust and confidence are recognized by the law both through our regulation of intimate relationships (e.g., husband-wife, parent-child, and nonmarital cohabiters) and our protection of special professional relationships (e.g., lawyer-client, doctor-patient, priest-parishioner, trustees, and fiduciaries).⁸ But friends seem left to fend for themselves without any possibility for recourse from a legal system that recognizes their special roles in our lives.

This Article pursues the normative question of why we might wish for our legal system to recognize friendship in a substantial way—and then mines the law for places where friendship and the status of friend might usefully guide legal decisionmaking. Perhaps surprisingly, there are domains within our law where friendship has become relevant. But it has become so without any real theory of how and why it should be so relevant and without any organized, systematic, or consistent approach to relationships of friendship. This Article argues that we would benefit from a legal system that recognizes the status of friend; at the very least, scholars, lawmakers, and judges must become more aware of how the law infringes upon, sustains, and regulates friendships.

Many areas of social inquiry outside the law have struggled to make sense of friendship's place in our lives and its role in the structure of our governing institutions. Philosophy,⁹ psychology,¹⁰ political theory,¹¹ literary studies,¹²

6. See, e.g., Dan Markel, Jennifer M. Collins & Ethan J. Leib, *Criminal Justice and the Problem of Family Ties*, 2007 UNIV. ILL. L. REV. (forthcoming Aug. 2007).

7. See Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 654–56 (arguing that people should be able to choose to give a limited number of testimonial “privilege tickets” to whomever they want, deciding for themselves where they most need a relationship of trust).

8. For an exploration of these relationships and how they are regulated, see Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005).

9. In the next few footnotes, I provide wide-ranging bibliographies of the friendship literature in various disciplines. I collect many sources in these early footnotes for ease of reference throughout the Article. See, e.g., LAWRENCE A. BLUM, *FRIENDSHIP, ALTRUISM AND MORALITY* (1980); TROY A. JOLIMORE, *FRIENDSHIP AND AGENT-RELATIVE MORALITY* (2001); *THE CHALLENGE TO FRIENDSHIP IN MODERNITY* (Preston King & Heather Devere eds., 2000); David B. Annis, *The Meaning, Value, and Duties of Friendship*, 24 AM. PHIL. Q. 351 (1987); Neera Kapur Badhwar, *Friends as Ends in Themselves*, 48 PHIL. & PHENOMENOLOGICAL RES. 1 (1987); Marcia Baron, *Impartiality and Friendship*, 101 ETHICS 836 (1991); Dean Cocking & Justin Oakley, *Indirect Consequentialism, Friendship, and the Problem of Alienation*, 106 ETHICS 86 (1995); Neera Badhwar Kapur, *Why It Is Wrong to Be Always Guided by the Best: Consequentialism and Friendship*, 101 ETHICS 483 (1991); Simon Keller, *Friendship and Belief*, 33 PHIL. PAPERS 329 (2004); Sibyl A. Schwarzenbach, *On Civic Friendship*, 107 ETHICS 97 (1996); Sarah Stroud, *Epistemic Partiality in Friendship*, 116 ETHICS 498 (2006); Jennifer E. Whiting, *Impersonal Friends*, 74 MONIST 3 (1991); William H. Wilcox, *Egoists, Consequentialists, and Their Friends*, 16 PHIL. & PUB. AFF. 73 (1987). Much of this literature considers whether, in light of morality's requirements of equality, impartiality, and fair treatment to all, we may favor or exhibit bias toward our friends. For more on this issue in particular, see *infra* Part II.B.4.

anthropology,¹³ religious studies,¹⁴ sociology,¹⁵ intellectual history (especially,

Another body of philosophical literature focuses on understanding Plato and Aristotle's early efforts to develop theories of friendship—and the Roman appropriation of those theories. See, e.g., DAVID BOLOTIN, *PLATO'S DIALOGUE ON FRIENDSHIP: AN INTERPRETATION OF THE LYSIS, WITH A NEW TRANSLATION* (1979); JEAN-CLAUDE FRAISSE, *PHILIA: LA NOTION D'AMITIÉ DANS LA PHILOSOPHIE ANTIQUE* (1974); HORST HUTTER, *POLITICS AS FRIENDSHIP: THE ORIGINS OF CLASSICAL NOTIONS OF POLITICS IN THE THEORY AND PRACTICE OF FRIENDSHIP* (1978); LORRAINE SMITH PANGLE, *ARISTOTLE AND THE PHILOSOPHY OF FRIENDSHIP* (2003); PAUL SCHOLLMEIER, *OTHER SELVES: ARISTOTLE ON PERSONAL AND POLITICAL FRIENDSHIP* (1994); SUZANNE STERN-GILLET, *ARISTOTLE'S PHILOSOPHY OF FRIENDSHIP* (1995); John M. Cooper, *Aristotle on Friendship*, in *ESSAYS ON ARISTOTLE'S ETHICS* 301 (Amélie Oksenberg Rorty ed., 1980); Anthony Kronman, *Aristotle's Idea of Political Fraternity*, 24 *AM. J. JURIS.* 114 (1979).

10. See, e.g., *CONVERSATIONS OF FRIENDS: SPECULATIONS ON AFFECTIVE DEVELOPMENT* (John M. Gottman & Jeffrey G. Parker eds., 1986); BEVERLEY FEHR, *FRIENDSHIP PROCESSES* (1996); WILLIAM K. RAWLINS, *FRIENDSHIP MATTERS: COMMUNICATION, DIALECTICS, AND THE LIFE COURSE* (1992); LILLIAN B. RUBIN, *JUST FRIENDS: THE ROLE OF FRIENDSHIP IN OUR LIVES* (1985); *THE COMPANY THEY KEEP: FRIENDSHIP IN CHILDHOOD AND ADOLESCENCE* (William M. Bukowski et al. eds., 1996); *THE DEVELOPMENT OF CHILDREN'S FRIENDSHIPS* (Steven R. Asher & John M. Gottman eds., 1981).

11. See, e.g., HAUKE BRUNKHORST, *SOLIDARITY: FROM CIVIC FRIENDSHIP TO A GLOBAL LEGAL COMMUNITY* (Jeffrey Flynn trans., 2005); DERRIDA, *supra* note 1; *LOVE AND FRIENDSHIP: RETHINKING POLITICS AND AFFECTION IN MODERN TIMES* (Eduardo Velásquez ed., 2003); JAMES R. MARTEL, *LOVE IS A SWEET CHAIN: DESIRE, AUTONOMY, AND FRIENDSHIP IN LIBERAL POLITICAL THEORY* (2001); CARL SCHMITT, *THE CONCEPT OF THE POLITICAL* (George Schwab trans., Univ. of Chi. Press 1996) (1932); Leib, *supra* note 1; James V. Schall, *Friendship and Political Philosophy*, 50 *REV. METAPHYSICS* 121 (1996); Jason A. Scorza, *Liberal Citizenship and Civic Friendship*, 32 *POL. THEORY* 85 (2004).

12. See ALLAN BLOOM, *LOVE AND FRIENDSHIP* (1993); CALEB CRAIN, *AMERICAN SYMPATHY: MEN, FRIENDSHIP, AND LITERATURE IN THE NEW NATION* (2001); ANDREW EPSTEIN, *BEAUTIFUL ENEMIES: FRIENDSHIP AND POSTWAR AMERICAN POETRY* (2006); RONALD A. SHARP, *FRIENDSHIP AND LITERATURE: SPIRIT AND FORM* (1986); Wayne C. Booth, "The Way I Loved George Eliot": *Friendship with Books as a Neglected Critical Metaphor*, *KENYON REV.*, Spring 1980, at 4. For novels with especial insight into friendship, see TIM LOTT, *WHITE CITY BLUE* (1999), and, perhaps, E. M. FORSTER, *A PASSAGE TO INDIA* (1924). For a fabulous collection of writers on friendship from within the literary tradition, see *THE NORTON BOOK OF FRIENDSHIP* (Eudora Welty & Ronald A. Sharp eds., 1991).

13. See, e.g., ROBERT BRAIN, *FRIENDS AND LOVERS* (1976); MARCEL MAUSS, *THE GIFT: THE FORM AND REASON FOR EXCHANGE IN ARCHAIC SOCIETIES* (W.D. Halls trans., 1990).

14. Scholars have undertaken different approaches to the subject of friendship and religion. See, e.g., ALAN BRAY, *THE FRIEND* (2003) (a history of the church's relationship to friendship); C.S. LEWIS, *THE FOUR LOVES* (1960) (a typological approach, highlighting different forms of love, including the love of God); GILBERT MEILAENDER, *FRIENDSHIP: A STUDY IN THEOLOGICAL ETHICS* (1981) (an ethical approach); GENE OUTKA, *AGAPE: AN ETHICAL ANALYSIS* (1972) (same).

15. See, e.g., LIZ SPENCER & RAY PAHL, *RETHINKING FRIENDSHIP: HIDDEN SOLIDARITIES TODAY* (2006); GRAHAM A. ALLAN, *A SOCIOLOGY OF FRIENDSHIP AND KINSHIP* (1979) [hereinafter ALLAN, *A SOCIOLOGY*]; GRAHAM ALLAN, *FRIENDSHIP: DEVELOPING A SOCIOLOGICAL PERSPECTIVE* (1989) [hereinafter ALLAN, *FRIENDSHIP*]; GRAHAM ALLAN, *KINSHIP AND FRIENDSHIP IN MODERN BRITAIN* (1996) [hereinafter ALLAN, *KINSHIP*]; CLAUDE S. FISCHER, *TO DWELL AMONG FRIENDS: PERSONAL NETWORKS IN TOWN AND CITY* (1982); ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY: SEXUALITY, LOVE AND EROTICISM IN MODERN SOCIETIES* (1992); RAY PAHL, *ON FRIENDSHIP* (2000); *PLACING FRIENDSHIP IN CONTEXT* (Rebecca G. Adams & Graham Allan eds., 1998); Allan Silver, *Friendship in Commercial Society: Eighteenth-Century Social Theory and Modern Sociology*, 95 *AM. J. SOC.* 1474 (1990).

the history of intellectuals),¹⁶ and the self-help genre,¹⁷ all, with their various methods and tools, try to understand friendship. But the law and legal scholarship are relatively silent about this social relationship. Admittedly, there are occasional ruminations on the law and its failure to recognize the friend.¹⁸ Still, the law has yet to develop a sophisticated approach to friendship—and this Article aims to begin a conversation about why we should, how we might, and how we do already recognize the status of friendship within the law. This Article initially focuses on getting the research agenda underway, defining and defending the area of inquiry, and commencing the work of showing how friendship can be and is already relevant to the law. But future work will develop more of the doctrinal specifics.

It is hard in this age to think about legal obligations and liabilities as being based on a “status.” Indeed, it is widely accepted that our legal culture—with all

16. See, e.g., A LATE FRIENDSHIP: THE LETTERS OF KARL BARTH AND CARL ZUCKMAYER (Geoffrey W. Bromiley trans., William B. Eerdmans Publ'g Co. 1982) (1977); RONALD ARONSON, CAMUS AND SARTRE: THE STORY OF A FRIENDSHIP AND THE QUARREL THAT ENDED IT (2004); MICHAEL P. FARRELL, COLLABORATIVE CIRCLES: FRIENDSHIP DYNAMICS AND CREATIVE WORK (2001); cf. BETWEEN FRIENDS: THE CORRESPONDENCE OF HANNAH ARENDT AND MARY MCCARTHY 1949–1975 (Carol Brightman ed., 1995); BRAY, *supra* note 14; CRAIN, *supra* note 12.

A parallel genre may inelegantly be referred to as “neocon autobiographical intellectual history.” See JOSEPH EPSTEIN, FRIENDSHIP: AN EXPOSÉ (2006); NORMAN PODHORETZ, EX-FRIENDS: FALLING OUT WITH ALLEN GINSBERG, LIONEL & DIANA TRILLING, LILLIAN HELLMAN, HANNAH ARENDT, AND NORMAN MAILER (1999). Or, perhaps, we might just call this latter genre memoir (often written by neocons); certainly that is the most apt categorization of ANDREW SULLIVAN, LOVE UNDETECTABLE: NOTES ON FRIENDSHIP, SEX, AND SURVIVAL (1998), a book with uncommon insight on the subject of friendship generally. Why are neocons especially attracted to this subject? Sullivan suggests that conservatives are committed to a “politics of *philia*,” whereas “liberals” “are suspicious of particular loyalties and seek to embrace universal values and egalitarian politics.” *Id.* at 244. That said, Epstein’s book hardly seems “political” in the conventional sense.

17. See, e.g., DALE CARNEGIE, HOW TO WIN FRIENDS & INFLUENCE PEOPLE (1936).

18. See, e.g., Michael J. Kaufman, *The Value of Friendship in Law and Literature*, 60 FORDHAM L. REV. 645 (1992). Peter Goodrich’s work takes the relationship between friendship and the law to the center of his intellectual agenda. See Peter Goodrich, *A Fragment on Cnutism with Brief Divagations on the Philosophy of the Near Miss*, 31 J.L. & SOC’Y 131 (2004); Peter Goodrich, *Amatory Jurisprudence and the Querelle des Lois*, 76 CHI.-KENT L. REV. 751 (2000); Peter Goodrich, *Friends in High Places: Amity and Agreement in Alsatia*, 1 INT’L J.L. CONTEXT 41 (2005) [hereinafter Goodrich, *Friends in High Places*]; Peter Goodrich, *Laws of Friendship*, 15 LAW & LITERATURE 23 (2003); Peter Goodrich, *The Immense Rumor*, 16 YALE J.L. & HUMAN. 199 (2004) [hereinafter Goodrich, *The Immense Rumor*]; Peter Goodrich, *Un Cygne Noir*, 27 CARDOZO L. REV. 529 (2005). Goodrich, however, is an outlier, whose extreme erudition and unconventional writing style (like Kaufman’s) likely keep many from recognizing the significance of the little work on friendship and the law that exists. Moreover, neither Goodrich nor Kaufman carefully examines the existing doctrine that does, in fact, regulate friendship; I treat this subject *infra* Part III. Finally, as I argue here, Goodrich’s ultimate definition of the friend is too capacious to command widespread recognition for the law. In particular, he is too ready to put lovers and spouses in the category of friend, a mistake that is counterproductive to getting the law to recognize the status of friend. I make this argument *infra* Part I.A.

progressive societies—has moved away from status toward “contract.”¹⁹ This status-to-contract story maintains that the law once held us liable for our social and familial roles but now holds us liable only for social relations to which we consent voluntarily: Under a contract model, we are able to define our own roles more freely and can limit our liabilities successfully by simply withholding our consent from creating binding legal relations in our private social lives.²⁰

Yet it would be hard for us to insist that our legal system is a fully “voluntarist” one that ignores social roles²¹: We hold mothers, fathers, spouses, children, lawyers, common carriers, and monopolists to have special duties. There is room for the status of the friend to gain more explicit, sophisticated, and systematic legal treatment; and this Article aims to show where we have room for it in our law, and where the law already enables the category of the friend to make a difference.²² But without a self-conscious analysis of who the friend is and why friends are significant, the law’s relatively random regulation of friendship remains unsatisfying. We barely realize we are doing it, so how could we be doing it thoughtfully?

This Article proceeds in three parts. Part I aims to define the category of friend relevant to this inquiry. It offers a narrow definition of the friend—one that excludes family members, romantic partners, spouses, and a generalized “civic friendship.” Although this circumscription of the friendship relation may be contentious, I believe it is necessary for reasons I later explain. The project of Part I is mostly descriptive, but it is also meant to serve as the basis for a normative conception of friendship that the law could use, as the status of the friend gains more explicit relevance in legal decisionmaking and public policymaking.

19. See SIR HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY AND ITS RELATION TO MODERN IDEAS* 170 (Oxford Univ. Press 1959) (1861) (“[T]he movement of the progressive societies has hitherto been a movement *from Status to Contract*.”).

20. For a case where a court has refused to find a promisor liable on account of a purported failure of the promisor to intend to create legal relations, see *Balfour v. Balfour*, (1919) 2 Eng. Rep. 571 (K.B.). Still, *Balfour* involved a contract between spouses, and one could just as easily argue that this legal rule is a product of a status-based legal regime, even if the language of contract is used as a subterfuge to avoid liabilities between spouses. For more on *Balfour*, see Stephen Hedley, *Keeping Contract in Its Place—Balfour v. Balfour and the Enforceability of Informal Agreements*, 5 OXFORD J. LEGAL STUD. 391 (1985). For an argument that our family law is still too oriented by contract, and that it should be returned to its status-oriented roots, see MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993).

21. For a discussion on “voluntarism” more generally, see SAMUEL SCHEFFLER, *Families, Nations, and Strangers* (1995), reprinted in *BOUNDARIES AND ALLEGIANCES: PROBLEMS OF JUSTICE AND RESPONSIBILITY IN LIBERAL THOUGHT* 48 (2001).

22. Although traditionally the concept of “status” allows for legal liabilities and perquisites to attach as a matter of law without elaborate fact-finding (at least in the fiduciary duty context, for example), it undoubtedly remains the case that status-based legal conclusions still require that certain evidentiary thresholds be met. Accordingly, the obvious fact-based nature of any finding of friendship should not preclude our thinking about the friend as a potential status.

Part II makes the normative case for the friend's relevance to the law. It first makes an affirmative argument, highlighting the benefits that could accrue from the state's support of friendship. Then it addresses some powerful objections. For example, some might argue that private consensual relationships like friendships flourish and retain intrinsic value precisely because the law cannot touch them; much of friendship's value may come from its being a fully consensual and voluntary relation outside the law. Thus, friendship, rather than being enhanced through legal recognition and regulation, might be debased if it failed to remain autonomous from the public legal sphere.

Or one might argue that friendships accentuate gender, racial, or class-based cleavages in society. The law's recognition of friendship could risk further entrenching the balkanizing and homogenizing forces of friendship, which tend to divide groups and do not contribute to broad social integration.

Third, friendship has traditionally maintained a subversive posture with respect to the state. Friends are routinely aligned against the state precisely because the duties of friendship are often seen as more important than the commands of nationalism or patriotism. And sometimes friendship is seen as underwriting partiality when morality requires more general impartiality. If these subversive visions of friendship are right, the state would seem to help friends only to its disadvantage.

Finally, one might argue that the law's regulation of social relations in the private sphere can only be reactive. Accordingly, a legal or judicial recognition of friendship might only end up addressing friendships that have failed. Part II develops these counterarguments and seeks to explain why they are not, in the final analysis, persuasive objections to the project of getting the law to appreciate the status of the friend.

Part III highlights areas within the law where friendship has been or could be relevant, even if scholars and judges have thus far ignored a systematic approach to the subject. In particular, Part III considers the status of friendship as it pertains to certain potential legal obligations and legal privileges: the *duties* of rescue, disclosure, fair dealing, and confidentiality; and the *privileges* of informality, caregiving, privacy, and the vindication of rights. This investigation spans a broad array of legal doctrines from fraud to Fourth Amendment jurisprudence, testimonial privileges to testamentary dispositions, securities regulation to donative promises, and the law of fiduciary duties to the entrapment defense. This survey is poised to show how often the friend turns out to be relevant for the law, how much more the law could do to promote friendship, and how much the law could benefit from greater clarity and consistency in its treatment of the friend.

This Article contends that it would be a dramatic step of progress for our law to recognize friendship explicitly and consistently, giving a most important social resource in all of our lives the respect of legal relevance, along with the benefits that can accrue from legal promotion and facilitation. Showing respect for a relationship does not, of course, mean that the law needs to do everything it can to promote it. However, it does important relationships no great service by ignoring them for the most part and by having no systematic approach to knowing when, how, and why they matter.²³ Friendships are central to our ability to flourish—and lawyers, judges, and legislators need to develop more sophisticated thinking about the intersections of friendship and the law. This Article is a step in that direction.

I. WHO IS A FRIEND?

The category of “friend” is a hard one to define—and this definitional challenge may be the biggest impediment to the entire research enterprise commenced here. The vast majority of us know who our parents, children, brothers, and sisters are.²⁴ But figuring out who constitutes a friend—and when friendship starts and ends—may be a harder task. A casual definition is usually ready to hand, but it is more challenging to settle on a working definition for more careful analysis.²⁵ Part of the difficulty stems from the fact that “friend is not just a categorical label . . . indicating the social position of each individual relative to the other. Rather it is a relational term which signifies something about the quality and character of the relationship involved.”²⁶

Indeed, if you asked everyone in the country to list his or her friends, it would be reasonable to suspect that those lists would not always line up: Some people would list friends who would not reciprocate. Even friends who would list one another in this thought experiment perhaps cannot be relied upon to be “true” friends at the core, for we all likely operate with varying thresholds, tolerances, and expectations for friendship. We sometimes feel social pressure to call someone a friend. Yet, perhaps, if pressed we all know who our “real” friends are. We think we know when we have reliable ones, but that does not give satisfactory guidance for any form of codification or sustained thinking.

23. See Hasday, *supra* note 8, at 528–30 (arguing that we can furnish respect for certain intimate relationships through various means and need not pursue all strategies at once).

24. Even defining the family, however, presents all kinds of serious challenges; non-kin ties can sometimes come within the concept of the family. See SPENCER & PAHL, *supra* note 15, at 36.

25. See FEHR, *supra* note 10, at 5 (“Everyone knows what friendship is—until asked to define it. Then, it seems, no one knows.”).

26. ALLAN, FRIENDSHIP, *supra* note 15, at 16.

This is an inauspicious beginning. As my first gambit, I will have to define the sort of friendship central to this inquiry. I start by suggesting what it must not be and follow with some general observations about how to pick friends out of the world of interpersonal relationships. The effort here is empirical, conceptual, and theoretical insofar as it is based on studies of the social phenomenon from a multitude of different disciplinary approaches and on a long tradition of thinking about friendship. But it is also normative, insofar as this descriptive project should be an excellent starting point for a definition the law could draw upon should the status of the friend command more organized treatment within the law. To be sure, it may be that differential normative considerations presented by varying areas of law would counsel for us to work with a differentiated conception of friendship, depending on the area of law affected.²⁷ But we nevertheless need a starting point to guide the discussion.

A. Friendship Is Not Kinship

Friendship is not kinship, and if a relationship is one of kinship, it cannot also be classified as a friendship.²⁸ Friends may not be related by blood or marriage, and they may not engage in any ongoing sexual relationship. Although there is something crude and contrived in this narrow version of the friend relation, it is necessary in performing a proper analysis of the category, and necessary if the law is ever to recognize the status of friend. To be sure, friendship will often be a love relation,²⁹ and certainly spouses and lovers routinely think of themselves as friends (even best of friends).³⁰ And friends who are not in fact lovers may still pine for one another sexually, whether

27. We undoubtedly work with varied conceptions of the family across issue areas within the law—sometimes only the nuclear family is relevant, sometimes the extended family is—but we just as surely can speak generally of special duties and privileges that attach to the family within the law.

28. In other work, I have argued for a more capacious working definition of friendship, one that includes familial relations—what Aristotle called the “friendship of unequals”—within its boundaries. See Leib, *supra* note 1. But in that work, I was exploring the use of friendship in political theory. Here, I have different, more practical and legal, aims; the concept to be isolated must be more narrowly defined for reasons I explain in the text.

29. FEHR, *supra* note 10, at 4 (“[W]hen lay people are asked to list types of love, friendship is listed most frequently. Friendship love also is seen as capturing the meaning of love . . .”) (citations omitted).

30. As Ray Pahl argues, “There may now be some normative pressure to put one’s partner into the category of ‘best friend.’” PAHL, *supra* note 15, at 36. Even among those who succumb to this social pressure, there is often resort to a “real” best friend to vent about or discuss the primary erotic relationship. See *id.* at 38–39.

consciously or subconsciously.³¹ Nevertheless, here, I must insist on an “exclusive” definition of the friend.³²

This is not a mere purist’s instinct.³³ If spouses, lovers, and family members could claim the status of friend, three problems might emerge. First, conceptual confusion might result because it could become much more difficult to isolate the work friendship does in our private lives and in the structure of our social and political lives. If the category of friend was so capacious as to include all our love-based and sexual relations—or even just those that are also “friendly” as well—it could become extremely difficult to ascertain or promote friendship’s role in society. We couldn’t know as clearly what work friendship was doing by itself and what work kinship and romantic or erotic relationships were doing through their particular forms of love. Romantic love, familial love, and sex might confound an analysis of friendship proper.

Second, and perhaps more importantly, by failing to disentangle friendship from sexual and familial intimacy, our public policy concerns about friendship might be subordinated to our public policy concerns in regulating other forms of intimacy, centrally the family.³⁴ It is not that I want to condone here the

31. See, e.g., BRAIN, *supra* note 13, at 222 (“Freudians maintain that amity derives from sexual instincts.”). The theme of same-sex friendship as a form of homoeroticism is omnipresent in discussions of friendship. See *id.* at 264; LEWIS, *supra* note 14, at 72 (“It has actually become necessary in our time to rebut the theory that every firm and serious friendship is really homosexual.”); PAHL, *supra* note 15, at 28–29. For an interesting argument that gay friendship is an especially useful model of friendship in modern times because gays have developed a deep “culture of friendship” (in large measure for their suffering through AIDS together and for their exclusion from legal recognition), see SULLIVAN, *supra* note 16, at 175–76, 230–35.

32. It may be worth noting that there are some who argue that once people marry and begin to form their own families, friendships are prevented from forming and the intimacy of marriage shuts out a role for friendship. See, e.g., Rebecca G. Adams & Graham Allan, *Contextualising Friendship*, in PLACING FRIENDSHIP IN CONTEXT, *supra* note 15, at 1, 8 (arguing that kin relationships prevent friendships from forming). But see Stacey J. Olicker, *The Modernisation of Friendship: Individualism, Intimacy, and Gender in the Nineteenth Century*, in PLACING FRIENDSHIP IN CONTEXT, *supra* note 15, at 18, 27 (arguing that intimate friendship itself developed with the growth of intimate marriages). Others, drawing upon Aristotle, see familial friendship as begetting more complete and truer friendships. See, e.g., Elizabeth Belfiore, *Family Friendship in Aristotle’s Ethics*, 21 *ANCIENT PHIL.* 113, 113–18, 126–31 (2001).

33. Indeed, this move should be reminiscent of one of Socrates’s most important suggestions in the *Lysis*, Plato’s dialogue on friendship. Socrates insists on the strong separation between the loves of kinship, which are unchosen, and the love of friendship, which is considered wholly voluntary. See BOLOTIN, *supra* note 9, at 65–66 (highlighting that one of the main themes of the dialogue is the “releasing,” or *lysis*, of family bonds); EPSTEIN, *supra* note 16, at xiii (“[W]here there is sex, there is not friendship . . .”). Of course, this is generally an oversimplification. But there is a need for this oversimplification—one I explain in the text.

34. For one legal scholar’s effort to run together family and friends, and see them as of a piece, see Goodrich, *Friends in High Places*, *supra* note 18. Goodrich ultimately sets himself up for disappointment in locating a jurisprudence of friendship in the regulation of family because he too easily assimilates the family as a form of friendship. Eliding the distinction between family and friends has

way intimacy, marriage, and the family are regulated in our society. Rather, we must acknowledge such regulation and distinguish other forms of intimacy. Indeed, precisely because we regulate sex, marriage, and family so substantially, friendship could get lost in the regulation if we operate with a working definition of friendship that includes sex or family. By keeping the category of friend separate and mutually exclusive from the status of spouse, family, or lover, our approach to friendship remains more sensitive to the different—and potentially more appropriate—public policy concerns relevant to friendship in particular. If we seek to have a general law of amity that includes all forms of intimacy, our too-obsessive approach to the regulation of the family will bleed into and crowd out a proper appreciation of friendship on its own terms.

Third, kinship relationships are routinely friendships of unequals.³⁵ Parents are not our social equals; neither are our uncles or older sisters. Although spousal friendships might optimally be considered friendships of equality, the structure of our society—and its gendered nature—perhaps recommend against facilely concluding that husbands and wives easily maintain friendships free from distortions of power.

In the final analysis, it may also be “maligning friendship always to associate it with sex,”³⁶ and it may be that familial “love is essentially possessive which is inimical to the pure form of friendship.”³⁷

unwelcome consequences for an analysis of the law's relationship to friendship. And failing to distinguish properly between family and friends may tend to focus the discussion about friendship and alternative forms of intimacy on the same-sex marriage debate—a debate that might be usefully informed by my account here but one that should not shape it, since much more is at play in that debate than the regulation of friendship per se. See, e.g., 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 (2001) (failing to maintain a distinction between sex-based unions and friendship proper); Richard Stith, *Keep Friendship Unregulated*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 263 (2004) (same).

From another perspective, there is a movement underway (outside the United States, for the most part) to protect all intimacy without any consideration or special privileges for conjugal relationships. See, e.g., Law Comm'n of Can., *BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS* (2001) [hereinafter *BEYOND CONJUGALITY*], available at http://epe.lac-bac.gc.ca/100/200/301/lcc-cdc/beyond_conjugality-e/pdf/37152-e.pdf; Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201 (2003); Brenda Cossman & Bruce Ryder, *What Is Marriage-Like Like? The Irrelevance of Conjugality*, 18 CANADIAN J. FAM. L. 269 (2001). Ultimately, if friends received the same treatment under the law as married couples, we could get “beyond conjugality.” But this radical agenda is not very likely to be adopted anytime soon, and nonconjugal friendship is especially underprotected under current legal regimes, justifying special attention to them here.

35. See, e.g., MARILYN FRIEDMAN, *WHAT ARE FRIENDS FOR?* 207 (1993) (contrasting the equality of friendship with the unequal power relations in families).

36. BRAIN, *supra* note 13, at 65.

37. PAHL, *supra* note 15, at 88. I concede that many family law scholars may consider my effort to treat friendly and familial intimacies differently as troublesome—both practically and morally. See, e.g., Laura A. Rosenbury, *Friends with Benefits?* (Nov. 6, 2006) (unpublished manuscript),

B. What Is Friendship?

The following set of criteria may be useful in delineating the contours of the friendship relation. These characteristics are not exhaustive, mutually exclusive, or necessary conditions for friendship; rather, they constitute an illustrative composite sketch of attributes that friendships may instantiate, drawing upon a wealth of analysis from disciplines outside the law.³⁸ And if the law were ever to develop a systematic approach to friendship and its privileges and obligations, lawyers, judges, and legislators may wish to appeal to this set of characteristics to help decide who should count as a friend in any given issue area.

Voluntariness. Friends voluntarily associate with one another with regularity, voluntarily seek the company of one another, are voluntarily interdependent, and voluntarily seek proximity to one another,³⁹ all without strong social pressures to do so. Of course, friendships ultimately come with a set of very real ethical obligations,⁴⁰ but the association in the first instance is rarely an externally enforced one.⁴¹

available at http://www.law.ucla.edu/docs/11_6_rosenbury_friends_draft__2_.pdf. Yet, for the reasons announced here, I hope my naïveté can be indulged. At the very least, the attempt to classify who counts as a friend gets more, rather than less, complex with the inclusion of our full range of intimacies within the friend category. An argument that family and friends are best viewed as nonmutually exclusive can be found in SPENCER & PAHL, *supra* note 15, at 108–27. Their argument is from a sociological perspective, however, not a legal one.

38. This composite draws from, inter alia, ALLAN, A SOCIOLOGY, *supra* note 15, at 85, 89, 95, 99, 107; ALLAN, FRIENDSHIP, *supra* note 15; ARISTOTLE, NICOMACHEAN ETHICS bks. viii–ix (Terence Irwin trans., 1985); ELAINE DONELSON & JEANNE E. GULLAHORN, WOMEN: A PSYCHOLOGICAL PERSPECTIVE 156–67 (1977); FEHR, *supra* note 10, at 6–8; LEWIS, *supra* note 14; PAHL, *supra* note 15; RAWLINS, *supra* note 10; JOHN M. REISMAN, ANATOMY OF FRIENDSHIP 93–94 (1979); Keith E. Davis & Michael J. Todd, *Assessing Friendship: Prototypes, Paradigm Cases and Relationship Description*, in UNDERSTANDING PERSONAL RELATIONSHIPS: AN INTERDISCIPLINARY APPROACH 17 (Steve Duck & Daniel Perlman eds., 1985); Willard W. Hartup, *The Origins of Friendship*, in FRIENDSHIP AND PEER RELATIONS 11 (Michael Lewis & Leonard A. Rosenblum eds., 1975); Robert B. Hays, *Friendship*, in HANDBOOK OF PERSONAL RELATIONSHIPS: THEORY, RESEARCH, AND INTERVENTIONS 391, 391–96 (Steve Duck ed., 1988); Paul H. Wright, *Self-Referent Motivation and the Intrinsic Quality of Friendship*, 1 J. SOC. & PERS. RELATIONSHIPS 115, 119 (1984).

39. Online friendships, perhaps, call for their own analysis. See JEFFREY BOASE ET AL., THE STRENGTH OF INTERNET TIES (2006); Rebecca G. Adams, *The Demise of Territorial Determinism: Online Friendships*, in PLACING FRIENDSHIP IN CONTEXT, *supra* note 15, at 153. The work of Danah Boyd, a self-described “ethnographer” of Friendster and other online communities is also worth perusing. See Danah Boyd, Publications, Installations, Presentations & Workshop Papers, <http://www.danah.org/papers> (last visited Dec. 28, 2006). For my purposes here, we can simply say that an online friendship can qualify for friendship status if it meets the majority of the criteria enumerated here.

40. See EPSTEIN, *supra* note 16, at 69 (“Whatever else it has to do with, friendship entails obligation—sometimes ample and demanding, sometimes miniscule and subtle, but always, I believe, present.”).

41. Scott Feld and William Carter call friendship the “most voluntary type of personal relationship.” Scott Feld & William C. Carter, *Foci of Activity as Changing Contexts for Friendship*, in

Intimacy. Friends seek intimacy with one another through time spent together developing their relationship.⁴² They pursue mutual knowledge and discovery of one another through conversation and activities.⁴³ There is often something confessional about conversations with friends; or, at least, friends are those to whom we can more easily confess.⁴⁴ In some undeniable way, confession breeds intimacy.

Trust. Friends tend to be trusting of one another and develop trust through private disclosures, sincerity, loyalty, openness of self, and authenticity.⁴⁵ “What do we tell our friends?” Andrew Sullivan asks. “We tell them everything. And we are not afraid of embarrassing ourselves or boring each other.”⁴⁶ Yet perhaps this view is slightly inflated: According to Graham Allan, “While there is a folk belief that total disclosure is the sign of real friendship, in reality friends rarely know everything about one another.”⁴⁷ We often withhold matters from our friends not because we do not trust them, but because we know they are not fundamentally interested in all we could share.

Perhaps trust is better defined as follows: “Trust is a belief that another will fulfill his or her obligations and pull his or her weight in [a] relationship. Symbolic gestures and experience create and maintain trust.”⁴⁸

Solidarity and Exclusivity. Friends identify with one another and consider one another aligned on some central dimensions.⁴⁹ More,

PLACING FRIENDSHIP IN CONTEXT, *supra* note 15, at 136, 136; see also Allan Silver, *Friendship and Trust as Moral Ideals: An Historical Approach*, 30 EURO. J. SOC. 274 (1989) (arguing that friendships are quintessentially voluntary).

42. Although time spent together is central, friendships clearly can endure some time spent apart. See SULLIVAN, *supra* note 16, at 204.

43. See *id.* (“[F]riendship draws strength from the past, from myriad shared jokes and understandings, from the remembrance of moments endured or celebrated together, especially the small ones.”); Silver, *supra* note 15, at 1477 (“Friendship . . . turns on intimacy—the confident revelation of one’s inner self to a trusted other . . .”); see also EPSTEIN, *supra* note 16, at 40 (“[O]ne of the things one looks for in a friend . . . is the possibility of easy candor in conversation.”); MONTAIGNE, *supra* note 1, at 136 (“Friendship feeds on communication.”).

44. See EPSTEIN, *supra* note 16, at 61; see also SULLIVAN, *supra* note 16, at 204 (“[T]he more you know a friend, the more a friend he is.”).

45. See generally Allan Silver, *Friendship and Sincerity*, 2003 SOZIALERSINN 123. For more on the “secrets” view of friendship, see generally Dean Cocking & Jeanette Kennett, *Friendship and the Self*, 108 ETHICS 502 (1998).

46. SULLIVAN, *supra* note 16, at 216.

47. ALLAN, *FRIENDSHIP*, *supra* note 15, at 107.

48. I STEWART MACAULAY ET AL., *CONTRACTS: LAW IN ACTION* 230 n.3 (2d ed. 2003).

49. One routinely sees this facet of friendship described as “agreement,” “consensus,” or “concord.” See, e.g., ARISTOTLE, *supra* note 38, at bk. ix, ch. 6, ll. 1167a22–b15 (noting that friends have similar judgments about their common interests); EPSTEIN, *supra* note 16, at 60 (citing Cicero’s suggestion that friendship requires “agreement over all things divine and human”); Goodrich, *The Immense Rumor*, *supra* note 18, at 211–12 (discussing concord and agreement as

friends—even if not necessarily or essentially dyadic⁵⁰—breed a sense of exclusivity.⁵¹ As C.S. Lewis understood, to claim “[t]hese are my friends” importantly implies that “[t]hose are not.”⁵² Friendship is “selective and an affair of the few.”⁵³

Reciprocity. Friends engage in mutual regard and make an effort to reciprocate in the realms of caring, emotional support, and goodwill.⁵⁴ Also, friends wish their counterparts well for their own sake, rather than for any benefit that might accrue to a friend on account of the other’s well-being. Each party to a friendship self-consciously engages in

central to friendship). Some even use more legally familial expressions, describing friendships as between those who have achieved a “meeting of the minds.” See PAHL, *supra* note 15, at 42.

Friendship as concord plays a substantial role in theories of “civic friendship,” a form of friendship only peripheral to my concerns here. See ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 22 (D.D. Raphael & A.L. Macfie eds., 1976) (1759) (arguing that “concord,” understood as friendship among citizens, is required for “the harmony of society”); see also ARISTOTLE, *supra* note 38, at bk. ix, ch. 6, ll. 1167a22–b5.

The idea that friends are “soul mates” or “second selves” permeates the friendship literature. See, e.g., *id.*, at bk. ix, ch. 9, ll. 1170b5–b8 (“A friend is another []self”); MONTAIGNE, *supra* note 1, at 141, 143 (arguing that friends are of “one soul in two bodies” and maintain a “fusion of . . . wills”; friends are a “second self”). Still, there is certainly an undercurrent in the literature of friendship that aims to emphasize that in differentiated society, friends cannot fulfill all of our varied needs. See EPSTEIN, *supra* note 16, at 54 (drawing upon Georg Simmel’s conception of “differentiated friendships”). Hence, agreement need only be reached on particular dimensions in any given case, “but only provided the things they disagree about are not all that important to them.” PODHORETZ, *supra* note 16, at 4.

50. Here is why perhaps friendship need not be deemed dyadic at its core:

[I]f, of three friends (A, B, and C), A should die, then B loses not only A but “A’s part in C,” while C loses not only A but “A’s part in B.” In each of my friends there is something that only some other friend can fully bring out. By myself I am not large enough to call the whole man into activity; I want other lights than my own to show all his facets. Now that Charles is dead, I shall never again see Ronald’s reaction to a specifically Caroline joke. Far from having more of Ronald, having him “to myself” now that Charles is away, I have less of Ronald. . . . Two friends delight to be joined by a third, and three by a fourth, if only the newcomer is qualified to become a real friend.

LEWIS, *supra* note 14, at 73–74. For other discussions of whether friendship is essentially dyadic, see ALLAN, *FRIENDSHIP*, *supra* note 15, at 10, 27; Stephen R. Marks, *The Gendered Contexts of Inclusive Intimacy: The Hawthorne Women at Work and Home*, in *PLACING FRIENDSHIP IN CONTEXT*, *supra* note 15, at 43, 43–44. Here’s Aristotle’s take: “[T]he friendship of companions is not found in groups of many people, and the friendships celebrated in song are always between two people.” ARISTOTLE, *supra* note 38, at bk. ix, ch. 10, l. 1171a15. Perhaps “couple friendships”—the phenomenon of married couples becoming friends—is a counterexample to the prevalence of dyads. In the final analysis, however, little is at stake in this question for my current project.

51. See LEWIS, *supra* note 14, at 100 (“Indeed the [f]riendship may be ‘about’ almost nothing except the fact that it excludes.”); see also EPSTEIN, *supra* note 16, at 2 (“By its nature, friendship is preferential: one chooses one person over another to draw closer to; an element of exclusivity is implied in the word ‘friend.’”); PAHL, *supra* note 15, at 164 (friendship is “fundamentally” “exclusive”). C.S. Lewis also warns that friendship may breed pride in the friendship itself, a feature that may help solidarity, but that has dangers of its own. See LEWIS, *supra* note 14, at 83–87.

52. LEWIS, *supra* note 14, at 72.

53. *Id.*

54. See, e.g., ALLAN, *FRIENDSHIP*, *supra* note 15, at 22.

reciprocity and is aware of her counterpart's goodwill. Unlike a romantic interest, which can be unrequited, friendship must be shared with an awareness of mutual regard.

Warmth. Friends feel warmly and tenderly toward one another much of the time. This warmth and tenderness frequently manifests itself as a form of acceptance, flaws notwithstanding.⁵⁵ Friendship is as much an emotion as it is an activity or art. And it inclines us to be forgiving, to withhold blame for minor infractions, and to serve as a sounding board in a nurturing environment.

Mutual Assistance. Friends help one another practically by offering advice, comfort, networks and connections, material aid (in the form of loans or gifts),⁵⁶ and favors of various kinds.⁵⁷ Although most of these forms of help will trigger reciprocity, it is useful to isolate the kinds of practical assistance with daily living that friendship involves. Indeed, focusing upon reciprocity tends to occlude the more banal exchange relationship embedded in most friendships. It is only idealism of a misguided form to presume that friendship is not instrumental in part.⁵⁸ After all, how could reciprocity truly obtain if exchange were not part of the equation? Although friendship is something more than a mere relationship of exchange, some exchange must be part of the give and take of friendship.⁵⁹

55. See SULLIVAN, *supra* note 16, at 236 ("Friendship is about acceptance.").

56. "In-kind" transfers or gifts help reinforce the solidarity of friendships and help symbolize to parties that they are not mere commercial partners. See Jack L. Carr & Janet T. Landa, *The Economics of Symbols, Clan Names, and Religion*, 12 J. LEGAL STUD. 135, 156 (1983); Janet T. Landa, *The Enigma of the Kula Ring: Gift-Exchanges and Primitive Law and Order*, 3 INT'L REV. L. & ECON. 137, 152-56 (1983); Ian R. Macneil, *Exchange Revisited: Individual Utility and Social Solidarity*, 96 ETHICS 567, 568 (1986). See generally MAUSS, *supra* note 13. Robert Ellickson uses these sources to devise an illustrative example:

Dinner guests, for example, commonly bring their host a gift such as a bottle of wine. But no dinner guest would, instead of bringing wine, arrive and say, "Here's twenty dollars. I've learned in an Economics course that you'd undoubtedly prefer this to the usual bottle of wine." The tender of cash would signal that the guest thought of the dinner not as an occasion among friends but as an occasion at a restaurant, where diners have a merely commercial relationship with those who serve them.

ROBERT C. ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 235 (1991).

57. See ALLAN, *FRIENDSHIP*, *supra* note 15, at 57 ("Only on relatively rare occasions do friends provide one another with direct financial support. They may lend each other small amounts to cover, say, the cost of a round of drinks or admission to some event if one of them is short of cash, but on the whole do not enter into more significant loans with one another."). But friends routinely furnish their counterparts with free child care, free places to stay (to avoid forcing their counterparts to pay for a hotel), and can be useful sources of employment information. See *id.* at 57-58.

58. See *id.* at 20.

59. See Richard Lempert, *Norm-Making in Social Exchange: A Contract Law Model*, 7 LAW & SOC'Y REV. 1, 2 (1972) ("[A] number of quite prominent sociologists and social psychologists are prepared to argue that almost all social interaction [including friendship] may profitably be viewed as exchange transactions." (citing "exchange theory" classics PETER M. BLAU, *EXCHANGE AND POWER IN SOCIAL LIFE* (1964); GEORGE CASPAR HOMANS, *SOCIAL BEHAVIOR: ITS ELEMENTARY FORMS* (1961); George

Nevertheless, there is probably a norm within friendship that prevents parties from being too explicit about keeping tabs.⁶⁰

Equality. As between friends, no feelings of superiority are appropriate, and social prestige should be irrelevant.⁶¹ Although friends are rarely equal in all ways, true friends treat one another as such. Friends give and take equally, or risk rupturing the bond of friendship.⁶²

Duration Over Time. Friendships wax and wane, dissolve, intensify, and become attenuated over time. Nevertheless, friendship must involve some durability. As Joseph Epstein writes, "A relationship with an acquaintance doesn't postulate a future."⁶³

Conflict and Modalities of Conflict Resolution. Friendships of substantial duration undoubtedly enter phases of tension and conflict.⁶⁴ Yet most

C. Homans, *Social Behavior as Exchange*, 63 AM. J. SOC. 597 (1958))). As Lempert recognizes, it would defy "common sense" to see friendship as *only* exchange. Lempert, *supra*, at 2–3. But, all the same, there is undeniably an element of exchange embedded in every friendship, and norms developed therein allow for the parties to a friendship to draw upon the implicit exchange morality. See ALLAN, FRIENDSHIP, *supra* note 15, at 22.

60. Robert Ellickson argues:

Fellow-feeling seems more likely to arise when [parties] are seen to act out of friendship, not out of a need to scratch each other's backs. Close friends have such a long future ahead of them that they need not worry about minor imbalances in the reciprocated favors between them. Therefore, a person who mentions that accounts have fallen a bit out of balance indicates either a lack of intimacy or some skepticism about future solidarity.

ELICKSON, *supra* note 56, at 236.

61. See, e.g., ALLAN, FRIENDSHIP, *supra* note 15, at 108 ("The essence of friendship from a sociological perspective is that it is a tie of equality."); ALLAN, KINSHIP, *supra* note 15, at 89 ("Friendship, in whatever form it takes, is defined as a relationship between equals. That is, within friendship there is little sense of social hierarchy or status difference."); BRAIN, *supra* note 13, at 20 ("Equality . . . is part and parcel of friendship."); PAHL, *supra* note 15, at 164, 167 (Friendship is "egalitarian" and "has no place in hierarchies or authoritarian structures."); Graham Allan, *Friendship and the Private Sphere*, in PLACING FRIENDSHIP IN CONTEXT, *supra* note 15, at 71, 76; Pat O'Connor, *Women's Friendships in a Post-Modern World*, in PLACING FRIENDSHIP IN CONTEXT, *supra* note 15, at 117, 127.

62. See ALLAN, KINSHIP, *supra* note 15, at 89–90. However, Epstein argues:

Francis Bacon, on this point, claims that "there is little friendship in the world, and least of all that between equals." I take Bacon's point to be that equality between people is chiefly a spur to rivalry, which can be death on friendship. And Balzac, with that worldly cynicism one comes to expect (and enjoy) in him, backs up Bacon by remarking that "nothing so fortifies a friendship as the belief on the part of one friend that he is superior to the other."

EPSTEIN, *supra* note 16, at 8.

63. *Id.* at 2. It may even be that no regular contact is required if a friendship forms in particularly intense ways or at a particularly formative time. See SPENCER & PAHL, *supra* note 15, at 50 (reporting case of a man who considered his closest friend to be a "childhood companion and co-evacuee during World War II to whom he had not spoken in over twenty years").

64. See BERNARD YACK, *THE PROBLEMS OF A POLITICAL ANIMAL: COMMUNITY, JUSTICE, AND CONFLICT IN ARISTOTELIAN POLITICAL THOUGHT* 110 (1993) (contending that, for Aristotle, friendship is "a source of conflict as well as a means of promoting greater cooperation"). Some even idealize conflict in friendship. See MICHEL DE MONTAIGNE, *Of the Art of Discussion*, in MONTAIGNE, *supra* note 1, at 705 ("[Friendship] delights in the sharpness and vigor [of verbal]

friendships have resources to mediate conflict that are achieved through maintenance and effort.⁶⁵ Friends must be willing to manage conflict because they are invested in the relational enterprise and its future.⁶⁶

To be sure, listing a bunch of attributes, some of which obtain in a given friendship and some of which do not, is a clinical method of getting at an important social relation that contributes to our integrity and our dignity. There are, of course, more romantic depictions of friendship in our cultural heritage, and they undoubtedly shed some truth on the relation at issue better than a top-ten list. Still, this composite sketch of the friend delineates the concept rather well and, in turn, could be the basis of the law's identification of the friendship relation.

C. Aristotle on Friendship

It seems necessary in modern discussions of friendship to compare one's account with Aristotle's canonical treatment of friendship in books eight and nine of his *Nicomachean Ethics*.⁶⁷ Although he was not the first to get his thoughts about the matter into a printed form that makes its way to our generation—that distinction might belong to Socrates, as chronicled by Plato in the *Lysis*⁶⁸ and the *Symposium*⁶⁹—our modern conception of friendship

intercourse It is not vigorous and generous enough if it is not quarrelsome, if it is civilized and artful, if it fears knocks and moves with constraint.”).

65. See PAHL, *supra* note 15, at 86 (claiming that friendship requires time and effort); SULLIVAN, *supra* note 16, at 204 (claiming that friendship “needs tending”).

66. See EPSTEIN, *supra* note 16, at 240 (“[Friendship] calls for regular maintenance through thoughtful cultivation.”); *id.* at 241 (“The very word friendship . . . implies not passivity but an active hand; it suggests taking control, charting a course, planning a future.”).

67. See ARISTOTLE, *supra* note 38, at bk. viii, ch. 11, l. 1155a1 to bk. ix, ch. 11, l. 1172a20. There is also much to be learned from Aristotle's slightly different discussion of friendship in his *Eudemean Ethics*. See A.W. PRICE, LOVE AND FRIENDSHIP IN PLATO AND ARISTOTLE 121 (1989) (arguing that the *Eudemean* account is “more abstract and metaphysical,” whereas the *Nicomachean* is “more concrete and empirical”); Michael Pakaluk, *Friendship and the Comparison of Goods*, 37 PHRONESIS 111, 129 (1992) (suggesting that the *Nicomachean* account must be read in light of the account of friendship in the *Eudemean Ethics*). Still, because the *Nicomachean Ethics* is the version most often read and discussed, I focus my treatment here virtually exclusively on the theory elaborated there.

Aristotle's *Politics* and *Art of Rhetoric* are other underappreciated sources of insight about Aristotle's theory of friendship. See Leib, *supra* note 1, at 168, 175–77 (exploring the relevance of Aristotle's *Politics* to his account of friendship); Kronman, *supra* note 9 (same); SULLIVAN, *supra* note 16, at 191–92 (discussing Aristotle's *Art of Rhetoric*).

68. See BOLOTIN, *supra* note 9, at 17–52 (translating and commenting on the *Lysis*, Plato's dialogue most directly about friendship).

69. See PLATO, *Symposium*, in THE DIALOGUES OF PLATO 215 (William Chase Greene ed., Benjamin Jowett trans., 1927). Some might also include the *Phaedrus*. PLATO, *Phaedrus*, *id.* at 435.

owes much to an Aristotelian legacy that has traveled through Cicero,⁷⁰ Montaigne,⁷¹ Emerson,⁷² and others.⁷³

Aristotle's inquiry into friendship begins by asking some very basic questions about the relationship: (1) if friends must be similar or if opposites attract;⁷⁴ (2) whether friends must be virtuous in order to maintain friendships;⁷⁵ and (3) whether happy people need friendship too, or whether the happy are self-sufficient without friendship.⁷⁶ Aristotle concludes that friendship "is most necessary for our life," and that "no one would choose to live without friends even if he had all the other goods."⁷⁷

These preliminary inquiries help Aristotle separate true friendships (sometimes called "character friendships" or "virtue friendships") from other kinds. Indeed, Aristotle's main legacy to contemporary discussions about friendship is his tripartite typology of friendship that isolates a pure or true form. For Aristotle, there are three degrees or species of friendship: friendships that are useful, friendships that are pleasant, and friendships of the good.⁷⁸

Friendships that are useful bring personal gain, and pleasant friendships bring pleasure.⁷⁹ Although Aristotle insists that these species of friendships deserve the title of friendship more than, say, the "natural friendships" we have for animals, our children, and our fellow human beings,⁸⁰ Aristotle considers the useful and the pleasant forms of friendship incomplete because they are easily

70. See CICERO, *DE SENECTUTE, DE AMICITIA, DE DIVINATIONE* (William Armistead Falconer trans., Harvard Univ. Press 1996).

71. See MONTAIGNE, *supra* note 1.

72. See Ralph Waldo Emerson, *Friendship* (1841), in RALPH WALDO EMERSON: *ESSAYS AND LECTURES* 339 (Library of America 1983).

73. Heather Devere traces the cultural heritage (suggesting that perhaps even Plato may be a latecomer) in Heraclitus, Xenophon, Herodotus, Lucretius, Lysias, Plotinus, Epicurus, Euripedes, Plutarch, Homer, Sappho, Ovid, Virgil, and Seneca. See Heather Devere, *Reviving Greco-Roman Friendship: A Bibliographical Review*, in *THE CHALLENGE TO FRIENDSHIP IN MODERNITY*, *supra* note 9, at 149. Goodrich also performs a nice genealogy, focusing on lawyers' contribution to the tradition in particular. See Goodrich, *The Immense Rumor*, *supra* note 18, at 206 (tracing ruminations on friendship through lawyers Cicero, Alciatus, Elyot, Bacon, Montaigne, Fulbeck, Wither, and Brathwaite). Goodrich believes that "it was lawyers who wrote about friendship because it is what they most lacked and hence what they most desired." *Id.* at 228.

74. ARISTOTLE, *supra* note 38, at bk. viii, ch. 1, ll. 1155a32–b8.

75. *Id.* at bk. viii, ch. 1, ll. 1155b11–b16.

76. *Id.* at bk. ix, ch. 9, ll. 1169b3–b10.

77. *Id.* at bk. viii, ch. 1, ll. 1155a2–a6.

78. *Id.* at bk. viii, ch. 3, ll. 1156a7–b33.

79. *Id.* at bk. viii, ch. 3, ll. 1156a10–a22.

80. *Id.* at bk. viii, ch. 1, ll. 1155a17–a23. The "lower" species of friendships are friendships, Aristotle claims, only by "similarity" to the most complete friendships, not in "the primary way." *Id.* at bk. viii, ch. 4, ll. 1157a26–a33. Good friends "are friends unconditionally; the others are friends coincidentally and by being similar to these." *Id.* at bk. viii, ch. 4, ll. 1157b1–b5. "[F]riendship of character," however, "is friendship itself." *Id.* at bk. viii, ch. 14, ll. 1163b13–b14.

dissolved. Both friendships are used as a means toward some intermediate end, and friendships sought merely for pleasure are likely to disintegrate when the end in question is achieved or when pleasure is achieved and then dissipates.⁸¹

Good friendships endure;⁸² they are constituted by “good people similar in virtue”⁸³ so need does not tarnish the friendship. Together, friends seek the good—specifically, the good of friendship, which is for Aristotle the “greatest external good.”⁸⁴ The only true and complete friendships on the Aristotelian paradigm are friendships of the good: Excellent people seek each other because “solitude makes happiness impossible,”⁸⁵ and because “good people’s life together allows the cultivation of virtue.”⁸⁶ Thus, true friendships are relatively stable because virtue is enduring, and good people tend to stay good. An oddity of this account—to be clear—is that only good people can have true friendships.⁸⁷ Obviously, Aristotle’s conception of friendship could not be adopted into our laws; among many other reasons, we do not like our laws taking a stand on who is a good person.

Nevertheless, Aristotle is still careful to note that true friends may, on occasion, be useful or advantageous or pleasant to each other.⁸⁸ And although he is clear that erotic and romantic love is another breed of relationship entirely,⁸⁹ Aristotle does not preclude spouses from being friends of the highest sort.⁹⁰

Aristotle’s canonical account of the highest form of friendship ultimately confirms many of the characteristics adumbrated in the previous Subpart. For

81. See *id.* at bk. viii, ch. 3, ll. 1156a23–a25 (utility friendships dissolve when the utility itself diminishes); *id.* at bk. viii, ch. 3, ll. 1156a31–b4 (friendships of pleasure are very mercurial because what pleasures us changes quickly).

82. *Id.* at bk. viii, ch. 3, ll. 1156b11–b13.

83. *Id.* at bk. viii, ch. 3, l. 1156b6.

84. *Id.* at bk. ix, ch. 9, ll. 1169b7–b10.

85. *Id.* at bk. ix, ch. 9, l. 1169b16.

86. *Id.* at bk. ix, ch. 9, ll. 1170a11–a15.

87. *Id.* at bk. viii, ch. 4, ll. 1157a18–a20; *id.* at bk. viii, ch. 5, ll. 1157b25–b28. This idea is not merely idiosyncratic. See Etienne de La Boétie, *On Voluntary Servitude*, in *FREEDOM OVER SERVITUDE: MONTAIGNE, LA BOÉTIE, AND ON VOLUNTARY SERVITUDE* 189, 220 (David Lewis Schaefer ed. & trans., 1998) (“Friendship is a sacred word; it is a holy thing. It never occurs except between honorable people. . . . It maintains itself not so much by means of good turns as by a good life. What renders a friend assured of the other is the knowledge he has of his integrity.”). I have argued elsewhere, however, that La Boétie’s account here may be less than fully honest. See Leib, *supra* note 1, at 180–82.

88. ARISTOTLE, *supra* note 38, at bk. viii, ch. 4, ll. 1156b32–1157a4 (arguing that complete and incomplete friendships are not mutually exclusive). John Cooper provides a substantial defense for the claim that character friendships may have elements of the other, incomplete forms. See Cooper, *supra* note 9, at 309.

89. ARISTOTLE, *supra* note 38, at bk. viii, ch. 4, ll. 1157a6–a10.

90. *Id.* at bk. viii, ch. 12, ll. 1162a25–a34.

example, he requires friends to have a substantial level of equality⁹¹ and a degree of concord between them.⁹² Also, he observes that friends must share “distress and enjoyment,”⁹³ spend time together,⁹⁴ and trust each other.⁹⁵ Friendship, furthermore, must be active; distance does not necessarily dissolve friendships, but prolonged absences will tend to do so.⁹⁶ More, Aristotle requires that friends must wish their counterparts well for their friend’s own sake;⁹⁷ his account focuses upon reciprocity, and he claims that unreciprocated goodwill is not constitutive of proper friendship.⁹⁸ Finally, he requires that friends be mutually aware of one another’s reciprocated goodwill.⁹⁹

There is, of course, some material in Aristotle that might seem, for lack of a better word—*weird*—and these features have not been adopted in the account above. For example, Aristotle is of the view that there is never any conflict in true friendship;¹⁰⁰ that older people cannot be true friends because they are unpleasant;¹⁰¹ that true friends must live together;¹⁰² that the paternal and maternal relations in and of themselves are forms of friendship;¹⁰³ that friendship is a form of self-love;¹⁰⁴ and that all friends are good people.¹⁰⁵ And Aristotle devotes

91. *Id.* at bk. viii, ch. 7, ll. 1158b30–b33; *see also id.* at bk. viii, ch. 5, l. 1157b37 (“[F]riendship is said to be equality.”).

92. *Id.* at bk. ix, ch. 6, ll. 1167a22–b4. In particular, Aristotle emphasizes the need for concord in generalized political or civic friendship. There is some debate about whether political friendship is considered by Aristotle to be of the highest form of friendship. Compare Kronman, *supra* note 9, at 129, 130 (arguing that political friendship partakes of the highest form), and ALASDAIR MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 155–56 (2d ed. 1984) (same), with YACK, *supra* note 64, at 118–21 (arguing that Aristotle rejects all political theories that aim to inspire fraternity among citizens), Leib, *supra* note 1, at 176 (arguing that political friendship is a low form of friendship), Cooper, *supra* note 9 (arguing that civic friendship is most similar to a friendship of utility), and Richard Mulgan, *The Role of Friendship in Aristotle’s Political Theory*, in *THE CHALLENGE TO FRIENDSHIP IN MODERNITY*, *supra* note 9, at 15 (arguing that “fraternal” citizenship is impossible and that civic friendship is only instrumental).

93. ARISTOTLE, *supra* note 38, at bk. ix, ch. 4, ll. 1166a7–a8.

94. *Id.* at bk. ix, ch. 4, ll. 1166a6–a7.

95. *Id.* at bk. viii, ch. 4, ll. 1157a21–a25 (noting that trust arises only in the highest type of friendships, as the other forms breed distrust).

96. *Id.* at bk. viii, ch. 5, ll. 1157b10–b15.

97. *Id.* at bk. viii, ch. 3, ll. 1155b31–b32; *id.* at bk. viii, ch. 3, ll. 1156b10–b12.

98. *Id.* at bk. viii, ch. 2, ll. 1155b33–b34.

99. *Id.* at bk. viii, ch. 2, ll. 1155b34–1156a6.

100. *Id.* at bk. viii, ch. 3, l. 1163a21.

101. *Id.* at bk. viii, ch. 5, ll. 1157b14–b18.

102. *Id.* at bk. viii, ch. 5, ll. 1157b18–b22; *id.* at bk. ix, ch. 11, l. 1171b29 to bk. ix, ch. 12, l. 1172a1. There is some ambiguity about whether Aristotle really means that friends must live under the same roof or whether friends must simply seek out living in proximity to one another and share “conversation and thought.” *Id.* at bk. ix, ch. 9, ll. 1170b10–b12.

103. *Id.* at bk. viii, ch. 12, ll. 1161b15–b30.

104. *Id.* at bk. ix, ch. 8, ll. 1168b8–1169b2. Ray Pahl also thinks through whether friendship is based in self-love and narcissism. See PAHL, *supra* note 15, at 78. I address this issue *infra* Part II.B.3.

105. ARISTOTLE, *supra* note 38, at bk. viii, ch. 5, ll. 1157b25–b28. This view continues to gain some adherents; some people seem to believe that friends never ask each other to tell lies to

pages to puzzles that seem downright odd: whether it is better to have friends in good fortune or bad fortune,¹⁰⁶ and whether we can befriend ourselves in any meaningful sense.¹⁰⁷ To be sure, some of these less familiar thoughts about friendship that fail to resonate emerge from Aristotle's focus on the Greek concept *philia* (or *philos* or *philein*), a relation that potentially includes a much broader set of relations than our modern conception of friendship.¹⁰⁸ But, all the same, we can trace our modern conception of intimate friendship to Aristotle's categories—and especially to his elevation of a virtue or character friendship above other, lesser, forms. Even if our own typologies differ from Aristotle's—and how could they not given obvious cultural differences—we will always be indebted

cover for them and the like. But, as Dean Cocking and Jeanette Kennett recognize, “[A] good friendship might well include a focus on certain vices.” Dean Cocking & Jeanette Kennett, *Friendship and Moral Danger*, 97 J. PHIL. 278, 286 (2000). They go even further: “Heinrich Himmler organized the mass slaughter of Jewish people, but he may well have been a conscientious and loving . . . friend.” *Id.* at 288.

106. ARISTOTLE, *supra* note 38, at bk. ix, ch. 11, ll. 1171a21–b29 (concluding that it is “choiceworthy” to have friends “in all conditions”).

107. *Id.* at bk. ix, ch. 4, ll. 1166a10–b1 (“[T]here seems to be friendship [toward oneself] in so far as someone is two or more parts.”).

108. See Devere, *supra* note 73, at 153–54 (citing many scholars who see *philia* as a extending more broadly than a circle of intimate friends); see also Baron, *supra* note 9, at 837 n.1 (considering *philia* to be constituted by “personal ties of many sorts, including but not restricted to parental love, other family ties, bonds between co-workers or members of the same political organization or church, etc., as well as love between spouses or lovers, and friendship”); Susan Bickford, *Beyond Friendship: Aristotle on Conflict, Deliberation, and Attention*, 58 J. POL. 398, 407 (1996) (“[T]he Greeks used *philia* to denote a wider range of relationships than does our ordinary understanding of ‘friendship’: relations between business partners, family members, citizens, fellow travelers, and personal friends, among others.”) (citation omitted); Goodrich, *The Immense Rumor*, *supra* note 18, at 207 (“*Philein* referred . . . to a relationship and specifically to membership in an institutional and hence legal group—the family, the city, the state.”). But see David Konstan, *Greek Friendship*, 117 AM. J. PHILOLOGY 71, 92 (1996) (arguing that “the Greeks themselves were, like us, quite clear about the difference between friends, relatives, and countrymen”); Jonathan Powell, *Friendship and Its Problems in Greek and Roman Thought*, in ETHICS AND RHETORIC: CLASSICAL ESSAYS FOR DONALD RUSSELL ON HIS 75TH BIRTHDAY 31, 45 (Doreen Innes, Harry Hine & Christopher Pelling eds., 1995) (arguing that *philia* “contains nothing essentially unfamiliar to the modern reader” because “friendship in its essence is much the same for human beings in all societies”).

A similar debate structures the interpretation of the Roman “*amicitia*.” Compare EPSTEIN, *supra* note 16, at 60–61 (explaining that the term “is said to have had its origin in party politics” and “much of it seems to turn on what we today call networking”), Devere, *supra* note 73, at 155 (discussing whether the term “is equivalent to our understanding of friendship or whether it is more commonly used to refer to patron-client relationships”), and Goodrich, *The Immense Rumor*, *supra* note 18, at 207 (“*Amicitia* was . . . a term that referred to institutional relationships, to ‘group consciousness’ and to what would later be termed legal rights. The referent of *amicitia* was originally that of the kin group, and latterly came to refer to fellow citizens or members of the polity, of the same legally defined group.”), with Powell, *supra*, at 45 (maintaining that the Roman term, like the Greek term, is similar to our own concept of friendship), and David Konstan, *Patrons and Friends*, 90 CLASSICAL PHILOLOGY 328 (1995) (same).

to his account and can learn much from his insistence that there are different forms and species of friendships that command different types of attention.

Some final lessons from Aristotle continue to ring true: One can befriend too many people.¹⁰⁹ Because friendship is the product of tremendous effort¹¹⁰ and requires true sharing of grief, distress, and celebration,¹¹¹ a person can spread herself too thin.¹¹² And, perhaps more insightfully, Aristotle notes that when disputes arise in friendships, the tension is often traceable to a transition within the friendship from one species to another;¹¹³ indeed, “friends are most at odds when they are not friends in the way they think they are,”¹¹⁴ when one party misleads the other into thinking a different kind of friendship exists. We would do well to remember all of these insights as we endeavor to construct a workable concept of the friend that the law could employ.

* * *

So much for the descriptive part of this project. As should be obvious, although much of the account of friendship in Part I.B draws from Aristotle, my working definition of the friend does not classify itself neatly into the Aristotelian category of the virtue or character friendship. I am ultimately working with a different definition of the friend, and I do not have the same expectations of the friend’s virtue as Aristotle. Contrary to Aristotle’s account, my account excludes from consideration spousal friendship, familial friendship, erotic friendship, civic friendship, and, more generally, the friendship of unequals.

Still, Aristotle’s discussion furnishes a nice segue into the normative inquiry that constitutes Part II: Should the law recognize the status of the friend?

Indeed, some argue that even the English word friendship itself underwent a similarly ambiguous phase in the eighteenth century, where “[t]he word ‘could mean a distant or close relation, a patron or a client, an individual to whom one was tied by mutual sponsorship, or someone attached by warm affection.’” Silver, *supra* note 15, at 1487 (quoting RANDOLF TRUMBACH, *THE RISE OF THE EGALITARIAN FAMILY: ARISTOCRATIC KINSHIP AND DOMESTIC RELATIONS IN EIGHTEENTH CENTURY ENGLAND* 64 (1978)).

109. ARISTOTLE, *supra* note 38, at bk. viii, ch. 6, ll. 1158a11–a12; accord ALLAN, *FRIENDSHIP*, *supra* note 15, at 42–43 (arguing that we all have limited capacities for the number of friends we can manage).

110. ARISTOTLE, *supra* note 38, at bk. ix, ch. 7, l. 1168a22.

111. *Id.* at bk. ix, ch. 10, ll. 1171a5–a8.

112. *Id.* at bk. ix, ch. 10, ll. 1171a2–a4. As Aristotle puts it, it “seems impossible to be an extremely close friend to many people.” *Id.* at bk. ix, ch. 10, ll. 1171a10–a11; see also *id.* at bk. ix, ch. 10, ll. 1171a16–a17 (“Those who have many friends and treat everyone as close to them seem to be friends to no one, except in a fellow citizen’s way. These people are regarded as ingratiating.”).

113. *Id.* at bk. viii, ch. 13, ll. 1162b25–b26.

114. *Id.* at bk. ix, ch. 3, ll. 1165b7–b8.

Aristotle does not have a well-developed response to the question, but he does offer some stimulating thoughts, ones that may be helpful to introduce the topic.

First, he suggests that friends have no need for justice.¹¹⁵ It is not perfectly clear what he means by this; but it might mean that the law and legally enforced justice have no place between friends.¹¹⁶ Support for this reading can be found in Aristotle's approving citation of the practice of some cities where "there are actually laws prohibiting legal actions in voluntary bargains [presumably between friends], on the assumption that if we have trusted someone we must dissolve the association with him on the same terms on which he formed it."¹¹⁷ Similarly, in drawing a distinction between "rules friendships" and "character friendships," Aristotle suggests that rules friends use explicit conditions for their contractual and debt arrangements, whereas character friends allow grace periods and transact much less formally. In these latter cases, Aristotle observes, "some cities do not allow legal actions . . . , but think that people who have formed an arrangement on the basis of trust must put up with the outcome."¹¹⁸

Ironically, Aristotle appears to endorse a legal recognition of the friend precisely by denying friends any benefit of legal enforcement to their arrangements (even if they are of traditional transactional forms). This is a provocative thought that endorses the idea that friends should live outside the law—or at least under their own, special, legal rules. And Aristotle furnishes a typology of friendship so that the law can figure out who shall be excluded from its purview—character friends, in particular. Part II argues that the law should protect the status of the friend in a more substantial way than merely denying friends access to the legal system.

II. WHY SHOULD FRIENDSHIP MATTER?

Friendship is so obviously a good in the world that it is hard to justify allocating space to defending its goodness. Indeed, to define it is already to embark upon a normative project of explaining why it is a central good in most people's

115. *Id.* at bk. viii, ch. 1, l. 1155a28.

116. It might also mean that once one shows oneself capable of having friends, one is assured of being a good and just person such that friends have no need to cultivate the virtue of justice in addition to cultivating friendship. Or it could mean that since a friend is a "second self," a friend never needs to worry about just distribution: Self-preservation and self-love will lead to proper distribution, even without an external norm of justice. For this latter argument, see Leib, *supra* note 1, at 174.

117. Aristotle, *supra* note 38, at bk. ix, ch. 1, ll. 1164b12–b15. Somewhat inexplicably, this discussion of friendship and the law in Aristotle remains virtually unnoticed by the generations of extensive commentary upon Aristotle's lectures.

118. *Id.* at bk. viii, ch. 13, ll. 1162b22–b32.

lives. Yet to argue that the law should recognize the status of the friend requires more carefully specifying the role friends play both in private and public life.

But even that will not be enough to justify legal recognition, of course, because the law is not designed to protect and recognize all human goods. Nice shaving cream is a good, but it obviously should get no special legal protection. Lollipops are goods for children (from their perspective, anyway), but it would be odd to argue that the law should protect and develop children's rights to lollipops.

Yet the panoply of friendship's benefits I expose here illustrates that friendship is not just any good; it is an "indispensable component of a good life."¹¹⁹ And it is especially indispensable to the kind of good life our society prizes: lives with deep private and personal connections. If one believes that our legal system should develop and facilitate the acquisition of capabilities that render our lives dignified and meaningful, the law should find a way to support, recognize, and promote friendship. But there are many other reasons for the law to respect friendship.

Parts II.A.1 and II.A.2 explore friendship's benefits in the private and public spheres, respectively, emphasizing those that recommend the support of a legal regime like our own, one committed to liberal rights and a flourishing economy. Then, Part II.B parries some core objections to the enterprise of making friendship matter in the law.

A. The Affirmative Case

1. Personal Advantages

Friendship confers a series of personal benefits in our daily lives. These benefits are not necessarily available exclusively through friendship, but friendship furnishes them plentifully.

First, friendship is central in identity exploration, identity formation, identity development, and identity maintenance.¹²⁰ "Shopping" for friends and trying to get along with various people in intimate ways allow us to learn more about who we are and who we most want to become.¹²¹ Our sustained

119. Stroud, *supra* note 9, at 518.

120. See, e.g., ALLAN, FRIENDSHIP, *supra* note 15, at 1, 107, 111 (arguing that friends help provide us with our sense of identity and help us express it); Cocking & Kennett, *supra* note 105, at 285 ("[F]riends contribute to each other's self-conception."); O'Connor, *supra* note 61, at 117 (noting that we can shape our identities in friendships); Oliker, *supra* note 32, at 18, 24 (contending that friendship is expressive of identity).

121. See Cocking & Kennett, *supra* note 105, at 286 ("As a friend, I am partly determined by my friend's interpretations of me . . ."); O'Connor, *supra* note 61, at 118 ("Friendship offers a

friendships ultimately constitute, in some measure, our very identity, and maintaining relationships through time helps the continuity of our identity through different life stages and substantial life challenges. Healthy friendships allow us room to develop our identities further, and they provide opportunities for a sense of self-selected identity outside of our institutional affiliations through work, education, and kin.¹²² More, friendship can be “the most fertile ground for acquiring the moral sensibilities.”¹²³

Second, and relatedly, friends confirm our sense of social and moral worth.¹²⁴ They allow us to feel “cared for and loved, that [we are] esteemed and valued, and that [we] belong[] to a network of communication and mutual obligation.”¹²⁵ Indeed, “[s]elf-esteem, the most important disposition associated with happiness and a prime protector against depression, is . . . closely related to friendship.”¹²⁶ Friendlessness causes depression, and friends help us avoid deep sadness.¹²⁷

To be sure, our families and extended kin networks also provide many of these benefits, but friendship is perhaps an even greater confirmation of social and moral worth because friendship relations tend to be chosen in a deeper sense—whereas we are usually stuck with our families.¹²⁸ Some have found that it is friendship rather than money, commodities, or family that buys us happiness.¹²⁹

Not only do friends help us avoid depression, they are more generally good for our health: Friends “appear to reduce the levels of stress experienced

way of inventing and re-inventing the self in an authentic way throughout one's life.”); Nancy Sherman, *Aristotle on the Shared Life*, in *FRIENDSHIP: A PHILOSOPHICAL READER* 91, 105–06 (Neera Kapur Badhwar ed., 1993) (stating that friends help their counterparts “develop . . . more completely” and are “eminently suited as models to be emulated”); Lynn Smith-Lovin & J. Miller McPherson, *You Are Who You Know: A Network Approach to Gender*, in *THEORY ON GENDER/FEMINISM ON THEORY* 223 (Paula England ed., 1993) (describing how differences in the relationships men and women form during development affect identity and behavioral differences between genders later in life).

122. As Graham Allan has written, “[I]t is evident that [friends] are major influences on the ways in which children, and indeed adults in later life, come to define themselves as social beings and develop an image of their self.” ALLAN, *KINSHIP*, *supra* note 15, at 1.

123. LAURENCE THOMAS, *LIVING MORALLY: A PSYCHOLOGY OF MORAL CHARACTER* 153 (1989).

124. See ALLAN, *FRIENDSHIP*, *supra* note 15, at 1.

125. James S. House, *Social Support and the Quality and Quantity of Life*, in *RESEARCH ON THE QUALITY OF LIFE* 253, 255 (Frank M. Andrews ed., 1986) (quoting Sidney Cobb, *Social Support as a Moderator of Life Stress*, 38 *PSYCHOSOMATIC MED.* 300 (1976)).

126. Robert E. Lane, *The Road Not Taken: Friendship, Consumerism, and Happiness*, 8 *CRITICAL REV.* 521, 530 (1994).

127. See *id.* at 525–26; see also ALLAN, *FRIENDSHIP*, *supra* note 15, at 1 (“[W]e tend to think of people with lots of friends as most likely to be happy and those without as often lonely and unfortunate.”); SPENCER & PAHL, *supra* note 15, at 28 (reporting that those with low levels of social support tend to suffer from more mental illness and have a harder time recovering therefrom).

128. Obviously, most of us choose our spouses too. Still, we can dispense with friends more easily, and our larger family circle is not chosen in the way our friendship networks are.

129. See Lane, *supra* note 126, at 527.

[by their counterparts], improve health, and buffer the impact of stress on health.”¹³⁰ Although there was a time when sociologists concluded that “friendship plays a very small part in the overall pattern of support and care” of the “chronically ill and handicapped”¹³¹ and that kin is more likely to perform these tasks, more recent evidence suggests that those with close friends and confidants live longer than those without them—and that “close family ties . . . ha[ve] no discernible effect on survival.”¹³²

More, friendship is “linked to the provision of public services so as to enhance both efficiency and community”¹³³ and can furnish important emotional and financial aid in times of crisis when public services are overextended¹³⁴: “The closer and stronger our tie with someone, the broader the scope of their support for us and the greater the likelihood that they will provide major help in a crisis.”¹³⁵ So, close friends are critical in the provision of care and keep us healthy and safe.

Finally, friends can inspire innovation and creativity in our professional and personal lives, giving rise to new modalities of thought.¹³⁶ By serving as a respite from other more formal social roles and obligations,¹³⁷ friendship facilitates our sense of control over our own lives, helps us to be authentic, and furnishes us

130. House, *supra* note 125, at 253; see also SPENCER & PAHL, *supra* note 15, at 28 (reporting that many causes of death disproportionately affect those who are isolated).

131. ALLAN, FRIENDSHIP, *supra* note 15, at 110.

132. Nicholas Bakalar, *Bonds of Friendship, Not Family, May Add Years*, N.Y. TIMES, June 28, 2005, at F6. To be fair, kin may still be providing most of the care; it is just that survival from that care is facilitated by friendship, and having close family ties has no effect on the care leading to survival.

133. Silver, *supra* note 15, at 1495 (citing MARTIN BULMER, NEIGHBORS: THE WORK OF PHILIP ABRAMS (1986)).

134. See Ely Portillo, *Feeling Alone? You're Not the Only One*, HOUSTON CHRON., June 22, 2006, at A1, available at 2006 WLNR 10916753.

135. Miller McPherson et al., *Social Isolation in America: Changes in Core Discussion Networks over Two Decades*, 71 AM. SOC. REV. 353, 355 (2006) (citing Barry Wellman & Scot Wortley, *Different Strokes from Different Folks: Community Ties and Social Support*, 96 AM. J. SOC. 558 (1990); Jeanne S. Hurlbert et al., *Core Networks and Tie Activation: What Kinds of Routine Networks Allocate Resources in Nonroutine Situations?*, 65 AM. SOC. REV. 598 (2000)). This sociological observation is true of both kin and non-kin ties, but for reasons already adumbrated, I am not discussing kin-based ties in this project.

136. See LEWIS, *supra* note 14, at 81 (“What we now call ‘the Romantic Movement’ once was Mr. Wordsworth and Mr. Coleridge talking incessantly (at least Mr. Coleridge was) about a secret vision of their own. Communism, Tractarianism, Methodism, the movement against slavery, the Reformation, the Renaissance, might perhaps be said, without much exaggeration, to have begun in the same way.”). For a book-length treatment of this very theme, see FARRELL, *supra* note 16 (exploring how friendship contributes to the arts and sciences through studies of, inter alia, C.S. Lewis, Sigmund Freud, Susan B. Anthony, Joseph Conrad, and their friends), and EPSTEIN, *supra* note 12 (exploring friendship’s role in the poetry of postwar America).

137. See Dorothy Jerrome, *Good Company: The Sociological Implications of Friendship*, 32 SOC. REV. 696, 709–12 (1984).

with a greater sense of individual autonomy. This freedom can open up for us new ways of thinking. Friends help us remain the same, but they also help us grow.

2. Public Advantages

Many of these personal benefits create a windfall for society more generally. For example, the state clearly reaps a public health benefit from friends who take care of the sick and handicapped, a cost that Medicaid or Medicare need not absorb if there are able-bodied friends willing and able to pitch in.¹³⁸ And if Robert Lane is right, “[a]dvanced societies are likely to increase ‘utility’ if they maximize friendship rather than the getting and spending of wealth.”¹³⁹ The avoidance of depression that friends accomplish has ramifications for our capital markets and may help the state with economic growth.

Friendship facilitates economic growth in a few other ways as well. In the first place, as noted above, close social networks promote individual freedom and creativity,¹⁴⁰ which have real market effects. Second, “amity . . . is desirable and conducive to business” because we are more likely to contract with those whom we trust.¹⁴¹ Friendship is, after all, “closely related to contractual agreement and reciprocal behavior,”¹⁴² and contracts and the collaborations that make them work lie at the center of our liberal market institutions.¹⁴³ Third, and relatedly, friendships establish paradigmatic examples of interpersonal trust, central to smooth operations of a market: “[I]nstead of demanding purely calculating behavior, markets require interpersonal trust.”¹⁴⁴ Friendships are especially well-suited to the creation and reinforcement of the interpersonal trust critical to helping the market function.

There are even more public benefits that could accrue to the state if it promoted friendship more directly. Friendships have the potential to save a legal system enforcement costs because transactions based in friendships often do

138. Friendship can also help sustain volunteer networks that in turn provide important public services. See Portillo, *supra* note 134 (“Red Cross volunteering [is] an effort for which friends often are recruiters and in which friendships sustain membership.”).

139. See Lane, *supra* note 126, at 521.

140. See Adams, *supra* note 39, at 176 (citing sociologist Georg Simmel).

141. Lisa Hill & Peter McCarthy, *Hume, Smith and Ferguson: Friendship in Commercial Society*, in *THE CHALLENGE TO FRIENDSHIP IN MODERNITY*, *supra* note 9, at 33, 35. This is in some tension, of course, with the old adage that we only contract with those whom we *do not* trust.

142. BRAIN, *supra* note 13, at 37.

143. On contract and collaboration, see generally Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004); Ethan J. Leib, *On Collaboration, Organizations, and Conciliation in the General Theory of Contract*, 24 QUINNIPIAC L. REV. 1 (2005). For a discussion about how contract and collaboration underwrite our liberal market institutions, see Markovits, *supra*, at 1515–18.

144. Lane, *supra* note 126, at 533.

not require the law for monitoring. Norms internal to friendship can successfully police party behavior and save the legal system effort in the process. The values of friendship and its commitments to reciprocity and goodwill lubricate and underwrite economic transactions.

To be sure, friendship also has its very real economic costs: In Andalusia, for instance, “[s]ome farmers [have] complain[ed] that friendship obligations force them to sell at a loss, or part with an object they would otherwise not have sold.”¹⁴⁵ Yet these costs are arguably counterbalanced by the costs friends save in not needing to rely on the relatively more expensive norm-enforcement techniques furnished by the law.

Of course, it cannot be that the law should provide room and recognition for all extrinsic norms that could potentially save a legal system enforcement costs. Many nonlegal regimes of social organization can furnish this benefit, and surely the law cannot give special status to all extrinsic norms. But friendship’s norms are especially useful for the law because those norms are centrally ones the legal system should stand ready to endorse. We basically like equality, reciprocity, and reasonable reliance in economic transactions, and if friendships can provide those desiderata, the law should support them.¹⁴⁶

145. BRAIN, *supra* note 13, at 110.

146. Perhaps an analogy would be helpful here. One of the law-and-society movement’s most robust and famous findings is that extrinsic norms outside the law bring civility to business relations. See Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963) (concluding that norms of fair dealing are as relevant as legal rules in Wisconsin business firm transactions); James J. White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life?*, 22 WASHBURN L.J. 1 (1982) (describing how chemical companies allocate supply during shortages according to extrinsic norms, not the law); see also ELLICKSON, *supra* note 56, at 235 (finding that cattle ranchers in Shasta County order their transactions according to extrinsic norms). The contract law surrounding the sale of goods, at least, is able to make use of background extrinsic norms through its recognition of and deference to “usage of trade.” See U.C.C. § 1-303 (2004). In so doing, it saves enforcement costs by recognizing a prior not-necessarily-legal relationship. But see Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 417 (1977) (suggesting that exclusive informal enforcement methods may be more efficient than the possibility for legal sanctions in certain gratuitous and altruistic transactions because legal enforcement may waste resources and incentivize overreliance).

Yet it only makes sense to allow extrinsic norms to penetrate the legal system and gain legal recognition if the norms themselves (as a general matter) are consistent with the law’s normative framework. Since the Uniform Commercial Code is explicitly designed “to permit the continued expansion of commercial practices through custom [and] usage,” U.C.C. § 1-103(a)(2), the law welcomes extrinsic norms in this context. Perhaps there is an assumption that certain customs are efficient, and that the law is more efficient when it temporarily makes use of extrinsic norms to police behavior. But see Lisa Bernstein, *The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999) (arguing that customs and usages of trade cannot be easily identified and do not arise frequently); Eugene Kontorovich, *Inefficient Customs in International Law*, 48 WM. & MARY L. REV. 859 (2006) (highlighting the relatively cool reception custom and extrinsic norms have received by the law outside of the contract and international law contexts); see also The T. J. Hooper, 60 F.2d 737, 740 (2d Cir. 1932) (Hand, J.)

This is a tad too facile, so I should say more. If “members of tight social groups will informally encourage each other to engage in cooperative behavior,”¹⁴⁷ it would be sensible for the law to facilitate such bonding—for the state’s own benefit. When people are engaged in close relationships of cooperation, collaboration, and reciprocity—as friends usually are—the law may find that its norms are better channeled through the extrinsic norms already available to the close-knit group,¹⁴⁸ an excellent reason to grant friends special status within a legal system. “[T]he more close-knit a group is, the better [the friends] will be able to use its informal-control system to minimize the sum of transaction costs and deadweight losses”¹⁴⁹—and the more the status of friend demands special recognition, precisely because friendship performs the function of law. The law need not impose its own foreign norms when they are so readily attended to through an external norm system that it can endorse and underwrite.¹⁵⁰ Just as the law can and should acknowledge enmity in developing legal remedies¹⁵¹—it fails to do so only through paying greater costs of enforcement—it should and can acknowledge friendships.

Some go even further and suggest that vast swaths of our legal system are themselves predicated on friendship, and that our law would not be possible without an underlying conception of friendship undergirding it. Perhaps certain

(remarking that “there are precautions so imperative that even their universal disregard will not excuse their omission”); Richard A. Epstein, *The Path to The T. J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992) (analyzing when it makes sense for courts to integrate custom between parties into dispute resolution).

147. ELLICKSON, *supra* note 56, at 167. Obviously, Ellickson’s “tight social groups” are not necessarily coextensive with the category of friendships (indeed, they are meant to be much broader). But there is nothing in his analysis that would suggest that friendships operate differently. Indeed, in defining the term “close-knit group,” Ellickson writes, “A group is *close-knit* when informal power is broadly distributed among group members and the information pertinent to informal control circulates easily among them.” *Id.* at 177–78. Friendship’s internal norms of equality and reciprocity—and their operation within friendship—make this description accurate of friendship as well. Yet friendship, despite its commitment to equality and reciprocity, tends *not* to establish wealth redistribution. See *supra* note 57. Ellickson also suggests that this is true of his close-knit groups (although he is open to their developing certain forms of charity, as we would expect to see in friendships on occasion also). See ELLICKSON, *supra* note 56, at 176–77.

148. See ELLICKSON, *supra* note 56, at 178 n.38 (reporting on a study of the remote island of Tristan da Cunha in the South Atlantic in which a small cooperative society was able to dispense with a criminal justice system altogether) (citing LAWRENCE M. FRIEDMAN, *AMERICAN LAW* 31–33 (1984)).

149. *Id.* at 177 n.35.

150. See generally Dan M. Kahan, *Social Influence, Social Meaning, and Deference*, 83 VA. L. REV. 349 (1997).

151. See Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 2010 (2001) (“Money damages are the superior remedy when the [injury] creates anger and hard feelings Injunctions are more suitable when emotion is unlikely to interfere with bargaining.”). But see Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211 (2002) (arguing that courts should usually ignore enmity in awarding remedies—with some notable exceptions—for a variety of economic and institutional competence rationales).

norms within contract and tort, for example, themselves had their genesis in friendship's commands. This is Peter Goodrich's provocative idea. And although he sees friendship as a "special kind of law," he thinks it "introduces *caritas* into the practice of legality, and it is precisely from this concept of care that comes the primary private law bond of community—the 'duty of care' that we owe to our neighbor in the law of obligations."¹⁵² If the law is parasitic upon the friend for its own normative structure, perhaps the law owes the friend the privilege of being recognized.¹⁵³

This is, to be sure, getting more and more abstract. But there are a few final things to be said about friendship's benefits for the political sphere more generally, beyond its contribution to public health, our economic system, and the law. Friendship can also be a resource for social integration¹⁵⁴ and political cohesion¹⁵⁵: Citizens can be made to care about their politics and contribute to public life when they realize that their friendships and their friends' lives are at stake within the same polity. I might not participate in public affairs or care much about the commonweal if it cannot touch my private life. But if I see that politics affect my friends, I might be more likely to become involved and feel a general solidarity with my broader community.¹⁵⁶ As Aristotle understood, friendship ultimately contributes to the moral worth of the state: "[F]riendship would seem to hold cities together."¹⁵⁷ In interpreting this credo, Anthony Kronman reads it this way: "[T]he best safeguard against political revolution is a stable spirit of friendship among the members of the *polis*. . . . This is why, for the continued existence of the *polis*, justice is not enough. There must also be friendship among its citizens."¹⁵⁸

152. Goodrich, *The Immense Rumor*, *supra* note 18, at 213.

153. See Sally F. Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Object of Study*, 7 LAW & SOC'Y REV. 719 (1973) (arguing that "fictive friendships" undergird most American business transactions, in which parties routinely use informal modes of address, exchange favors and gifts, and act "chummy"); see also MACAULEY ET AL., *supra* note 48, at 230 n.3 ("A lawyer who deals with contracts and fails to understand the power and the limits of trust and the social sanctions flowing from 'fictive friendships' is incompetent.").

154. See ALLAN, KINSHIP, *supra* note 15, at 108.

155. See SEYMOUR MARTIN LIPSET ET AL., UNION DEMOCRACY: THE INTERNAL POLITICS OF THE INTERNATIONAL TYPOGRAPHICAL UNION 67 (1956) (finding that patterns of friendship contribute to political integration, "democratic unionism," and a broad sense of community).

156. I make this argument at greater length in Leib, *supra* note 1, at 167–68.

157. ARISTOTLE, *supra* note 38, at bk. viii, ch. 1, l. 1155a23. See generally RONALD BEINER, POLITICAL JUDGMENT 79 (1983) (emphasizing the centrality of friendship to Aristotle's conception of politics); Kronman, *supra* note 9 (explaining how, for Aristotle, friendship can hold cities together).

158. Kronman, *supra* note 9, at 126. Although Kronman is ultimately interested in a generalized civic friendship, this idea holds true for the promotion of deep friendship ties within the polity as well.

There are some who might object to protecting friends because there are too many of them and because the class is too expansive to warrant protection. Yet, the most recent study on friendship in the sociology literature confirms that most people in the United States think they have only two close friends, and one in four people say they have no one with whom they can discuss important matters.¹⁵⁹ This is not a hopelessly large class of people that will get special treatment. And to reap the benefits that accrue from a society composed of close-knit friendship networks, the institution needs greater support and promotion.

More generally, it is worth taking note that friendship is on the decline.¹⁶⁰ For all the reasons adumbrated here, friendship sorely needs and deserves the support of our public institutions to help it flourish. As a recent newspaper report observes:

Weakening bonds of friendship, which [many] studies affirm, have far-reaching effects. Among them: fewer people to turn to for help in crises such as Hurricane Katrina, fewer watchdogs to deter neighborhood crime, fewer visitors for hospital patients and fewer participants in community groups. The decline, which was greatest in estimates of the number of friends outside the family, also puts added pressure on spouses, families and counselors.¹⁶¹

The decline of friendship is a serious finding and commands the attention of lawyers, public policymakers, judges, and legal scholars. The law can indeed help protect friendship—but the law has thus far failed to take friendships sufficiently seriously and appreciate its role in regulating them. Of course, it is not obvious that legal recognition will lead to an increase in the actual number

159. See McPherson et al., *supra* note 135, at 358–59 (comparing the results of General Social Surveys from 1985 and 2004 and noting that the percentage of people who talk to at least one person who is not connected to them through kinship declined from 80.1 to 57.2 percent during this period); see also Portillo, *supra* note 134 (analyzing the McPherson et al. study). To be fair, it is not obvious that this study's subject is friendship as defined *supra* Part I.

160. See McPherson et al., *supra* note 135, at 362 (“Both kin and non-kin ties have decreased, although the change is larger in nonfamily ties.”); see also Peter Bearman & Paolo Parigi, *Cloning Headless Frogs and Other Important Matters: Conversation Topics and Network Structure*, 83 SOC. FORCES 535, 547 (2004) (finding that 20 percent of respondents have no one with whom they can discuss important matters); Pamela Paxton, *Is Social Capital Declining in the United States? A Multiple Indicator Assessment*, 105 AM. J. SOC. 88 (1999) (confirming that socializing with friends and neighbors is on the decline). But see McPherson et al., *supra* note 135, at 366 (“In 1990, for example, the Gallup Poll found that only 3 percent of their sample reported no close friends; only 16 percent had less than three friends. While there are many differences between the Gallup and [General Social Surveys that form the basis of the McPherson et al., *supra* note 135, conclusions], this raises the interesting question of whether the important-matters question gets at closer, core ties than the concept of close friend. Another recent telephone survey by [the Pew Internet and American Life Project] also found much larger numbers of core or close friends, when it asked about a combination of types of contact.”); see also BOASE ET AL., *supra* note 39 (reporting the results of the Pew Internet and American Life project, which has Americans claiming an average of twenty-three core or very close ties).

161. Portillo, *supra* note 134.

or quality of friendships within society. But, at the very least, we need some account of the law's relationship to friendship. We need to remain mindful that legal rules will have some effect on this most important social institution and social resource that allows us to function and furnishes us with dignity, integrity, and well-being.

B. Parrying Objections

Admittedly, my thesis is counterintuitive. Nevertheless, here, I give some form to the sorts of objections that likely structure people's intuition that this is a bizarre—and bad—idea. In doing so, this Subpart aims to show why people's intuitions may be wrong.

In setting up my affirmative case, I have already addressed the first problem that plagues this enterprise: defining who counts as a friend. That is the first hurdle in getting the law to recognize friendship. Part I settled on a definition that does not idealize only the highest species of friendships (of Aristotle's typology) but one that respects a wider circle of affection. I furnished a list of attributes that the law could potentially use so that inquiring into friendship would not be a mere "know-it-when-I-see-it" affair. Think of the list in Part I.B as a proposed ten-part, nonexclusive test for determining whether a person is a friend for the purposes of the law in some hypothetical Restatement (First) of the Law of Friendship.¹⁶²

To be sure, there is good symbolic reason to keep friendship out of law and the law out of friendship. Goodrich is illustrative:

[T]he judge must recuse him or herself from judging friends, the attorney cannot properly represent or act for a cause in which he or she has an interest or amity, and affect indeed is supposed to play no part in the concatenations or elaborations of law. The order of law is predicated upon a refusal to deal with friendship and so it institutes a non-recognition of the friend¹⁶³

Indeed, keeping friendship out of law helps keep the law impartial and free from affect and eros, an obvious Western liberal good.¹⁶⁴ But the law's appropriate

162. While multifactor tests to ascertain whether a party qualifies for a legal status are common, the obvious analogy here is RESTATEMENT (SECOND) OF AGENCY § 220 (1958). The Restatement there offers a ten-part, nonexclusive test for determining if a worker is a servant or an independent contractor, from which status flows certain duties and privileges. My set of factors—with their explanations—is not as pithy as § 220, but provides more guidance in delimiting the category. Of course, more work and debate is warranted, and it may be that we need a variable concept, depending on the particular issue area in which the status of friend becomes relevant. Mine is only a starting point.

163. Goodrich, *The Immense Rumor*, *supra* note 18, at 203.

164. See *id.* at 222–23.

posture of impartiality to repel criticisms of “cronyism and nepotism”¹⁶⁵ does not justify a complete nonrecognition of the relationships of friendship in society, and it is hardly clear that the law can rid itself of cronyism without some theory of when a friendship triggers a partiality to which the law must respond (by a demand for recusal if nothing else). While Part III of this Article rebuts the case that the law is successful in any thoroughgoing campaign of “non-recognition,” this Subpart develops five more potential theoretical objections to my enterprise.

1. Keeping the Private Sphere Private

Most obviously, perhaps the law and friendship should not intermingle because we tend to think of our friendships as quintessentially voluntary and the law as quintessentially coercive.¹⁶⁶ Allowing the law to penetrate friendship in any way might threaten friendship’s core and undermine its defining characteristic. One could go further too: Friendship and keeping it private is central to our freedom;¹⁶⁷ without friendship’s privacy we might have no authentic personal relations outside the control of the state.¹⁶⁸

Indeed, according to a widely discussed reading of the thinkers of the Scottish Enlightenment (David Hume, Adam Smith, Francis Hutcheson, and Adam Ferguson),¹⁶⁹ both a healthy commercial society and friendship itself function much better when the public economic system takes no special notice of friendship.¹⁷⁰ The logic is as follows: Friendship prospers best when there is a

165. *Id.* at 229.

166. *See id.* at 223 (“Banishing friendship to the rites of passage or ceremonies of death keeps it hygienically private and squarely in the safety of ‘another context.’”); Silver, *supra* note 15, at 1476 (“[F]riendship in modern society is a quintessentially private relationship, not normatively constituted by public roles and obligations—[and] indeed often in distinction from them.”); *see also* BRAIN, *supra* note 13, at 75 (“Friendship should be ‘free,’ ‘pure,’ and based on moral obligations alone.”).

167. *See* Silver, *supra* note 15, at 1477 (“Since personal relations other than friendship are to some extent constituted by public or ascriptive statuses, friendship more fully meets the criterion of nonsubstitutability as a prototype of the personal.”).

168. This objection might be cast in terms of “commodification”: “Marx, Tönnies, and others of the anticapitalist Left hold that commodification renders personal relations alienated and morally corrupt.” *Id.* And if friendship becomes just another legal category that can be enforced with the power of the state, it risks being commodified, resulting in alienation and moral corruption. For a new and exciting collection on commodification, see *RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE* (Martha M. Ertman & Joan C. Williams eds., 2005). The classic starting point in the legal literature is, of course, Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987).

169. *See, e.g.,* Hill & McCarthy, *supra* note 141 (arguing that Adam Smith and David Hume share this view but that Adam Ferguson does not); Silver, *supra* note 15 (presenting a unified account of these thinkers without rigorously distinguishing among their individual views); Allan Silver, ‘Two Different Sorts of Commerce’—*Friendship and Strangership in Civil Society*, in *PUBLIC AND PRIVATE IN THOUGHT AND PRACTICE: PERSPECTIVES ON A GRAND DICHOTOMY* 43 (Jeff Weintraub & Krishan Kumar eds., 1997).

170. *See* Silver, *supra* note 15, at 1474.

separate sphere of public commercial transactions because such a separation helps demarcate friendship as noninstrumental. Before there was a public commercial sphere, it was more difficult to tell who was a true friend and who was being befriended for commercial gain. Once a public economic sphere emerged, however, it became easier to signal who is a true intimate and who is a mere business partner.

As applied in our current debate, one might agree with the Scots and argue that keeping friendship private helps “purify [it] by clearly distinguishing friendship from interest and founding friendship on sympathy and affection.”¹⁷¹ Keeping the market (and, by extension, the law that governs it) free from considerations of friendship serves friendship best. A market society that ignores friendship makes it more likely that we will be able to make authentic friends because we can credibly signal to them that the friendship is not fundamentally about exchange.¹⁷²

From another perspective, keeping friendship private also potentially serves the economy best at the same time. Adam Smith imagined this dynamic functioning in two ways. First, natural intimate friendship in the private sphere helps to generate sympathy and trust in society, facilitating the market economy without overriding it.¹⁷³ Second, friendship helps to establish “strangership” in the public sphere, which is useful to the economy as follows: When true friendships emerge in the private sphere, people no longer see those with whom they do not do business as enemies or competitors but as strangers with whom they can have disinterested transactions.¹⁷⁴ Strangers in commercial society are not “charged with uncertain and menacing possibilities” but are “authentically indifferent co-citizens—the sort of indifference that enables all to make contracts with all.”¹⁷⁵ Thus, private friendship is aided by the market and, in turn, aids the market’s functioning.

171. *Id.* at 1487; see also *id.* at 1480 (“The Scots celebrate the liberation of friendship from instrumental concerns made possible by the advent of commercial society.”).

172. See Adams & Allan, *supra* note 32, at 11.

173. See SMITH, *supra* note 49, at 220, 223–25; ALAN WOLFE, WHOSE KEEPER? SOCIAL SCIENCE AND MORAL OBLIGATION 29 (1989) (arguing in the tradition of Adam Smith that private friendships are very useful to commerce because the natural sympathy of friendship has the capacity to “enrich and deepen [our] moral obligations to one another”); Silver, *supra* note 15, at 1481 (describing Smith’s argument that friendship based on “natural sympathy . . . is not exclusivistic, like fictive kinship and clientage,” which are typical forms of precommercial personal solidarity,” but rather that friendship “reflects a new universalism in civil society”); *id.* at 1483–84 (“Smith applauds the advent of sympathetic personal relations not because . . . they weaken traditional or mercantile constraints on market exchanges, but because the new forms of friendship help shape a civil society free of exclusivistic relationships hostile or suspicious toward others.”).

174. See Silver, *supra* note 15, at 1482–83 (analyzing the benefits of “strangership” for Adam Smith’s theory of the market); Hill & McCarthy, *supra* note 141, at 41 (same).

175. Silver, *supra* note 15, at 1482–83.

These are serious challenges to any project that tries to get the public sphere to do more to facilitate, recognize, and promote private friendship. Such intervention into the private sphere risks unsettling the balance between private and public that allows our liberal society to function. There are, nevertheless, a few things one can say in response. In the first place, many of these arguments merely serve to highlight again the very significance of friendship to our economy and society. That only reminds us how urgent it is to protect friendship and enable it to flourish. Even if we choose to retain friendship's core as a private relationship rather than one with public recognition that carries duties and privileges, there remains good reason to give the legal system competence to recognize friendship—even if only to keep a hands-off policy to it.

One must also challenge the basic supposition that friendship is *purely* voluntarist, that friendship lays exclusively in the private sphere of personal choice.¹⁷⁶ Indeed, much of the sociological literature about friendship seeks to establish that friendship is relatively constrained by social structure and stratification¹⁷⁷: “[F]riendship is not just a voluntary or freely chosen relationship. It is one which is patterned and structured in a variety of ways by factors which can be recognised, at least to some degree, as genuinely . . . outside the individual's immediate control.”¹⁷⁸ The details of this stratification and the limitations imposed upon friendship are explored in the next two Subparts, but the central point is nevertheless important here: Fetishizing the voluntariness of friendships is misguided because structural stratification—governed by rules of state and society—predetermines many of our friendships and their concomitant commitments.

Given this sociological reality, the idea that the law should stay out of our friendships is at least naïve: The law makes possible and structures friendships, whether it does so consciously or not. Accordingly, pretending that the law has nothing to do with our friendships is not a plausible posture. As cultural environments and their enabling conditions within the law change, so do friendship patterns and processes.¹⁷⁹ And the forms of intimacy friendships display in any cultural context are no doubt affected by the law and legal categories.¹⁸⁰

Moreover, consider the family: It is something we tend to think of as a quintessentially private relation—indeed, it constitutes the very core of the

176. As Liz Spencer and Ray Pahl show in their new book on friendship, we too easily assume friendship to be a chosen relationship and family to be a given one. We actually can view friends as given and family as chosen too. See SPENCER & PAHL, *supra* note 15, at chs. 2, 5 (exploring this thesis).

177. See ALLAN, FRIENDSHIP, *supra* note 15, at 8–9. See generally ROSEMARY BLIESZNER & REBECCA G. ADAMS, ADULT FRIENDSHIP (1992).

178. ALLAN, FRIENDSHIP, *supra* note 15, at 152; see also *id.* at 152–53 (arguing that “space” for sociability patterns friendship and is carved by socially constructed factors).

179. See Allan, *supra* note 61, at 72.

180. See, e.g., O'Connor, *supra* note 61, at 128–29.

private sphere. Yet, one does not need elaborate citation to know that it is heavily regulated by the state. Despite inhabiting the private sphere, the law takes notice of the family, confers legal recognition upon it (marriage is a legal union), and erects a series of duties and privileges that flow from familial status.¹⁸¹ From this example, we might conclude that legal recognition hardly invades and demeans the private sphere; rather, it can often help protect it from infringement. In any case, legal protection and recognition surely does not preclude true friendship or love.¹⁸² Arthur Stinchcombe summarized a similar objection to the one I have outlined here as follows: "The notion is that the more formal, impersonal, technical [and legal] social relations there are in a group, the less intimacy, charity, and mutual faith there is likely to be." His response: "There is . . . not a shred of evidence for this proposition, and a good deal of evidence against it."¹⁸³

Finally, as for the theory of friendship and economy Allan Silver and others find in the thinkers of the Scottish Enlightenment, Robert Lane offers reasons to disagree. He forcefully argues that a modern commercial (and capitalist) society, one insensitive to the role of the friend, will not ultimately promote personal relations.¹⁸⁴ We are living in an age of decline for close friendships: We have fewer intimate friends and weaker social ties more generally.¹⁸⁵ Lane believes that the free market has a "destructive influence on friendship . . . through elevating instrumentalist and materialist values over social values, by eroding communities and neighborhoods, and by intermittently increasing the demand for overtime labor."¹⁸⁶ He finds some evidence that "markets, themselves, are an inherent cause of social isolation," and that "the increased impersonality of shopping and the increased use of individually, as contrasted to socially, consumed goods have played modest roles in the loss of a therapeutic community of friends."¹⁸⁷ This decline leads to a culture of depression, and market inefficiencies follow.¹⁸⁸

181. For a critique of some of the privileges family members get in the criminal law context, see Markel, Collins & Leib, *supra* note 6.

182. See BRAIN, *supra* note 13, at 89 ("As in marriage, which is also superficially a practical and businesslike affair, the signing of a contract and the existence of sanctions do not preclude love.").

183. Arthur L. Stinchcombe, *Social Structure and Organizations*, in HANDBOOK OF ORGANIZATIONS 142, 185 (James G. March ed., 1965).

184. Lane, *supra* note 126, at 533 (arguing that Silver's thesis—that commercial society promotes personal relations—is "inoperative in modern societies").

185. See Portillo, *supra* note 134 ("Americans, who shocked pollsters in 1985 when they said they had only three close friends, today say they have just two. And the number who say they've no one to discuss important matters with has doubled to 1 in 4 . . .").

186. Lane, *supra* note 126, at 539 (identifying television-watching as a source of such degeneration).

187. *Id.* at 541–42.

188. Consider also Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 578–79:

Some theorists have even advanced a bold hypothesis of a specific historical causal relationship between the fantasy world of political-legal ideological discourse about contracts and the

One way to fix the decline might be for our legal system to find some way to have our public sphere give friendship its due. This could lead to the repair of both friendship networks and the economic networks that can be sustained by them. Lane knows the agenda is a tall order: “[P]eople are chary of governmental intrusion in their most private lives.”¹⁸⁹ But he has a strategy: “[L]est governments become invasive and paternalistic, the authorities . . . have to focus on creating a ‘scaffolding’ within which individuals [can] find new opportunities for the companionship and . . . solidarity that [could] genuinely increase their sense of well-being.”¹⁹⁰ This project aims to begin the legal scaffolding of friendship promotion and the well-being it generates.

2. Gender Dynamics in Friendship

Some may be opposed to the state’s subsidization or endorsement of friendship for the same reason some oppose the state’s deference to and substantial protection of the family: It is a potentially patriarchal and male-dominated institution with a history of gender hierarchy.¹⁹¹ Many who have studied friendship patterns confirm that men and women have different kinds of friendships,¹⁹² and the friendship literature in many disciplines clearly use male friendship as a model.¹⁹³ Some even go as far as suggesting (falsely, in my view) that “there is

social world of contracting; they contend that encouraging people to deal with one another as strangers progressively erodes the underlying relations of solidarity, reciprocity and trust upon which capitalist economies essentially depend.

If Gordon is right about this view (one he credits to the venerable economists Joseph Schumpeter and Albert O. Hirschman), there may be good economic grounds for developing a legal framework to support friendships in society. See *id.* at 578 n.30.

189. Lane, *supra* note 126, at 544.

190. *Id.*

191. For one argument that the criminal law should be more suspicious of protecting the family because of gender hierarchies that get reinforced in doing so, see Markel, Collins & Leib, *supra* note 6.

192. See ALLAN, FRIENDSHIP, *supra* note 15, at 40–42 (suggesting that women have less time for friendship than men); *id.* at 67 (highlighting evidence that men have more friends and that women have closer friends); *id.* at 69 (highlighting newer evidence that men and women have the same number of friends, some evidence that women have more friends, and evidence that women spend more time with their friends); *id.* at 72 (suggesting that men sometimes enforce distance in friendships to project strength); *id.* at 73 (suggesting that male friendships are based more around sociability than intimacy); ALLAN, KINSHIP, *supra* note 15, at 93 (claiming that women have face-to-face friendships and men have side-by-side friendships); Olicker, *supra* note 32, at 19 (claiming that men and women have very different friendship patterns); *id.* at 29 (claiming that women have deeper friendships than men).

193. See ALLAN, KINSHIP, *supra* note 15, at 92 (claiming that friendship is gendered); *id.* at 65 (arguing that secondary names for friendship (buddy, pal, mate) are male-centered and all the great friendships from literature are male-male); BRAIN, *supra* note 13, at 50–51 (discussing Montaigne, the “arch-propagandist of male friendship,” who “is emphatic about the impossibility of friendship between men and women”); *id.* at 51 (“Friends are generally of the same sex.” (quoting GEORGE SANTAYANA, *LITTLE ESSAYS* (1920))); DERRIDA, *supra* note 1, at 278–79 (suggesting that the

no cultural idea of friendship between women, and the cultural and social space for women's friendships is limited."¹⁹⁴ Finally, it is not just high school students who query whether guys and girls can be friends: Serious researchers of the social phenomenon question the viability of cross-gender friendship¹⁹⁵ and investigate which kinds of friendships serve as stronger social ties. It is a robust finding, in any event, that friends tend to be of the same gender.¹⁹⁶

Perhaps it is hard, in practical terms, to see how the support of friendship contributes to patriarchy. Even if friendship's history is one that is dominated by male friendships, its benefits should accrue to all; and surely in the current age, friendship is an equal-opportunity institution. However, there is at least one way that it is imaginable for the state's endorsement or protection of friendship to reinforce gender hierarchy: To the extent the friendship gives one access to information, knowledge, networks, and clubs,¹⁹⁷ supporting friendship may contribute to helping men retain power over certain domains of society.

In the final analysis, I do not think this objection has power in condemning the enterprise of getting our law and policies to take seriously the support, facilitation, and maintenance of friendship. Although it undoubtedly remains true that many friendships occur within the same gender, that our cultural heritage displays more prominent examples of male-male friendship, and that male friendships are used to pass along "secret handshakes" to help other men maintain positions of power in our society, it is just as surely the case that the battle for gender equality can be fought elsewhere. Any contribution of friendship to patriarchy can be countered in other ways without needing to dispense with the protection of the institution itself.¹⁹⁸

"ethico-politico-philosophical discourses on friendship" have excluded friendships between women and between men and women); PAHL, *supra* note 15, at 122–24 (discussing the purported "inferiority" of female friendships and "the patriarchy's" role in promoting such a vision); Devere, *supra* note 73, at 153 (discussing Jacques Derrida's take).

194. O'Connor, *supra* note 61, at 118.

195. See ALLAN, FRIENDSHIP, *supra* note 15, at 11 (specifically isolating cross-gender friendships as "of special interest" because they "contravene the norm" of friends being social equals); *id.* at 82 (noting, in a bit of heterocentrism, that it is rare to have straightforward cross-gender friendships without sexual interest because the "elements of sexuality often impinge on cross-gender sociability at the outset"). The locus classicus here is, obviously, WHEN HARRY MET SALLY (Castle Rock Entertainment 1989).

196. See ALLAN, FRIENDSHIP, *supra* note 15, at 23 ("[F]riends . . . tend to . . . be of the same gender."); Adams, *supra* note 39, at 173 (identifying the finding that friends tend to share gender as one of the most repeated findings in friendship literature).

197. See O'Connor, *supra* note 61, at 123.

198. Anyone who is reading my work carefully would probably realize that I am far less sanguine about fighting for gender equality "elsewhere" when confronted with the special protection the family receives in our criminal law. See Markel, Collins & Leib, *supra* note 6 (arguing that the family's historical role in contributing to the domination of women recommends against protecting family privacy in the criminal justice context). Still, as I make clear there (with my coauthors),

There are a few other things to say on the matter. First, there is very recent evidence that suggests that women are closing the gap and have as many non-kin confidants as men.¹⁹⁹ With friendship equality, women can similarly help one another hold open the door of opportunity. Second, if the law recognized the status of friend in the manner operationalized in Part I, it could contribute to the gender neutralization of friendship; nothing in the operationalized concept is gender specific (though I concede that its emphasis on equality may give same-sex friendships an advantage). Finally, just as with the institutions of family and marriage, keeping the law out of the private sphere may do more to replicate patterns of domination within the institution;²⁰⁰ interposing the law within friendship could further help break the cycle of male domination by disfavoring secret-handshake male friendships. Once the law adopts a working conception of friendship, it can self-consciously exclude the sort of friendships that do little else but serve the gender hierarchy. Refusing to allow the law into the private sphere of marriage ultimately buttressed male domination; the law's interposition into marriage has helped to upset the gender hierarchy promoted by keeping the private private.²⁰¹

there are other reasons that counsel against protection of the family in the criminal law context—and the very reason the criminal law sought to protect families was, in many cases in the first instance, the protection of the gender hierarchy. Here, the protection of friendship would be accomplished in spite of an attenuated endorsement of gender hierarchy, not because of it.

199. See McPherson et al., *supra* note 135, at 362. Yet, sadly, “the equity is being achieved by men’s *shrinking* interconnection with non-kin confidants rather than by women’s greater connection to the world outside the family.” *Id.*

200. For works on the theme of the law’s carving out of the family and protecting male domination, see generally ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 17–33 (1987); Goodrich, *Friends in High Places*, *supra* note 18; Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000); Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321 (2003); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835–39 (1985) (discussing the “legal tradition of noninterference in the family”); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

201. Obviously, even marriage promotion itself contributes to gender inequality. Notably, as Laura Rosenbury argues, friendship recognition and promotion could help undo the contribution marriage makes to gender inequality. See generally Rosenbury, *supra* note 37. Rosenbury’s work—although quite different from mine—should help address the normative objection to my enterprise that emanates from the perspective of gender.

Rosenbury does, however, advert to a different sort of challenge to my enterprise, a challenge I will have to leave to queer theorists to validate and consider. She highlights that friendships in the gay community may take on very different characteristics from friendships in the heterosexual community. See *id.* at 10–11 (citing sources). Accordingly, it is plausible that my research agenda and the way I am carrying it out may disadvantage friendships within the gay community. That is certainly not my intention—and precisely by cordoning sex out of friendship, I am hopeful that sexual identity can be rendered irrelevant to qualify for friendship protection. Yet, Rosenbury furnishes good reason to think the strict separation of sex and friendship cannot work because the queer boundaries between friends and lovers are not distinct.

3. Race, Class, and Friendship

It is not only that most friendships remain within one gender; rather, a more general “homophily” pervades the social phenomenon. It is one of the most robust findings in the sociological friendship literature that “friends are normally of roughly the same age and class position. They also tend to share similar domestic circumstances[,] to have similar ethnic backgrounds and, where it is of social consequence, to belong to the same religion.”²⁰² Accordingly, friends arguably further entrench differences of class, race, age, religion, and ethnicity. Also, blacks are more likely than whites to have very few close friends and confidants; thus, to the extent that the law gives any privileged status to friendship, it may be preferring whites.²⁰³ Although friends must be similar on some important dimensions to sustain the friendship (as Part I suggests),²⁰⁴ their socioeconomic and racial homophily might be of greater concern for a society committed to full-scale integration and desegregation.

The differences in friendship patterns in different socioeconomic classes are widely studied.²⁰⁵ Researchers study whether intimacy is the same among working-class and middle-class people; whether only the middle and upper classes have time for friends; whether “buddies” and “mates” are different forms of friendship existing predominantly among the working class; and whether kin plays a larger role in the lives of the working class.²⁰⁶ There is at least some

Id. at 10 (citing 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)); see also SPENCER AND PAHL, *supra* note 15, at 85 (suggesting that among gay males there is no taboo about having sex with friends under certain circumstances). If this is right, more care needs to be taken with operationalizing the concept of the friend to ensure that it does not privilege heterosexuals.

202. ALLAN, FRIENDSHIP, *supra* note 15, at 23; see also ALLAN, KINSHIP, *supra* note 15, at 91 (noting that among the most replicated findings in friendship literature is that friends share gender, race, and sociodemography); Adams, *supra* note 39, at 173 (same); McPherson et al., *supra* note 135, at 361 (explaining that it is well known that social networks and friendships are homophilous) (citing Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. SOC. 415 (2001)).

203. See McPherson et al., *supra* note 135, at 370; see also *id.* at 362 (“Both blacks and other-race respondents have smaller networks of confidants than white Americans.”).

204. See SULLIVAN, *supra* note 16, at 205 (“However different they are, when they interact as friends, they do so from a position of being alike. If they did not have this similarity, the friendship could not exist.”).

205. See ALLAN, KINSHIP, *supra* note 15, at 90 (arguing that differences in friendship are especially traceable to class differences); Allan, *supra* note 61, at 73 (describing class “as a crucial variable in understanding patterns of sociability”); Yaojun Li et al., *Social Change, Friendship, and Civic Participation*, 8 SOC. RES. ONLINE (Nov. 28, 2003), <http://www.socresonline.org.uk/8/4/li.html> (reporting on recent research on cross-class friendships).

206. See, e.g., ALLAN, FRIENDSHIP, *supra* note 15, at 25 (discussing “buddies” and “mates” and their role in the class structure); Allan, *supra* note 61, at 73 (noting that kin plays a bigger role in working-class lives); *id.* at 75 (contrasting the friendship of the middle class and the “mateship” of the working class); Oliker, *supra* note 32, at 31–33 (examining whether the working class has very different—and more attenuated—friendships).

consensus among those who study the sociology of friendship that the poor and the working class are not able to form and maintain the same kinds of friendships as the upper classes, at least in part because the members of these social classes have less time for leisure and fewer resources for the gift giving and entertaining that help sustain friendships.²⁰⁷ Moreover, certain friendship-forming activities—such as clubs, gyms, team sports, neighborhood watch groups, political party work, and parent-teacher associations²⁰⁸—have lower participation rates within the disadvantaged classes.²⁰⁹

Is this an argument against the public recognition of friendship in our law? Perhaps. If one is especially interested in dismantling our class-based and racial hierarchies, it is plausible for one to resist giving friendship any special privileges in the law on account of friendship's contribution to maintaining and reproducing such hierarchies and social stratifications.²¹⁰ As Mark Granovetter urges, friendship's exclusive networks "may be one reason why poverty is self-perpetuating"²¹¹—and if you are committed to being against poverty, perhaps you should be against friendship generally and against any public recognition of the friend.

Moreover, beyond redistributive concerns, even if all one wants is an efficient marketplace, homophily may cause market distortion. Enlightenment thinkers, for example, attacked idealized notions of friendship "associated with aristocratic milieus, because these inhibited the development of efficient markets."²¹² As with the concern about gender, "old-boys" networks may contribute to the parceling of occupational and financial resources to those already in an "in group" and the diverting of opportunities to friends when they could be more efficiently allocated to others.

207. See PAHL, *supra* note 15, at 41.

208. See Feld & Carter, *supra* note 41, at 137.

209. See generally TONY BENNETT ET AL., ACCOUNTING FOR TASTES: AUSTRALIAN EVERYDAY CULTURES (1999) (examining the activity preferences of different occupational classes in Australia); Peter A. Hall, *Social Capital in Britain*, 29 BRIT. J. POL. SCI. 417 (1999) (describing how group membership affects the availability of social capital); Michael Johnston & Roger Jowell, *How Robust is British Civil Society?*, in BRITISH SOCIAL ATTITUDES, THE 18TH REPORT: PUBLIC POLICY, SOCIAL TIES 175, 190–92 (Alison Park et al. eds., 2001) (reporting that the lower classes participate with less frequency in certain social-capital-building groups).

210. See generally WENDY BOTTERO, STRATIFICATION: SOCIAL DIVISION AND INEQUALITY (2005) (discussing homophily and its relationship to social stratification).

211. Mark Granovetter, *The Strength of Weak Ties: A Network Theory Revisited*, in SOCIOLOGICAL THEORY 201, 213 (Randall Collins ed., 1983) ("This pervasive use of strong ties by the poor and insecure is a response to economic pressures . . . [But] the heavy concentration of social energy in strong ties has the impact of fragmenting communities of the poor into encapsulated networks with poor connections between these units; individuals so encapsulated may then lose some of the advantages associated with the outreach of weak ties.").

212. Silver, *supra* note 15, at 1485.

Finally, the reality and robustness of homophily may expose friendship's roots in narcissism and self-love. Since we tend to enjoy friendship only with those similar to ourselves, one might think that friendship itself is an indulgent institution where we get to lavish ourselves with self-love, projected through a similar other. This idea is not unheard of in discussions about friendship²¹³—and, indeed, Aristotle himself found the relationship of friendship and self-love noteworthy.²¹⁴ If friendship is really about self-love, perhaps it is not sensible to encourage narcissism through the legal promotion of the institution.

Ultimately, none of these objections is sufficient to deny legal protection to the status of the friend. The reproduction of racial and class-based hierarchies is undoubtedly a serious matter. But most people—irrespective of race or class—see friendship as a central good, too important to be ignored completely on account of a potential contribution to hierarchy or inefficiency. If friendship is indispensable to our form of the good life, we ought to protect it and encourage it, even if we are also simultaneously committed to combating hierarchies and maintaining market efficiency. Indeed, to the extent that the law fails to recognize friendships and continues to keep friendships immune from the law, the law actually further entrenches stratification through friendship. If the law got involved in friendship and recognized its role in our lives, the law could actually do more to encourage cross-class and cross-race friendships.²¹⁵ Although I am not sure this is the wisest of ways to promote friendship (and, accordingly, I do not address possible ways to do this in Part III), it assuredly could be done somehow if this objection must be met in a more practical fashion. At the very least, it bears noting that ignoring friendship does nothing to stop the reproduction of hierarchies that friendships accomplish.

Homophily is analogous to a similar finding in marriage patterns: “homogamy.” “*Homogamy* (marriage between individuals with similar social characteristics) is frequent” and “extends well beyond class.”²¹⁶ Indeed, “marriage and family ties are *more* [homogamous] on class, religion, race, and several other social attributes” than friendship is homophilous.²¹⁷ As Peter Blau and his colleagues observe: “Disproportionate numbers of spouses are members of the same group or stratum. Catholics tend to marry Catholics; whites, whites; persons of Greek

213. See, e.g., OUTKA, *supra* note 14, at 18–19 (discussing friendship as “self-love”); *id.* at 34–36 (considering whether friendship is such “nefarious self-love” that it is incompatible with “neighbor-regard”); PAHL, *supra* note 15, at 78.

214. ARISTOTLE, *supra* note 38, at bk. ix, ch. 8, ll. 1168b8–1169b2.

215. For example, one could imagine a legal regime that would dole out certain privileges to friends who share core demographic differences. I do not condone this approach to friendship regulation, but it could be done in certain contexts to meet the objection.

216. BOTTERO, *supra* note 210, at 167.

217. McPherson et al., *supra* note 135, at 359 (citing McPherson et al., *supra* note 202).

descent, other Greek-Americans; and members of the upper-middle class, others in the same class.”²¹⁸ Yet we do not use homogamy as a reason to condemn or ignore marriage and deny it legal privileges and duties—and homophily should not be used as an excuse to ignore friendship. Of course, the law ought to do what it can within its regulation of intimacy (whether of friendship or of marriage) not to reproduce racial and class-based hierarchies; but these intimacies are too important to be marginalized in service of diminishing the potentially pernicious forms of balkanization that these “loves of similars” can engender and sustain.

It is also relevant to note that the hold of homophily in the context of friendship may not be iron clad. Although we are undoubtedly attracted to friends who are similar to us (as measured by some important register), it may be that homophily is merely a product of a failure of social mobility in times past. Indeed, as higher education becomes more accessible to people regardless of class or race, friendships may cease to display the characteristic of homophily; higher education furnishes opportunities for class mixing and higher forms of friendship irrespective of class and race.²¹⁹ There is evidence that there are increases in the number of people who have a confidant of another race.²²⁰ And whether the growth of online friendships (where we can mask our own identity) contributes to the loosening of homophily is another area for further study.²²¹

Finally, it is not clear what to make of the connection between homophily and narcissism. Whether our potential narcissism is any business of the state is contestable. And narcissism is at least as troublesome within marriage and parenthood. Still, there may be a way to turn the narcissism objection on its head. As John M. Cooper distills Aristotle’s argument about friendship and self-love, friendship facilitates self-love and inspires confidence; friendship is

218. Peter M. Blau et al., *Intersecting Social Affiliations and Inter-marriage*, 62 SOC. FORCES 585, 600 (1984). The same homogamy is reported in more casual sexual relationships as well. See EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 268 (1994).

219. See McPherson et al., *supra* note 135, at 362 (arguing that more-highly educated people have more to talk about, which, in turn, contributes to an increase in close friends); *id.* at 368 (“Net of all other factors, increasing education sharply increases the number of discussion partners that a respondent reports.”); PAHL, *supra* note 15, at 117 (highlighting how higher education may loosen the grip of homophily).

220. See McPherson et al., *supra* note 135, at 361 (claiming that racial diversity has increased in discussion networks and in close ties).

221. There is some evidence that online friendships may be dissolving homophily’s grip on friendship, but it is too soon to say for certain. See BOASE ET AL., *supra* note 39. More, it remains unclear the extent to which we can treat online friendships as “real” friendships. See generally Mitchell Zuckoff, *The Perfect Mark: How a Massachusetts Psychotherapist Fell for a Nigerian E-mail Scam*, NEW YORKER, May 15, 2006, available at http://www.newyorker.com/fact/content/articles/060515fa_fact (detailing how easy it is to prey on the tropes of friendship and trust in order to ensnare people in scams online). Further work in this area is certainly warranted.

not ultimately about narcissism but helps us love and value ourselves.²²² On this view, homophily contributes to our own ability to value ourselves and is perhaps yet another advantage friendship confers rather than a basis for objection to its legal protection.

4. Subversive Friendships

Friends' special obligations to one another may undermine duties and responsibilities that flow to co-citizens or to the state more generally—and this may be reason for the state not to confer upon friends any special standing. The subversiveness of friendship—to state, to morality, and even to epistemology—is actually a recurring theme among those who think seriously about it. First, consider C.S. Lewis:

It is . . . easy to see why Authority frowns on Friendship. Every real Friendship is a sort of secession, even a rebellion . . . unwelcome to top people. . . . Each therefore is a pocket of potential resistance. Men who have real Friends are less easy to manage or "get at"; harder for good Authorities to correct or for bad Authorities to corrupt. . . . Friendship (as the ancients saw) can be a school of virtue; but also (as they did not see) a school of vice. . . . [T]he element of secession, of indifference or deafness (at least on some matters) to the voice of the outer world, is common to all Friendships. . . . The danger is that this partial indifference or indifference to outside opinion, justified and necessary though it is, may lead to a wholesale indifference or deafness.²²³

This account of the subversive nature of friendship is also echoed in more contemporary authors.²²⁴ The idea that the state might try to combat friendship rather than support it seems to follow from this portraiture (though families may be just as guilty as friends on this score).²²⁵

Lewis's notion has been given a more explicitly political valence by other writers on friendship. For example, E. M. Forster famously said in the late 1930s, "[I]f I had to choose between betraying my country and betraying my friends, I hope I should have the guts to betray my country."²²⁶ Montaigne also suggests

222. See Cooper, *supra* note 9, at 333.

223. LEWIS, *supra* note 14, at 94–95.

224. See PAHL, *supra* note 15, at 79, 153–54, 166.

225. The state's response to the subversiveness of the family, however, is solicitude. See generally Markel, Collins & Leib, *supra* note 6.

226. See, e.g., Lynn McFall, *Integrity*, 98 ETHICS 5, 12 n.17 (1987) (quoting E. M. Forster, *What I Believe* (1939), reprinted in E. M. FORSTER, *TWO CHEERS FOR DEMOCRACY* 68 (1951)); EPSTEIN, *supra* note 16, at 80; PAHL, *supra* note 15, at 41; SULLIVAN, *supra* note 16, at 221. Forster's original essay is available at <http://www.geocities.com/dspichtinger/otexts/believe.html>.

that the obligations to true friends could dissolve all other obligations to the city;²²⁷ he writes of a paradigmatic friendship that the parties were “friends more than citizens, friends more than friends or enemies of their country.”²²⁸ This theme is also prevalent in Allan Bloom’s treatment of friendship: “[Friends] are more dedicated to each other than to the polity, the goals of which they may not share.”²²⁹ Bloom continues: “The pair of friends is a community of its own, which may or may not be in accord with the body of citizens as a whole. Friendship helps to explain what is wanted in politics but also leads to an awareness that politics cannot arrive at that desired end.”²³⁰ States may reject friends because friends do not share their goals and because friends can expose the impoverished nature of mere civic bonds.²³¹ More concretely, “friendship frequently constitutes the basis for the creation of underground organizations and antigovernmental activities.”²³² And friends, precisely owing to their high level of trust, are candidates for the bonds that spur criminality.²³³

Apart from challenges to the political establishment, friendship also poses potential ethical problems. For example, “Christian theology has long been concerned with the problem of ‘preferential friendship’—friendship offered to one or some but not others or to all—in light of the Christian obligation to love all humanity.”²³⁴ Indeed, Søren Kierkegaard thought that friendship can too easily lead to despair and jealousy and threaten our moral lives consequently.²³⁵ Others have suggested that friendship can lead to “aristocratic isolation,”²³⁶ “elitism,”²³⁷ or “corporate superiority”²³⁸ that is incompatible with Christian commands.

227. See MONTAIGNE, *supra* note 1, at 142. It is worth noting, however, that Montaigne thought that the inherent goodness of friends would keep them in check. Presumably, Aristotle and La Boétie also have this rejoinder since they insist that friends are always virtuous.

228. *Id.* at 140.

229. BLOOM, *supra* note 12, at 413.

230. *Id.* Recall that I am not committed to friendships always coming in pairs. See *supra* note 50.

231. I make this point in Leib, *supra* note 1, at 180–81.

232. VLADIMIR SHLAPENTOKH, PUBLIC AND PRIVATE LIFE OF THE SOVIET PEOPLE: CHANGING VALUES IN POST-STALIN RUSSIA 172 (1989). As Pahl notes, in the former Soviet Union, for example, friendship was especially critical in helping people “beat[] the system.” PAHL, *supra* note 15, at 154 (quoting SHLAPENTOKH, *supra*, at 174).

233. See SHLAPENTOKH, *supra* note 232, at 203–04 (discussing the role of close friendship ties in crime and the mafia).

234. Silver, *supra* note 15, at 1488. The problem of friendship’s preferential treatment in light of the Bible’s command of *agape* (in short, “Thou shalt love thy neighbor as thyself,” Matthew 22:39) is discussed in OUTKA, *supra* note 14, at 281–85, and SULLIVAN, *supra* note 16, at 240–51.

235. See SØREN KIERKEGAARD, WORKS OF LOVE 78 (Howard & Edna Hong trans., 1962). Kierkegaard also takes issue with friendship because he thinks preferential love is reducible to self-love. See *id.* at 65; OUTKA, *supra* note 14, at 18 & n.19.

236. OUTKA, *supra* note 14, at 282–83 (citing PAUL TILICH, LOVE, POWER, AND JUSTICE 119 (1954)).

237. *Id.* at 282.

238. LEWIS, *supra* note 14, at 99.

As Epstein puts it, "The problem is that friendship is particular and exclusionary; Christianity, in its intention at least, is universal and all embracing."²³⁹

Although the state and our laws may not need to concern themselves with the particulars of Christian ethics, a number of secular moralities are also challenged by friendship's partiality. Indeed, contemporary ethical theorists expend substantial energy trying to ascertain whether "associative duties"²⁴⁰—special ethical duties that flow to friends and seem to arise from the friendship relation—are reconcilable with general ethical commands of equal treatment for all. As Niko Kolodny puts the problem, the worry about "differential treatment"—that I might give prior and more extensive treatment to my friends rather than to strangers who may be in equal or greater need—stems from a concern about "distributive effects" that our associates will gain more than they deserve.²⁴¹

The "problem of friendship" obtains especially, it seems, in ethical systems that issue universalized commands that encompass the way we must act to all others (or all other compatriots),²⁴² such as Kantianism,²⁴³ utilitarianism, consequentialism, welfare liberalism, and other systems that demand forms of impartiality.²⁴⁴ And even if friendship does not challenge the entirety of an ethical system (because we have been able to construct successfully a system that allows us to prefer our friends), friendship can lead us into what some philosophers call "moral danger": By lying for friends, covering for them,

239. EPSTEIN, *supra* note 16, at 57; *see also id.* at 62.

240. "Associative duties" are at the center of much of Sam Scheffler's recent work. *See* SCHEFFLER, *supra* note 21, at 4–5, 49–65, 67–70, 72–76, 78–79.

241. *See* Niko Kolodny, *Do Associative Duties Matter?*, 10 J. POL. PHIL. 250, 250 (2002). The "distributive objection" has been developed by Scheffler in Samuel Scheffler, *The Conflict Between Justice and Responsibility*, in GLOBAL JUSTICE 86 (Ian Shapiro & Lea Brilmayer eds., 1999).

242. For more on the special duties owed to compatriots, *see* Andrew Mason, *Special Obligations to Compatriots*, 107 ETHICS 427 (1997), and Christopher Heath Wellman, *Friends, Compatriots and Special Political Obligations*, 29 POL. THEORY 217 (2001).

243. Here I mean the political philosophy with roots in Immanuel Kant's work. Kant himself had some rather unusual things to say about how friendship dovetailed with his own thinking in IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 261–64 (Mary Gregor trans., 1991) (1797).

244. For discussions of friendship that see it as an objection to theories that demand broad impartiality, *see* JOLLIMORE, *supra* note 9, at 13 (focusing on friendship's challenge to consequentialism); Cocking & Oakley, *supra* note 9 (same); Kapur, *supra* note 9 (same); Stroud, *supra* note 9, at 498 (noting that many ethical philosophers are considering "friendship in connection with debates over partiality and impartiality in ethics"); John Cottingham, *Partiality, Favouritism, and Morality*, 36 PHIL. Q. 357 (1986) (focusing on the favoritism afforded friends, and the moral consequences that may flow therefrom); Baron, *supra* note 9 (same); Susan Wolf, *Morality and Partiality*, 6 PHIL. PERSP. 243 (1992) (same). Some consequentialists have developed rebuttals. *See, e.g.,* SHELLY KAGAN, *THE LIMITS OF MORALITY* 367–68 (1989) (denying that love and friendship require favoritism); Kolodny, *supra* note 241, at 250–51 (arguing that associative duties are no problem, as long as there is also a global duty to take care of others once you are done helping your associates).

helping them escape capture by the authorities, or helping them violate substantial moral violations, we implicate ourselves in their misdeeds.²⁴⁵

Finally, some see friendship as a challenge not only to morality and the demands of impartiality, but as a challenge to our reigning epistemologies that require us to believe only that for which credible objective evidence can be marshaled. Friendship causes biases in how we hear stories about our friends and can threaten our epistemological system accordingly.²⁴⁶

Such is the case for friendship's subversiveness from a variety of perspectives. Although I certainly cannot undertake extended engagement with all of the claims I articulate here, none firmly makes the case against promoting the legal status of friend within the law.

In the first place, the authorities—threatened as they may feel by particular friendships—ultimately have the power of coercion. Any friendship that leads to true rebellion can be stopped in its tracks; cells that are brewing serious trouble can themselves be subverted through the mechanisms of the criminal law. More importantly, it is the hallmark of a free society that members are entitled to develop their capacities and identities with their intimates, so long as no harm comes to others;²⁴⁷ this may be at the core of our purported “freedom of association,” with roots in the First Amendment.²⁴⁸ Subversive to public authority as friends have the capacity to become, they remain central elements in a full and flourishing life (even if we occasionally tell little white lies and help cover for friends who lie to their parents, for example). Refusing friends any status in the law seems like a severe response to an attenuated possibility of threat to state and society. Friends who are friends to commit crimes and wreak havoc need not be respected in their status; a wholesale legal ban on recognizing friendship seems like an overinclusive and draconian response to a very low-level threat that can be managed with other techniques.²⁴⁹

245. See Cocking & Kennett, *supra* note 105 (focusing on the moral dangers presented by loyalty to friends who ask us to violate moral commands); *id.* at 287 (suggesting that one can be a good friend by lying to others). It is worth noting here that family members are exempted from prosecution for harboring fugitive family members in fourteen states; friends never get this benefit. I discuss and cite these exemptions (with my coauthors) in Markel, Collins & Leib, *supra* note 6.

246. See Keller, *supra* note 9 (addressing the challenge of friendship to epistemological partiality); Stroud, *supra* note 9 (same).

247. See SHLAPENTOKH, *supra* note 232, at 172 (Soviet totalitarianism had an “ideological opposition to friendship. . . . The leadership in [totalitarian] societies prefers to have an individual completely isolated from other people and thus more at the mercy of the authorities.”).

248. See U.S. CONST. amend. I.

249. Indeed, the prevalence of these kinds of friendships may help us with the second-generation questions about what sorts of legal protections for friends are appropriate. If the law discovers too many friends that are co-conspirators, that will have effects on how the law treats friends in certain areas of the criminal law—but it is no argument that the law should ignore friendship entirely.

Indeed, friendship is important to develop *precisely because* it furnishes freedom from the state. The citizens of the Soviet Union were said to treat friendships as precious in large measure because they helped develop personal integrity and dignity when the state otherwise could not.²⁵⁰ A free society like ours should welcome the dignity that can be conferred through friendship, not fear it. As Lewis understood well: “[I]f our masters . . . ever succeed in producing a world where all are [c]ompanions and none are [f]riends, they will have removed certain dangers, [but] will also have taken from us what is almost our strongest safeguard against complete servitude.”²⁵¹ And as Jason Scorza recently argued, “[T]he proliferation of personal friendships . . . serves as an independent check on the possible civic corruption of the state as a whole.”²⁵² Of course, there is always the danger that friends in high places will only help one another out—and nepotism and favoritism still need policing—but this is simply another area where friendship potentially needs to be regulated, not ignored.

To the extent that the bonds of friendship will expose civic bonds to be thin, it can hardly be the place of a free society to ban friendship to reinforce patriotism. Such bans are the sort of actions undertaken by totalitarian societies. The ties modern liberal states create and need for regime maintenance need not be especially strong or tight to perform their functions. No one seriously considers policies and laws that would aggressively subvert familial ties for the potential role the family plays in exposing mere civic ties to be weak. Neither should we consider having the law undermine the importance of friendship to prop up the co-citizen relationship.

It does not seem especially pressing to worry about Christian ethics and whether our public policies and public laws are consistent with Christian commands. And this is probably not the best venue to try to tackle the interesting ethical challenges philosophers have developed. Still, as Peter Railton argues:

[W]e must recognize that . . . friendships . . . are among the most important contributors to whatever it is that makes life worthwhile; any moral theory deserving serious consideration must itself give them serious consideration. . . . If we were to find that adopting a particular morality led to irrec-
oncilable conflict with central types of human well being . . . then this
surely would give us good reason to doubt its claims.²⁵³

250. See PAHL, *supra* note 15, at 153–54 (drawing from SHLAPENTOKH, *supra* note 232, 170–77).

251. LEWIS, *supra* note 14, at 94.

252. Scorza, *supra* note 11, at 89 (citing PAUL J. WADDELL, FRIENDSHIP AND THE MORAL LIFE 49, 61–68 (1989)).

253. Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, in CONSEQUENTIALISM AND ITS CRITICS 93, 98–99 (Samuel Scheffler ed., 1988). Railton seeks to preserve a consequentialist ethical theory even though consequentialism is the theory most susceptible to the challenge from friendship. For an argument that Railton’s effort ultimately fails, see Wilcox, *supra* note 9.

This general theme is consistent among the philosophers who see friendship as a challenge to this or that ethical theory: The partiality of friendship may be problematic if it bleeds into territories where we have a strong requirement of impartiality. It is likely the case that we have no thoroughgoing requirement to be impartial all the time in every context. To be sure, we must be careful not to let the partiality of friendship overwhelm our general duties, but the idea that the friend is not a morally relevant category itself may be seriously misguided.²⁵⁴ We can say with certainty that we should not allow a judge to prefer (or even sit in judgment over) her friends because there is, in the judicial context, an especially stringent duty of impartiality. We can also say with certainty that corporate boards of directors charged with protecting shareholder interests should not use corporate assets to benefit directors' friends. Even a law committed to encouraging friendship could not admit or tolerate such forms of improper partiality.²⁵⁵ But the idea that I have to share my licorice with everyone impartially borders on the laughable; preferential treatment for my friends in licorice distribution is not morally problematic. Again here, a sophisticated regulation of friendship can help distinguish when friendship is problematic to the state's core and appropriate commitments, and when it is not.

In any case, for the most part, philosophers do not present friendship as a challenge to morality to argue in earnest that we ought not to have friends. Rather, through inquiring about friendship's relationship to morality, they aim to refine our understanding of what makes an ethical system plausible and to refine conceptions of ideal friendship. Same with Simon Keller's and Sarah Stroud's

254. This theme is nicely developed with sophistication in Baron, *supra* note 9.

255. Yet, even the latter limitation of friendship promotion requires a clearer law of friendship. Take, for example, the recent Martha Stewart cases. In *Beam v. Stewart*, 845 A.2d 1040 (Del. 2004), Delaware's high court announced that friendship "may influence the demand futility inquiry." *Id.* at 1050. In short, in a derivative action, shareholders that wish to sue members of their boards of directors must present a demand upon directors as a prerequisite to litigation. The demand requirement, however, is not necessary if the board members can be shown to lack "independence," for the demand would be "futile." As *Beam* holds, although independence will be presumed, "to render a director unable to consider demand, a relationship must be of a bias producing nature." *Id.* Although the court held that the friendships between Martha Stewart and her colleagues on the board of directors at Martha Stewart Living Omnimedia did not rise to this level, the court left open the possibility that certain friendships—if properly pleaded and described in detail—could be "[s]ufficient to raise a reasonable doubt about a director's independence." *Id.* No further standards about the sort of friendships that might establish demand futility have been forthcoming, but this is yet another fertile area for investigation into how the law regulates and renders relevant the friendships in our lives.

Needless to say, without any standards, courts have not been especially solicitous of shareholders who try to use friendships to prove demand futility. See, e.g., *Caviness v. Evans*, 229 F.R.D. 354 (D. Mass. 2005); *Fagin v. Gilmartin*, No. 03-2631, 2004 U.S. Dist. LEXIS 28916 (D.N.J. Aug. 20, 2004); *Khanna v. McMinn*, No. 20545-NC, 2006 Del. Ch. LEXIS 86 (Del. Ch. May 9, 2006); *Benihana of Tokyo, Inc. v. Benihana, Inc.*, 891 A.2d 150 (Del. Ch. 2005).

Thanks to Matt Bodie and Arthur Pinto for discussion on these points.

recent challenges to reigning theories of epistemology from the perspective of friendship's "epistemic partiality": The idea is not to condemn friendship but to refine our epistemology. Accordingly, we should not utilize these potential "short-comings" of friendship to argue against having friends and having the state support and facilitate those relationships central to our lives. Indeed, ignoring them completely is a sure way to trigger high legal-compliance costs and to maintain a polity with little affective resonance among citizens.²⁵⁶

In any case, whatever moral challenges friendship presents, the state's commitment to equal regard could be manifested in multiple ways (and ways that still protect friendships). There is much more the state could be doing to bring about the equal regard of all citizens, and friendship's distributional effects must be seen as a relatively minor contribution to social and economic inequality. Families undoubtedly also challenge the moral command of equal regard, and they also potentially contribute to economic inequality through inheritance laws. Yet the law clearly confers the family with the respect of status,²⁵⁷ and friends potentially deserve similar respect.

5. Why Focus on Friendship's Failure?

As a final effort to explore why reasonable people may oppose having our law recognize the status of friend, I have to assume certain facts not in evidence, as it were. It is all well and good to consider at a very high level of abstraction whether the law should "recognize," "respect," "support," "facilitate," or "promote" the status of the friend as I have done thus far, but it is hard to know quite what that might mean without Part III to come, which will introduce more specific ways the law could take notice of friendship. Nevertheless, here I am trying to understand core objections that arise before embarking on that more nuanced effort to put flesh on the idea of what a law that recognizes friendship would look like.

In that preliminary spirit, this objection is, in a sense, a variant of the first because it centers on friendship's voluntary nature. One might argue that one simply does not need the law to protect friendship because true friends protect themselves. The law would seemingly step in only when a friendship

256. See Pitman B. Potter, *Guanxi and the PRC Legal System: From Contradiction to Complementarity*, in *SOCIAL CONNECTIONS IN CHINA: INSTITUTIONS, CULTURE, AND THE CHANGING NATURE OF GUANXI* 179 (Thomas Gold et al. eds., 2002) (detailing how China's legal system must take account of informal social networks to maintain compliance and affective resonance); Kahan, *supra* note 150, at 369.

257. It does this in the context of default rules for wills and support requirements, for example: "[I]f a man dies intestate, his assets would go not to the dear friend or friends who may have taken good care of him for years right up to the end, but instead quite possibly to a distant relative whom the deceased may never have met." EPSTEIN, *supra* note 16, at 64. And, of course, we cannot wholly disinherit our spouses.

has dissolved or when there was no friendship worth respect in the first place.²⁵⁸ In such cases, it would be hard to justify enforcing friendship's norms upon parties who do not want to be bound by them; as many suggest, the norms of friendship are often defined in contradistinction to nonvoluntary norms that the law imposes. If friendship is to retain what is most special about its internal norm structure, it cannot be imposed upon nonconsenting parties.

There are a few things to be said in response. First, one need not see the law as a mere tool to repair broken relationships. Perhaps the legal regimes of contracts, torts, and property—when looked at wholly *ex post*—present to us this way. But if viewed through their capacity to incentivize behavior in the future—traditionally understood as *ex ante* reasoning—there is much the law can do to support and facilitate friendship through the adjudication and administration of cases between litigants who have previously been friends. We can and should protect the invocation of friendship and the trust it entails so that people who try to trade or prey on the trope in the future will be deterred. Moreover, as Aristotle understood, dissolved friendships still ought to (and did, according to him) get some special treatment on account of friendship past.²⁵⁹ It is natural to think that the category of “ex-friend” also carries with it a status worthy of recognition and may be relevant to ascertaining appropriate legal remedies as well.²⁶⁰

That the law is not a mere tool of repair also coheres with a certain perspective on friendship that is rooted in Jacques Derrida's work: Perhaps one can declare a friendship to be real only upon death. As Goodrich (deeply indebted to Derrida) puts it, “[A] friend is only irrefragably a friend once dead and hence incapable of betraying intimacies or changing character or opinion.”²⁶¹ Goodrich

258. Of course, some might argue that if parties try to resolve their disputes through litigation, that fact alone is evidence that the parties were never friends in the first place. To be sure, one of the affirmative arguments for supporting friendship is the resources it provides in averting litigation. See Potter, *supra* note 256, at 184 (arguing that informal social networks help resolve disputes, averting formal legal action). Nevertheless, any skim of the state and federal reporters should make it clear that ex-friends often end up in court; indeed, the dispute can be aggravated by friendship precisely because friends expect more of one another and feel more betrayed by not being able to reach amicable agreements outside the legal system. I perform such a survey *infra* Part III and find many cases where friends (or ex-friends) end up in court.

259. ARISTOTLE, *supra* note 38, at bk. ix, ch. 4, ll. 1165b35–b37.

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. See ALLAN, KINSHIP, *supra* note 15, at 95.

261. Goodrich, *The Immense Rumor*, *supra* note 18, at 222; see also *id.* (“Derrida affirms at the end of his treatise that ‘friendship could not have been declared during the lifetime of the friend . . . It is thanks to death that friendship can be declared. Never before, never otherwise.’” (quoting DERRIDA, *supra* note 1, at 302)).

suggests that the conclusion that “present friendship is always failing, imperfect, and unsaid” leads to the law’s “non-exposure” and nonendorsement of friendship.²⁶² Yet, one can see this feature of friendship as recommending a different approach: Friendship’s incompleteness is one reason why the law *can* and *should* intervene. Rather than seeing the law as interposing in a broken friendship that was, the law can treat parties as incomplete friends in the process of becoming. Thus, unlike the posture that the law takes in divorce—a place where the law clearly steps in only upon rupture—within friendship, reconciliation could be a presumptive goal.

Finally—and more concretely and practically—the law can do its work outside the context of case adjudication altogether. There are many ways that a policy program of supporting friendship could operate: We could offer tax breaks or deductions for “friendship expenditures”; we could allow “loss of society” damages to friends of those who die from tortious conduct;²⁶³ we could establish a “Friends Medical Leave Act” to allow friends to leave work to take care of one another during sickness;²⁶⁴ we could allow friends to sue on one another’s behalf and furnish them with standing; we could give prisoners rights to see their friends (as we do);²⁶⁵ we could presume to give friends the legal right to make medical decisions on our behalf (without a contract giving them that right);²⁶⁶ and we

262. *Id.* at 226.

263. The *Beyond Conjugality* report recommends this approach to respecting nonconjugal friendships. BEYOND CONJUGALITY, *supra* note 34, at 37–40.

264. The same report recommends this option as well. *See id.* at 40.

265. *See* Fed. Bureau of Prisons, U.S. Dep’t of Justice, Inmate Discipline and Special Housing Units, Program Statement 5270.07, § 541.12(5) (Dec. 29, 1987) (“[Inmates] have the right to visit and correspond with family members, and friends.”).

266. Florida, for example, furnishes the “close personal friend” with standing to make end-of-life decisions. In the absence of an advance directive, end-of-life health care decisions may be made by a close friend—although priority of the friend’s wishes is subordinated to the preferences of a judicially appointed guardian, a spouse, an adult child, a parent, a sibling, and close relatives. *See* FLA. STAT. ANN. § 765.401(1)(a)–(g) (West 2005). Practically, a friend will almost never get the right to make a decision given the low priority friendship receives by statute. But, at least in theory, all the friend would need to do is meet the statutory definition of “close personal friend”:

“Close personal friend” means any person 18 years of age or older who has exhibited special care and concern for the patient, and who presents an affidavit to the health care facility or to the attending or treating physician stating that he or she is a friend of the patient; is willing and able to become involved in the patient’s health care; and has maintained such regular contact with the patient so as to be familiar with the patient’s activities, health, and religious or moral beliefs.

Id. § 765.101(3). And you thought the friend couldn’t be defined by the law!

New York has adopted a very similar approach to Florida’s. *See* N.Y. PUB. HEALTH LAW § 2961(5) (McKinney 2002) (defining “close friend”); *id.* § 2965(2)(a)(i)–(vi) (prioritizing potential surrogates if no specified surrogate decisionmaker is available, with the friend having the lowest priority). And many states, of course, allow citizens to appoint a surrogate of their choosing (whether a family member or a friend) to make medical decisions in case of incapacity. *See generally* ABA Comm’n on

could establish legal rituals to solidify friendships just as we solemnize the status of marriage and citizenship—our other associative duties—through public oaths and legal documents.²⁶⁷ However we judge the merits of these particular ideas (and

Legal Problems of the Elderly, *Citations of State Health Care Decisions Legislation*, BIOETHICS BULL., Winter/Spring 1997, at 23 (listing living will and healthcare power of attorney statutes).

I thank Mary Coombs for drawing my attention to Florida's interesting effort to give the friend statutory recognition and definition.

267. The ritualization and institutionalization of friendship is something considered by ALLAN, FRIENDSHIP, *supra* note 15, at 4 ("There are no rituals associated with [friendship] nor any specifically public affirmation of the solidarity that exists between those who are friends."), and BRAIN, *supra* note 13, at 75 ("Unlike most societies, we have no means of embellishing friendship with ritual or pact, and except in the children's playground it is not even allowed an exchange of vows."). Brain, in particular, urges more ceremony surrounding friendships. See *id.* at 106–07.

Such ceremonies could have a potentially salutary effect on the law's trying to perform the difficult task of assessing who counts as a friend. For example, there is a German custom—*Brüderschaft trinken* (literally, "to drink brotherhood")—in which two male friends decide to use a more informal mode of addressing each other, going from the *Sie-Sie* or the *Sie-Du* relationship (formal) to the *Du-Du* (informal). They self-consciously share a drink while bringing each other close (often, interlocking arms) to signify the change in the mode of address. This ceremony could help to signal to the law that parties, in fact, consider one another friends. Although this tradition was once reserved for men, the contemporary instantiation of the practice seems to include women as well.

For more on this very interesting friendship ceremony (that seemingly aims to make friendship ties more like a kinship tie ("brotherhood")), see Email from Markus Dubber to Ethan J. Leib (Jan. 13, 2005) (on file with author), and Email from Christopher C. King to Ethan J. Leib (July 12, 2006) (on file with author) (suggesting that the ceremony may have some "evidentiary importance in labor law"). Little has been written in English about the ceremony, though it is mentioned in Florian Znaniecki, *The Dynamics of Social Relations*, 17 SOCIOLOGY 299, 301 (1954), and appears in LEON URIS, *EXODUS* (1958), and PATTON (20th Century Fox 1970). Thanks to Jeff Lipshaw for the leads on sources in American popular culture. Of course, "elevating" friendship to brotherhoods and sisterhoods is the stuff of, *inter alia*, college fraternities and sororities.

David Chambers has proposed that certain kinds of friends be allowed to register with the government as "designated friends." Here is how he describes his proposal:

[C]ouples would come to a government office and register as "designated friends." The form for registering would tell them that by doing so they are accepting a set of mutual responsibilities. They are empowered to make and undertake the obligation to make financial and medical decisions on behalf of the other in case the other becomes incapacitated; they are entitled to family leave, or the same terms as married persons to take care of the other if the other becomes seriously ill; they are entitled to the same testimonial privileges as spouses in civil and criminal cases if they enter the designated friend relationship at least two years prior to the event giving rise to the case; if the other dies without a will, they are entitled to some specified modest share of his or her estate; and, finally, if they are government employees, they will be subject to anti-nepotism rules that apply to employees who are married to each other.

Chambers, *supra* note 34, at 1353. The idea draws from "reciprocal-beneficiary" statutes in effect in Hawaii, HAW. REV. STAT. ANN. §§ 572c-1 to -7 (LexisNexis 2005), and Vermont, VT. STAT. ANN. tit. 15, §§ 1301–1306 (2002).

Although Chambers offers a very interesting way to codify friendship, I have a few hesitations about endorsing Chambers's designated friends status. First, Chambers's proposal is fundamentally a marriage substitute. Indeed, Rosenbury calls Chambers's idea "marriage-lite." Rosenbury, *supra* note 37, at 18. And although designated friend is a status available to platonic friends, Chambers includes among the eligible parties lovers and family members. Accordingly, his working definition

my plan is not to defend these ideas at length here), none depends on enforcing friendship upon parties who do not wish to be friends. Rather, they are ways our public policies could further support and recognize a legal status for the friend.

This discussion provides a nice segue to Part III, which briefly surveys some ways this research agenda can help us see where the law does and where it can support friendship. This Article ultimately leaves to future work second-generation inquiries about where, in particular, it would be best to operationalize a law of friendship.

III. WHERE DOES AND WHERE SHOULD FRIENDSHIP MATTER?

The ambition of this Article is to commence a research agenda that both develops the normative case for having the law confer upon friendship special status and embarks upon an empirical and doctrinal inquiry into how the law can and does perform such a task. Now that Part II has offered arguments for why the agenda is important, Part III surveys various areas within the law in which courts have found or could find the subject of friendship relevant for legal analysis. There is nothing systematic or exhaustive about the domains of the law investigated here; they are merely meant to provoke discussion and lay a foundation for further work in developing a law of friendship. To the extent that they can be organized thematically, they divide into two classes of ways the law could take account of friendship: first, by exacting special duties upon friends (the duties of rescue, disclosure and fair dealing, and confidentiality); and, second, by furnishing friends with certain privileges (the privileges of informality, giving care, privacy, and vindicating rights). Although this Part tends to focus on ways courts and judges can do and treat the subject matter,

of the friend is too broad, and functionally treads on the regulation of sex and the family sufficient to render his proposal very unlikely to garner substantial support.

Second, designated friends are products of contract, not more organic social relations. Although one could reasonably attempt to limit the duties and privileges of friendship only to those who enter "friendship contracts," I concede that I remain leery of forcing friends to appeal to the state in advance to receive legal recognition. The law should come to friends, not force friends to sign up with the state. As Ira Ellman writes (focusing on friends who cohabit), "The problem with the contract [ideal] is that it does not acknowledge that duties can arise from relationships themselves apart from an exchange of promises that constitutes a contract." Ira Ellman, *Why Making Family Law Is Hard*, 35 ARIZ. ST. L.J. 699, 711 (2003). That said, Chambers's approach at least answers the challenge of how we will identify who shall count as a friend.

Finally, with Rosenbury, *supra* note 37, at 18, I think the proposal for designated friends status too neatly supports "coupledom." Stable couples are privileged in Chambers's scheme, and friends do not need to embody such stability. More, even if friendship is predominately dyadic, *see supra* note 50, surely we can have multiple friends, something Chambers's proposal limits.

Thanks to Leslie Harris for discussion on Chambers's article. For further discussion of "contractarianism" in the duties and privileges of friendship, *see infra* note 423.

the public policy arguments favoring the law's support for friendship need not focus only on the judiciary. Legislators also should take notice and move the law toward a greater protection of the status of the friend.

A. The Duties of Friendship?

1. The Duty to Rescue

As everyone who has gone to law school in this country knows, Americans do not have a general duty to rescue strangers.²⁶⁸ This fact has been a matter of debate among scholars²⁶⁹ and legislators,²⁷⁰ some of whom reject the rule and aim to create a more general duty of helping our fellow citizens avoid trouble. To be sure, there are a number of exceptions to the rule, most of which draw upon some *status* of one of the parties: A special duty tends to emanate from a special relationship.²⁷¹ Special relationships could include that of employer-employee, school-student, and business-customer, but the list is open ended.²⁷² It is plausible to imagine that a duty to rescue friends could and should be recognized by the law. This may, of course, be one of the areas where legal protection is least needed—after all, it is a pitiful friend that would not undertake a rescue. But for just that reason there would be little cost to recognizing such a duty in law.

The case most on point—and one where such a duty was arguably recognized—is *Farwell v. Keaton*.²⁷³ In this case, a defendant watched his friend

268. See, e.g., *Williams v. State*, 664 P.2d 137, 139 (Cal. 1983) ("As a rule, one has no duty [under tort law] to come to the aid of another."); 3 FOWLER V. HARPER ET AL., *THE LAW OF TORTS* § 18.6 (2d ed. 1986); WAYNE R. LAFAVE, *CRIMINAL LAW* § 6.2 (4th ed. 2003).

269. See, e.g., Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 YALE L.J. 247 (1980); A. D. Woosley, *A Duty to Rescue: Some Thoughts on Criminal Liability*, 69 VA. L. REV. 1273 (1983); RESTATEMENT (SECOND) OF TORTS §§ 314, 321–25 (1965). This literature is too large to cite with any completeness here.

270. See David C. Biggs, "The Good Samaritan Is Packing": An Overview of the Broadened Duty to Aid Your Fellowman, With the Modern Desire to Possess Concealed Weapons, 22 U. DAYTON L. REV. 225, 229–36 (1997) (surveying "Good Samaritan" statutes that create a duty to rescue); Lon T. McClintock, Note, *Duty to Aid the Endangered Act: The Impact and Potential of the Vermont Approach*, 7 VT. L. REV. 143 (1982) (summarizing "Good Samaritan" provisions).

271. An example is the *Tarasoff* rule, where a psychiatrist is deemed to have a duty to warn her patient's threatened victim that the patient intends to exact violence upon him. See *Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334 (Cal. 1976). More generally, invitees and licensees get special protection. See 1 WILLIAM K.S. WANG & MARC I. STEINBERG, *INSIDER TRADING* § 3:4.4 (2d ed. 2005) (specifying exceptions to the no-duty-to-rescue rule). There is also an exception for when a plaintiff is brought by a defendant into a false sense of dependency on some action purportedly taken by the defendant to protect the plaintiff. See *Johnson v. Souza*, 176 A.2d 797 (N.J. Super. Ct. App. Div. 1961) (host liable to guest for injury on icy steps because of assurances that steps would be salted). Even here the status of host may be doing much of the work to get the defendant on the hook.

272. See RESTATEMENT (SECOND) OF TORTS §§ 314A–314B.

273. 240 N.W.2d 217 (Mich. 1976).

undergo a beating, resulting in substantial head injuries.²⁷⁴ He then drove his friend around for a few hours and noticed that the friend passed out in the back of his car.²⁷⁵ Ultimately, the defendant parked the car in the driveway of his friend's grandparents' house and left him there after failing to awaken him.²⁷⁶ The friend died as a result of his injuries and as a result of failing to get medical attention on time.²⁷⁷ The friend's estate sued for wrongful death and the court upheld a jury verdict against the defendant.²⁷⁸

The court made it clear that a variety of factors were relevant in reaching its conclusion and did not make explicit that its judgment was based on the duties of friendship in particular (although the friendship is mentioned more than once).²⁷⁹ The parties were, the court says, "companions" on a "social venture."²⁸⁰ Indeed, the court aims to reason by analogy and fit the social relationship between the parties into an already-recognized "special-relationship" exception.²⁸¹

Other courts, such as the one in *Webstad v. Stortini*,²⁸² limit the *Farwell* case to its facts—highlighting both the fact that the plaintiff was an invitee in the defendant's car (because the status of invitee rather than friend tends to trigger special duties of rescue upon hosts) and the fact that the defendant's leaving his friend in his car disabled the friend from getting the help he otherwise might have gotten elsewhere (another traditional factor in duty-to-rescue cases that tends to trigger liability).²⁸³

Notwithstanding the limited holding of *Farwell* (as further circumscribed by *Webstad*), if the arguments in Part II were persuasive, one could recommend that more courts adopt the approach of the *Farwell* court and be clear that we have a duty to rescue our close friends.²⁸⁴ Perhaps we do not need the law to tell us to save our friends. But why shouldn't the law confirm what we already know to be true? It is perfectly sensible for the law to reinforce our well-accepted duties; it contributes to the law's affective resonance, and may have broader effects in facilitating compliance with the law's commands more generally.

274. *Id.* at 219.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.* at 222.

279. *Id.*

280. *Id.*

281. *Id.*

282. 924 P.2d 940 (Wash. Ct. App. 1996).

283. *Id.* at 947–48.

284. One would think this would be a relatively easy sell. But we have no duty to rescue our family members. See, e.g., *Bell & Hudson, P.C. v. Buhl Realty Co.*, 462 N.W.2d 851, 853–54 (Mich. Ct. App. 1990) (finding that no "special relationship" exists between brothers). I am not holding my breath on this one.

2. The Duty to Disclose and Deal Fairly

In fraud cases, courts will not impose a general duty to disclose or deal fairly upon anyone but fiduciaries or those in relationships of trust or confidence.²⁸⁵ Although some courts would never treat friendship as capable of triggering such fiduciary duties, other courts take a different approach. This is a fertile area for further investigation and exploration, and I aim here merely to scratch the surface and show how courts sometimes find themselves entangled in friendships and could, perhaps, benefit from a more systematic approach to them. But the recommendation here is consistent with the general theme of this Article: Courts should treat good friends as fiduciaries, and use the definition of friendship in Part I to assess whether a true friendship exists.

*Wilson v. Zorb*²⁸⁶ is the classic treatment of friendship and fraud, where friendship is held not to trigger fiduciary duties. The factual background is as follows: The plaintiff and defendant, both doctors, “had been close friends for many years, intimately associated in social activities.”²⁸⁷ They spent much time together (with their wives) and stayed at each other’s homes often.²⁸⁸ Then the defendant negligently shot the plaintiff.²⁸⁹ After several weeks in the hospital, the plaintiff recovered in defendant’s home over a number of months.²⁹⁰ The defendant gave the plaintiff a payment as further compensation and got the plaintiff to sign a release of all claims stemming from the shooting.²⁹¹ Ultimately, the plaintiff sued because he claimed he was induced to sign the release based on alleged false assertions that the defendant made about his financial situation.²⁹² At issue in the case was whether the friendship constituted a fiduciary relationship, which would have triggered special disclosure duties from the defendant to the plaintiff. Here is what the court had to say:

Warm friendship, confidence and an affectionate regard for each other were mutual with the parties, and yet each was self-sufficient, competent and independent. At times each attended and prescribed for the other’s patients and they consulted with each other in professional matters. Such relationships happily are common, but they are not confidential

285. See RESTATEMENT (SECOND) OF TORTS § 540 (1965).

286. 59 P.2d 593 (Cal. Dist. Ct. App. 1936).

287. *Id.* at 594.

288. *Id.*

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* at 594–95.

relationships in a legal sense. It takes something more than friendship or confidence in the professional skill and in the integrity and truthfulness of another to establish a fiduciary relationship.²⁹³

In the final analysis, little turned on these pronouncements in *Wilson* because the court found no evidence of misstatements of material facts by the defendant, and the defendant voluntarily disclosed his financial situation in any event.²⁹⁴ But one can infer from the court's opinion that the duties of fiduciaries—including the duties of disclosure and fair dealing—will not apply to friends on account of a friendship.²⁹⁵

This approach was endorsed more recently in *Kudokas v. Balkus*,²⁹⁶ a fraud case in which the court refused to find a duty to disclose despite a life-long friendship between the buyer and seller of a motel. The court did not deny that close ties of friendship might be found within certain "confidential relationships" in which a duty to disclose would be required of a seller. But it was careful to indicate that friendships do not *create* confidential or fiduciary relationships that trigger duties to disclose and deal fairly.²⁹⁷

A similar conclusion was reached in *Vargas v. Esquire, Inc.*,²⁹⁸ where the court refused to find a fiduciary relationship between two friends without a showing that one of the friends dominated or exerted influence over the other. The plaintiff was a foreign artist who entered into an employment contract with a defendant corporation, which published magazines and calendars.²⁹⁹ The president of the corporation was a close personal friend of the plaintiff and his wife, and the plaintiff claimed not to be aware of the compensation terms in the agreement.³⁰⁰ The plaintiff claimed that his friend unfairly and fraudulently induced him to sign the contract.³⁰¹ At issue was whether the friendship between the parties triggered any special duties by the defendant.³⁰² The court concluded that it did not.³⁰³ In particular, notwithstanding the trust between the two men, no "confidence had been reposed in [the defendant,]" and the defendant had not "dominated or influenced" the plaintiff.³⁰⁴

293. *Id.* at 596.

294. *Id.* at 597.

295. *Cf. Bush v. Stone*, 500 S.W.2d 885, 894 (Tex. Civ. App. 1973) (Bissett, J., dissenting) ("Friendship alone does not establish a fiduciary relationship . . .").

296. 103 Cal. Rptr. 318 (Cal. Ct. App. 1972).

297. *Id.* at 321–22.

298. 166 F.2d 651, 653 (7th Cir. 1948).

299. *Id.*

300. *Id.*

301. *Id.* at 652.

302. *Id.* at 652–53.

303. *Id.* at 653.

304. *Id.* at 655.

Not all courts, however, have reached such conclusions. An early California case, for example, held that “[f]iduciary relations are not found solely in those legal relationships, such as guardian and ward, husband and wife, trustee and beneficiary, but are also found where in fact the relation of trust and confidence exists between trusting friends.”³⁰⁵ And a case from Washington in 1912 contains this rumination about friendship and its role in deciding cases about the duties of disclosure and fair dealing:

A point is made that Mr. Gray was a shrewd and successful business man and ought not to have been misled by promises that, when revealed in the courtroom, seem to be unreasonable. But in this appellants have overlooked an element which disarms caution; that is, friendship. . . . The impulse that leads men to trust those in whom they have confidence cannot be ignored by the courts. . . . Hence, when men deal as friends and the one accepts that as true which, but for the element of friendship, would put a man upon inquiry, the law will protect him in his trust as certainly as it will deny him relief if the personal relations of the parties are such that the dealing is at arm's length. Although everything that would tend to show fraud in law is denied or qualified by explanation, we have here two men; the one an experienced mining man whose connection with a mine of sensational history had made him the envy of all who had not touched hands with luck, the other, shrewd and successful in the unemotional pursuit of trade, but utterly ignorant of mines and mining. . . . To say that a man who is moved to part with his money under such circumstances is to be held at arm's length is to deny sustenance to the very root of society; to make friendship a liability instead of an asset.³⁰⁶

In this case, Mr. Gray's friend was held to have special duties of disclosure and fair treatment to his business partner, who was a close friend that used his friendship for personal gain. Perhaps here it is hard to say that the defendant was a “real” friend. Still, he traded on the currency of the concept and can be held to the special duties real friendships can impose.

Indeed, many courts have held that friendship may be a relevant factor in establishing a party's right to rely on representations.³⁰⁷ And an underlying

305. *Thompson v. Thompson*, 267 P. 375, 380 (Cal. Dist. Ct. App. 1928); *see also* *Palladine v. Imperial Valley Farm Land Ass'n*, 225 P. 291, 299 (Cal. Dist. Ct. App. 1924) (recognizing the role of friendship in trust, and giving friendship legal effect).

Just to make it clear: The California cases are all over the place. *Wilson, Kudokas, Thompson*, and *Palladine* are all from California and reach different conclusions on the subject.

306. *Gray v. Reeves*, 125 P. 162, 163 (Wash. 1912).

307. *See* *Spiess v. Brandt*, 41 N.W.2d 561, 566–67 (Minn. 1950) (finding that friendship can establish a party's right to rely on her friend); *Bank Leumi Trust Co. v. Luckey Platt Ctr. Assocs.*, 245 A.D.2d 622 (N.Y. App. Div. 1997) (same); *Callahan v. Callahan*, 514 N.Y.S.2d 819, 822 (App. Div. 1987) (same); *Liebergessell v. Evans*, 613 P.2d 1170, 1176 (Wash. 1980) (same); *Graff v. Geisel*, 234

friendship between contracting parties may excuse a party from carefully investigating form contracts for exculpatory clauses, relying on the good will of a friendship.³⁰⁸ These are all ways that courts have—albeit inconsistently—enabled friendship to matter in the law and, indeed, promoted friendship by enforcing its special duties.³⁰⁹

In another relevant case, a court in Idaho found that a plaintiff's medical release was voidable because his doctor was a very close friend for a long period of time, and the doctor's statements induced the plaintiff to sign as a friend.³¹⁰ Notable, perhaps, in this case was that the friend-patient only sued his friend-doctor because he knew insurance might cover the liability—a way a dispute can arise between friends without real friendship breakdown.³¹¹ Again, although any proven misstatement of fact or mutual mistake could have led the court to void the release, friendship was a relevant factor in the court's determination of the sort of disclosure owed by a friend to his counterpart.³¹²

The case of *Cox v. Schnerr*³¹³ is especially instructive on the friend's duty to deal fairly. There, the plaintiff commenced an action to quiet title to a property purportedly transferred from the defendant.³¹⁴ The defendant claimed that the transfer was invalid, owing to the plaintiff's "undue influence" over the transferor—the defendant's deceased wife—a trusted friend and advisor of the plaintiff.³¹⁵ After noting that the burden of proving fraud usually rests with the one asserting it, the court held that the burden should shift to the one resisting the claim to prove she "exhibited the *uberrima fides* [utmost good faith] which removes all doubt respecting the fairness of the contract."³¹⁶ The court made

P.2d 884, 890 (Wash. 1951) (same); *Bush v. Stone*, 500 S.W.2d 885, 892 (Tex. App. 1973) (friendly ties can give rise to confidential relationships with special duties, even if the plaintiff is a sophisticated businessperson).

308. See *Bates v. Southgate*, 31 N.E.2d 551, 558 (Mass. 1941).

309. In Texas, "close, personal friendships" are central in a court's consideration of whether special fiduciary-like duties apply. See *Horton v. Robinson*, 776 S.W.2d 260, 265 (Tex. App. 1989); *Dominguez v. Brackney Enters., Inc.*, 756 S.W.2d 788, 791 (Tex. App. 1988); *Garcia v. Fabela*, 673 S.W.2d 933, 935 (Tex. App. 1984); *Adickes v. Andreoli*, 600 S.W.2d 939, 945–46 (Tex. Civ. App. 1980); *Bush*, 500 S.W.2d at 890–91; *Kalb v. Norsworthy*, 428 S.W.2d 701, 705 (Tex. Civ. App. 1968); *Holland v. Lesesne*, 350 S.W.2d 859, 861–62 (Tex. Civ. App. 1961). One Texas case makes a point of distinguishing real friendships from mere "business friendships" that should receive no special treatment. See *Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962). Other states have also recognized friendships as establishing a duty to deal fairly. See, e.g., *Frowen v. Blank*, 425 A.2d 412, 417–18 (Pa. 1981) (holding that an elderly plaintiff was entitled to a fair price from younger neighbors who befriended her).

310. See *Estes v. Magee*, 109 P.2d 631, 633–34 (Idaho 1940).

311. *Id.* at 632–33.

312. *Id.* at 633–34.

313. 156 P. 509 (Cal. 1916).

314. *Id.* at 511.

315. *Id.*

316. *Id.* at 513.

clear that this burden-shifting regime should apply not only to parties whose relationships are traditionally considered to be confidential, such as physicians, attorneys, and clergymen, but also to those parties “who by the very force of their . . . relationship are presumed to be in the class of persons bound to act with the utmost good faith.”³¹⁷ The friends in this case were held to be included in this class and the transfer was held invalid.³¹⁸

Finally, a duty to deal fairly might be discharged through heightened punitive damages for friends who wrong one another. Take the case of *TVT Records v. Island Def Jam Music Group*.³¹⁹ The fact that members of the litigating parties were friends influenced the court’s determination about whether an unusually high punitive damage award was appropriate. The jury awarded the plaintiff approximately \$132 million in compensatory and punitive damages in a dispute involving breach of contract, tortious interference with contractual relations, fraud, and willful copyright infringement.³²⁰ The defendant—a division of the world’s largest record company, Universal Music Group Recordings—objected to the award and moved for remittitur, arguing that its conduct was not sufficiently reprehensible to sustain the punitive damage award.³²¹ In disposing of the defendant’s motion (and ultimately granting it), the court noted that social relationships and friendship underlying the transaction may counsel for or against the award and can help assess the reprehensibility of the conduct.³²² In particular, the court found it relevant that TVT’s principal owner and chief executive officer considered a certain high-ranking official at Universal “one of his closest friends in the industry” and “a personal mentor and confidant.”³²³ Although this consideration was one of many factors, it highlights how friendship may, after all, trigger special duties of fair dealing that are enforceable through punitive damage levels.³²⁴

317. *Id.*

318. *Id.* For another example of a friend taking advantage of a friendship—and the court penalizing the friend as a fiduciary—see *Turner v. Miller*, 618 S.W.2d 85, 87 (Tex. Civ. App. 1981).

319. 279 F. Supp. 2d 413 (S.D.N.Y. 2003).

320. *Id.* at 416.

321. *Id.* at 416–17.

322. *Id.* at 444–45.

323. *Id.* at 445.

324. It is probably worth noting for completeness that the Second Circuit Court of Appeals thoroughly rejected the punitive damage analysis offered by this trial court. See *TVT Records v. Island Def Jam Music Group*, 412 F.3d 82, 93–96 (2d Cir. 2005). However, the appellate court did not comment specifically on the district court’s consideration of personal relationships in punitive damage assessment.

One also might imagine that an abuse of a friendship might figure into a criminal sentence by subjecting a defendant to an enhancement for an “abuse of a position of trust.” See U.S. SENTENCING GUIDELINES MANUAL § 3B1.3 (1992). For discussion of this possibility, compare *United States v. Pardo*, 25 F.3d 1187, 1190–93 (3d Cir. 1994) (finding that no abuse of a position of

Those persuaded by the arguments in Part II may want to develop further an account of friendship's duties of disclosure and fair dealing and help guide courts in finding friendship relevant to the inquiry of whether a plaintiff was owed special duties. In this issue area, there is already an inconsistent jurisprudence that can be investigated systematically, one that could use guidance from scholars sensitive to the importance of friendship. Obviously, the cases are not easy to reconcile and do not operate with a definition of friendship that can be efficiently applied in future cases. But, generally speaking, fiduciary duties—and courts relying upon them—“arguably help create” and maintain “extralegal norms.”³²⁵

3. The Duty of Confidentiality³²⁶

A potential fiduciary duty owed by friends may take the form of a confidentiality requirement. This is easiest to imagine in the context of the insider trading prohibitions interpreting Securities and Exchange Commission (SEC) Rule 10b-5,³²⁷ adopted pursuant to the Securities Exchange Act of 1934.³²⁸ Under the “misappropriation” doctrine of insider trading liability, an investor commits fraud “when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information.”³²⁹ The U.S. Supreme Court, in *United States v. O'Hagan*,³³⁰ recently made clear that there is no duty not to trade on material nonpublic information unless one gets

trust enhancement was appropriate when a defendant took advantage of his friend in perpetrating his fraud), with *United States v. Zamarripa*, 905 F.2d 337, 340 (10th Cir. 1990) (finding an abuse of a position of trust when a friend sexually abused his friend's daughter). The central idea is that an enhancement may be appropriate because those who take advantage of friendships may be more culpable than those who do not. See *Pardo*, 25 F.3d at 1191 (citing *United States v. Craddock*, 993 F.2d 338, 340 (3d Cir. 1993)). Yet the enhancement can just as easily incentivize people not to abuse their friendships in their criminal activities.

325. Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 237 (citing Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1741–42, 1744 (2001)); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2425 (1995) (“By establishing a standard of performance that emphasizes heightened obligations of loyalty and integrity, and by the use of hortatory moral rhetoric, the law invokes a personal sense of moral obligation in the performance of fiduciary duty.”).

Of course, as Ribstein warns, “The law may be ineffective if it tries to develop a norm that is too far removed from existing perceptions of good behavior. Courts squander their moral authority by condemning conduct that people widely regard as being in the ordinary course of business.” Ribstein, *supra*, at 237 (citing Robert Cooter, *Expressive Law & Economics*, 27 J. LEGAL STUD. 585, 601–06 (1998)).

326. Bill Wang was especially helpful in developing this Subpart.

327. 17 C.F.R. § 240.10b-5 (2006).

328. 15 U.S.C. § 78j (2000).

329. *United States v. O'Hagan*, 521 U.S. 642, 652 (1997).

330. 521 U.S. 642.

the information through a confidential relationship.³³¹ The relationship involved in *O'Hagan* was one that classically requires confidentiality and trust, and is a traditional fiduciary relationship: lawyer-client.³³² Indeed, courts have found misappropriation liability to lie in other "'hombrook' fiduciary relationship[s], such as: . . . executor-heir, guardian-ward, principal-agent, trustee-beneficiary, or senior corporate official-shareholder."³³³

The influential Second Circuit Court of Appeals decision in *United States v. Chestman*³³⁴ also guides the law in this area. There, the court held that one may not misappropriate information in breach of a fiduciary duty "or similar relationship of trust and confidence."³³⁵ Yet, it simultaneously held that a family relationship, standing alone, is insufficient to trigger liability.³³⁶ A natural question for the research agenda commenced here is whether a friendship should qualify as a relationship of trust or confidence to trigger misappropriation liability.

Yet friends would seem to lack *inequality*, a prerequisite for the fiduciary or quasi-fiduciary relationship underlying misappropriation liability in *Chestman*. *Chestman* requires qualifying relationships to be "characterized by superiority, dominance, or control," the inequality presumed not to characterize friendship in Part I.³³⁷ Nevertheless, the SEC has recently called certain holdings in *Chestman* into doubt. For example, the SEC has written:

[T]he *Chestman* majority's approach does not fully recognize the degree to which parties to close family and personal relationships have reasonable and legitimate expectations of confidentiality in their communications. For this reason, we believe the *Chestman* majority view does not sufficiently protect investors and the securities markets from the misappropriation and resulting misuse of inside information.³³⁸

This dissatisfaction with *Chestman* led to the SEC's promulgation of Rule 10b5-2, a regulation that makes clear that family relationships of "spouse,

331. *Id.* at 660–66.

332. *Id.* at 653.

333. *United States v. Kim*, 184 F. Supp. 2d 1006, 1010 (N.D. Cal. 2002); *see also* *United States v. Falcone*, 257 F.3d 226 (2d Cir. 2001) (finding misappropriation in an employer-employee context); *United States v. Willis*, 737 F. Supp. 269 (S.D.N.Y. 1990) (finding the same in a psychiatrist-patient relationship). For a general discussion, see I WANG & STEINBERG, *supra* note 271, § 5:4.3.

334. 947 F.2d 551 (2d Cir. 1991).

335. *Id.* at 566.

336. *Id.* at 568.

337. *Kim*, 184 F. Supp. 2d at 1011. *But see* *United States v. Reed*, 601 F. Supp. 685, 712–18 (S.D.N.Y.), *rev'd on other grounds*, 773 F.2d 477 (2d Cir. 1985) (finding a father-son relationship without dominance or control to be sufficiently confidential to trigger misappropriation liability, although also finding that mere kinship is not enough to trigger a duty of confidentiality).

338. Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590, 72,602 (proposed Dec. 28, 1999) (to be codified at 17 C.F.R. pt. 240).

parent, child, or sibling” will be presumed confidential unless a party can show otherwise.³³⁹ Friends, however, were not similarly named in the nonexclusive list offered by the SEC.

Yet nothing should necessarily stop a court from taking notice that strong personal relationships of friendship can be presumed to be confidential and can be the basis of misappropriation liability under Rule 10b5-2. The SEC has rejected *Chestman*—and those interested in having the law protect friendship could urge courts to recognize friendships’ duties of confidentiality in the 10b-5 insider trading context.³⁴⁰

B. The Privileges of Friendship?

1. The Privilege of Informality

Friends deal with one another with some degree of informality. Friends are not usually mere business partners and likely have enhanced levels of trust and reliance between them. This reality and the reasonability of their reliance may counsel for different treatment by the law.

Perhaps one could argue that friends need not require consideration for their promises to be binding. Of course, nearly all contracts require consideration. But there are clear exceptions for certain kinds of donative promises that trigger reasonable reliance.³⁴¹ Because friends can be presumed to rely on one another, perhaps their donative promises to one another should be presumed enforceable through the law. At the very least, it should be easy within friendships to find donative intent in making gifts.³⁴²

339. 17 C.F.R. § 240.10b5-2 (2006).

340. A similar conclusion is offered by Ray J. Grzebielski, *Friends, Family, Fiduciaries: Personal Relationships as a Basis for Insider Trading Violations*, 51 CATH. U. L. REV. 467, 493 (2002) (concluding that “[t]he SEC should abandon any inquiry into the quality of relationships with family members and friends, and should simply conclude that they all involve relationships of trust and confidence” for the purposes of misappropriation liability). *But see* SEC v. Talbot, 430 F. Supp. 2d 1029, 1046 (C.D. Cal. 2006) (endorsing a restrictive view of the relationship of trust and confidence in the context of a lengthy analysis of misappropriation liability).

341. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

342. For a gift to be effective, a donor must transfer property without consideration and with donative intent. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 6.1(a) (2003). Although it is usually relatively easy to ascertain the subjective intent of a donor, many cases arise where courts must determine whether donative intent, in fact, was present. Friendship should, perhaps, furnish a presumption that the donor intended to make a gift—as familial relations provide, see *Estate of Lang v. Comm’r*, 64 T.C. 404, 413 (1975) (finding a presumption of donative intent in familial gift transactions).

A ready example comes from the recent case of *Stukas v. Muller*.³⁴³ Muller was a close friend of an elderly couple, Burton and Doris Stukas; the three began their friendship in the 1970s.³⁴⁴ In 1995, the couple transferred money and property (their farm and home) into Muller's name, opened a joint account with him (from which he withdrew \$20,000), and named him executor of Doris's will.³⁴⁵ The court found that consideration was paid for the farm,³⁴⁶ but that none was paid for the Stukas residence or for the establishment of the joint account.³⁴⁷ In rejecting the claim of Stukas's conservator for unjust enrichment, the court noted that the closeness of the relationship among the parties warranted concluding that the joint account and residence were, in fact, gifts given to a "close friend" who was "liked" and "trusted."³⁴⁸

The law of fiduciary duties is relevant in this context as well. Take the recent New York case, *Schwartz v. Houss*.³⁴⁹ There, the plaintiff and defendant were close friends and neighbors.³⁵⁰ The plaintiff allegedly transferred property to his friend to hold as a nominee while the house was being converted for a different use; the plan was for the defendant-friend to give the property back upon completion of the work.³⁵¹ When the plaintiff died, the defendant informed his friend's children that he intended to sell the property rather than return it to the estate.³⁵² The plaintiff's children sued to impose a constructive trust over the property and for a permanent injunction to prevent the sale.³⁵³ There was some factual dispute over whether any consideration for the original transfer changed hands, and whether the purported agreement was formalized in any writing.³⁵⁴ The core of the legal dispute was whether there was a confidential or fiduciary relationship between the parties, as such a relationship is a requirement for imposing a constructive trust in New York.³⁵⁵ The defendant opposed the trust because he believed that no such relationship could be predicated upon mere friendship.

343. No. 04-1230, 2005 WL 1225382 (Iowa Ct. App. May 25, 2005).

344. *Id.* at *1.

345. *Id.*

346. *Id.* at *2.

347. *Id.* at *3.

348. *Id.* at *2.

349. No. 21741/04, 2005 WL 579152 (N.Y. Sup. Ct. Jan. 3, 2005).

350. *Id.* at *1.

351. *Id.*

352. *Id.* at *2.

353. *Id.*

354. *Id.* at *3.

355. *Id.* at *4 ("It is well settled that in order to set forth a valid cause of action to impose a constructive trust, the following four elements must be alleged: (1) a confidential or fiduciary relationship, (2) a promise, express or implied, (3) a transfer in reliance thereon, and (4) unjust enrichment.") (internal quotation marks omitted).

Nevertheless, the court firmly held that such a relationship could be found “in appropriate circumstances, between close friends.”³⁵⁶ And the court viewed the informality of the agreement itself as proof that the close friendship was one of trust and confidentiality: “Thus, contrary to defendant’s argument, plaintiffs have adequately alleged that [parties] were not merely social friends, and that the absence of a formal written agreement was a consequence of the close relationship between [the parties].”³⁵⁷

The case is similar to the New York case of *Cody v. Gallow*,³⁵⁸ in which a party claimed he casually gave money to his friend, expecting the money to be returned.³⁵⁹ When the plaintiff-friend married another woman (the plaintiff was a man and the defendant a woman) without telling his friend, the defendant denied ever having received the money to hold for the plaintiff.³⁶⁰ There was no formal documentation or writing, and the defendant-friend opposed the plaintiff’s application for a constructive trust over what he deemed his own property.³⁶¹ The court, in imposing the trust, noted the “close, harmonious and trusting relationship”³⁶² between the two “close friends”³⁶³ (prior to their falling out over the plaintiff’s marriage), finding that the “court of equity should interpose its powers to remedy the wrong” between friends.³⁶⁴ The court found a confidential relationship existed and was not deterred by the informality of the transaction between friends.³⁶⁵

It is, perhaps, not surprising that constructive trust actions and unjust enrichment actions—actions expressly predicated on equity—seem more sensitive to friendships and the privileges and benefits that should accrue to them.³⁶⁶

356. *Id.* (quoting *Penato v. George*, 383 N.Y.S.2d 900, 905 (N.Y. App. Div. 1976)).

357. *Id.*

358. 214 N.Y.S.2d 127 (N.Y. Sup. Ct. 1961).

359. *Id.* at 128.

360. *Id.* It is possible that this case involves sex and courtship, and should be excluded from my analysis, given the discussion *supra* Part I.

361. *Id.*

362. *Id.*

363. *Id.*

364. *Id.* at 129 (quoting *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380 (N.Y. 1919)).

365. *Id.*

366. For another demonstrative constructive trust case where friendship served as the predicate confidential or fiduciary relationship, see *Holland v. Lesesne*, 350 S.W.2d 859, 862 (Tex. Civ. App. 1961) (“[I]t has been well established that such strict and technical relationships as trustee and cestui que trust, principal and agent, attorney and client, are not indispensable, but that such informal relationships, such as moral, social, domestic, or merely personal ones, where one person trusts in and relies upon another, are sufficient” to establish a fiduciary or confidential relationship for purposes of imposing a constructive trust.). There, the court found a fiduciary relationship because “an unusually close personal friendly and confidential relationship existed between the parties and their families. They visited each other regularly, they dined together, and they vacationed together.” *Id.*

Still, it is useful to expose this heightened sensitivity in the equity context to show how friendship may be given legal effect in other domains.³⁶⁷ It is also instructive to show that even though the law has no organized approach to its regulation or promotion of friendship, regulation and friendship promotion are not wholly anathema, and they occur in a variety of contexts. But it is happening below the radar of legal academics, lawmakers, and judges, who have not shown especial interest in developing a systematic law of friendship or a legal framework that recognizes the status of friendship as one worthy of attention.

2. The Privilege of Caregiving

Family members are not the only care providers when individuals get sick. Accordingly, state and federal legislators might consider a “Friends and Medical Leave Act” in recognition that, just as we feel it appropriate for our governments to force certain employers to give us leave to take care of family members,³⁶⁸ we should similarly be given leave from our jobs to help our friends in need—especially friends who do not have familial resources nearby. One of the privileges of friendship should, perhaps, be the privilege to give care, and the law could endorse this privilege through a series of legislative initiatives.

But there are also judicial forums where the issue of caregiving to friends has been explored. Consider *In re Conservatorship of Estate of McDowell*.³⁶⁹ There, the court held that a decedent’s friend who helped care for her in her final stages of life should not be presumed to have exerted undue influence under California’s Probate Code § 21350, disabling the friend from inheriting under the decedent’s will.³⁷⁰ The code requires that all “care custodians” be presumptively disqualified from being a named beneficiary in a will unless they can show that the will was not the result of undue influence.³⁷¹ The court, applying

Some other academics have noticed and commented upon the role of friendship in determining whether fiduciary relationships have formed. See Roy Ryden Anderson, *The Wolf at the Campfire: Understanding Confidential Relationships*, 53 SMU L. REV. 315, 344–52 (2000); Gregory B. Westfall, Comment, *But I Know It When I See It: A Practical Framework for Analysis and Argument of Informal Fiduciary Relationships*, 23 TEX. TECH L. REV. 835 (1992).

367. Another example where friendship was useful to a court in an equitable determination is *Hedges v. Primavera*, 218 F. Supp. 797 (E.D. Pa. 1963). There, a “close and intimate” friendship was deemed to “explain[] and excuse[] plaintiff’s failure sooner to discover defendant’s fraud and deceit,” enabling the court to find that the statute of limitations on the fraud and deceit action was equitably tolled. *Id.* at 801–02.

368. See Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601–2654 (2000).

369. 23 Cal. Rptr. 3d 10 (Cal. Ct. App. 2004).

370. *Id.* at 677. This case actually provides an interesting contrast with *Cox*, which I explored *supra* text accompanying notes 313–317.

371. The definition of “care custodian” is administratively defined in the California Welfare and Institutions Code as any “administrator or . . . employee of [a variety of] public or private facilities

In *re Conservatorship of Estate of Davidson*,³⁷² found that the statute was intended to limit professional caregivers' ability to receive donative transfers from their elderly patients, but was not meant to limit an elderly person's ability to "recognize and reward services performed for them . . . by close personal friends, intimates, and companions."³⁷³ Friends, *Davidson* held, should be allowed to help one another in old age without the presumption against being a beneficiary attaching, recognizing an inchoate privilege for friends to provide care (without discrimination in testamentary dispositions).³⁷⁴ In *McDowell*, the court found the decedent's friend to be "well meaning," even though the friendship was of relatively short duration.³⁷⁵

However, more recent case law in California has called *McDowell* into question, and has held that close personal friends who provide care do come within the statute and are presumptively disqualified from being donees. *Bernard v. Foley*³⁷⁶ now makes clear that the Probate Code's statutory scheme does not allow for a "preexisting friendships exception" to the "care custodian" provision—the standard articulated in *Davidson* and applied in *McDowell*.³⁷⁷ The *Bernard* court's exercise of statutory interpretation—utilizing textual canons, legislative history, and public policy arguments—was, at the least, respectable.³⁷⁸ Yet, it was arguably insensitive to the role the law can play in supporting friendship and the way statutory construction can incentivize the behavior of friends. The thoughtful concurrence of Chief Justice George was more attuned to the importance of the law's role in respecting genuine friendship: In agreeing with the majority's construction of the Probate Code in the particular case before the court, he called for legislative modification to help support and promote friends' roles in the provision of care and aimed to limit

or agencies, or persons providing care or services for elders or dependent adults, including members of the support staff and maintenance staff" or any "protective, public, sectarian, mental health, or private assistance or advocacy agency or person providing health services or social services to elders or dependent adults." CAL. WELF. & INST. CODE § 15610.17 (West 2001).

372. 6 Cal. Rptr. 3d 702 (Cal. Ct. App. 2003).

373. *Id.* at 713.

374. *Id.* at 716.

375. *McDowell*, 23 Cal. Rptr. 3d at 21–25. Here is an interesting example of a court interposing itself in a friendship and issuing judgment on the *quality* of the relationship.

376. 47 Cal. Rptr. 3d 248 (2006).

377. The resolution of this matter also implicates the discussion about donative transfers and the friend's potential privilege of informality, discussed *supra* Part III.B.1. For a recent analysis of California's "care custodian" provision, see generally Kirsten M. Kwasneski, Comment, *The Danger of a Label: How the Legal Interpretation of "Care Custodian" Can Frustrate a Testator's Wish To Make a Gift to [a] Personal Friend*, 36 GOLDEN GATE U. L. REV. 269 (2006).

378. It is worth noting that the vote split 4–3, with one member of the majority bloc writing separately to explain his position more carefully. *Bernard*, 47 Cal. Rptr. at 264–65 (George, C.J., concurring).

the holding of *Bernard* to its facts.³⁷⁹ If the normative argument in Part II was convincing, Chief Justice George's approach may be the preferred one, and state legislatures would be well advised to carve "preexisting friendship" exceptions to statutes like the one at issue in *Bernard*.³⁸⁰

3. The Privilege of Privacy

The relationship of trust and confidence that is friendship (in life if not always in law) also could be granted a different range of privacies than it has under current law. This issue was recognized over twenty years ago by Sanford Levinson;³⁸¹ he attempted to find a way to give the status of friend the same respect that evidence law confers upon certain relationships with members of the family, the bar, and the cloth.³⁸² Our relationships with our spouses (and our children and parents in some jurisdictions), our lawyers, and our rabbis and priests are protected from discovery in public proceedings, but our communications with our best friends have no such protection. Levinson's particular proposal—allowing people to issue a finite number of "privilege" tickets to whomever they want, including friends and family³⁸³—has gained little traction and no adherents.³⁸⁴ Yet Levinson highlighted an interesting problem, whose solution may lie in further consideration of how the law could protect a friendship's privilege of privacy. If the law developed a recognizable category of friend, perhaps we would not need to distribute tickets to figure out who is entitled to the privilege of privacy.

The Monica Lewinsky affair may be the most recent highly publicized example where intimacies between friends were required to be exposed to the

379. *Id.*

380. Of course, if the law ultimately treats friendship as triggering a full panoply of fiduciary duties, courts may also have to presume undue influence in situations like this one. This highlights that one needs to be careful before embracing the "friend-as-fiduciary" idea: We may not want friends to be fiduciaries for all purposes.

381. Levinson, *supra* note 7.

382. The *Beyond Conjugality* report also embraces this approach to respecting friendship. BEYOND CONJUGALITY, *supra* note 34, at 46.

383. Levinson, *supra* note 7, at 654–62.

384. Sanford Levinson, *Structuring Intimacy: Some Reflections on the Fact that the Law Generally Does Not Protect Us Against Unwanted Gazes*, 89 GEO. L.J. 2073, 2079 (2001) ("To put it mildly, the proposal has gathered no support. . . ."). One notable exception to the silence with which Levinson's article was met may be Judge Levy, in dissent in *Diehl v. State*, 698 S.W.2d 712, 715 (Tex. App. 1985) (Levy, J., dissenting). In disagreeing with the majority's ruling in *Diehl* that there was no parent-child privilege in Texas, Judge Levy felt that "it is necessary to face the relationship issue squarely in order to reach a just and salutary result . . . because the most serious, intimate, and far-reaching social values are in conflict here, involving the very nature of the relationships between the individual, the family, and the State." *Id.* at 717.

state: Kenneth Starr got Monica Lewinsky's best friend, Catherine Allday Davis, to testify and share intimate emails with his grand jury.³⁸⁵ Surely this goes on all the time. Friends are pitted against friends, threatened with indictment for failure to cooperate—and no testimonial privilege can protect them as it protects spouses.³⁸⁶

Should the law of evidence allow us to claim a friendship privilege? That is a question I cannot answer here, for that is a project for the second-generation portion of this research enterprise. At the very least, however, if courts or legislators were to begin to recognize a friendship privilege, the descriptive effort in Part I might guide a relevant multifactor test to figure out which friends qualify.

There is another general area within the law where a friendship's "right to privacy" might also be vindicated: Fourth Amendment jurisprudence.³⁸⁷ If the law were truly interested in protecting our friendships, we might have different Fourth Amendment rights than we do under current doctrine.

It is undoubtedly the case that "police conduct in searching may have an impact on [a defendant's] . . . friends."³⁸⁸ Indeed, police searches routinely disrupt shared spaces where friendship occurs in privacy. For example, friends often spend time together in one another's home or car. Yet police searches need not currently respect "shared" privacy and are only bound to respect the privacy of an individual. As Mary Coombs explains, "Most lay people . . . are probably not aware that the law would not recognize their claim to privacy in a friend's car."³⁸⁹ Accordingly, it may make sense to create a category of friendship privacy within Fourth Amendment jurisprudence. Here is Coombs's provocative suggestion:

[C]ourts should recognize that a gratuitous bailment gives rise to expectations of shared privacy even though the bailee has only a minimal legal claim against the bailor. For example, I might, when leaving town for a few days, ask my closest friend to keep my expensive new painting for me. When she agrees, I can assume that she will place it in some place to which she has access and which she feels is safe from strangers. If the police break into her house a few days later and find the painting in her closet, I

385. See JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 54 (2000).

386. See Levinson, *supra* note 384, at 2074 (Monica Lewinsky's best friend's "status as 'best friend' prevented neither the subpoena nor her cooperation with the grand jury; her cooperation was bought, apparently, by an immunity agreement that protected her against potential prosecution for attempting to erase the relevant e-mails.").

387. For a much more elaborate and sophisticated analysis of this issue, see Mary I. Coombs, *Shared Privacy and the Fourth Amendment, or the Rights of Relationships*, 75 CAL. L. REV. 1593 (1987).

388. *Id.* at 1594.

389. *Id.* at 1596.

ought to be able to assert a [F]ourth [A]mendment challenge to the search. Current doctrine does not bar the recognition of such shared privacy claims. However, because such concerns are not explicitly recognized by current [F]ourth [A]mendment law, the courts neglect them.³⁹⁰

If the privilege of privacy within a friendship is disrupted by a police search, perhaps a legal regime interested in protecting friendships would give the friend the legal right to challenge a search. To some extent, a version of this right exists on account of *Jones v. United States*,³⁹¹ where the Supreme Court recognized a claimant's right to contest a search of his good friend's house because he was staying there, had permission to do so, and was, in any case, the defendant charged with possession.³⁹² Yet, *Jones* did not consider the possibility for a privacy privilege conferred by friendship and, in any event, has been subject to substantial criticism.³⁹³ Perhaps all that can be said on behalf of those who wish to establish more Fourth Amendment protection for friends is that litigants should push courts to recognize that friends routinely have a shared expectation of privacy between them that Fourth Amendment jurisprudence should grow to appreciate more substantially.³⁹⁴

If we care to protect friendships from abuse, perhaps the normative argument in Part II has something to recommend on the Fourth Amendment issue of "false friends."³⁹⁵ False friends are government agents who extract information from defendants by pretending to be their friends. And as James Tomkovicz has written, "[F]ourth [A]mendment challenges to this law enforcement method, in all its forms, have inevitably fallen upon a majority of deaf ears."³⁹⁶ The logic for the failures of these challenges turns on the idea that victims of the false friends disclose voluntarily any secret information and have no reasonable expectation of privacy in such disclosures. If friends are entitled to the privilege of privacy

390. *Id.* at 1618–19 (citation omitted).

391. 362 U.S. 257 (1960).

392. *Id.* at 265–67.

393. See, e.g., *Rakas v. Illinois*, 439 U.S. 128 (1978). *Rakas* did not allow the rationale of *Jones* to extend to any right of privacy associated with riding in a friend's car. *Id.* at 140–49. And *Jones*'s "automatic standing" rule (for the defendant) was overruled in *United States v. Salvucci*, 448 U.S. 83, 85 (1980).

394. See Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 19 (1983) ("[A person] who entrusts property to a relative, friend or confederate in crime ordinarily has a reasonable expectation of privacy in any private place where the bailee stores this property.").

395. See generally *id.* at 33; Peter Goldberger, *Consent, Expectations of Privacy, and the Meaning of "Searches" in the Fourth Amendment*, 75 J. CRIM. L. & CRIMINOLOGY 319, 344 (1984); James J. Tomkovicz, *Beyond Secrecy for Secrecy's Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province*, 36 HASTINGS L.J. 645, 727–30 (1985).

396. Tomkovicz, *supra* note 395, at 727 n.331 (citing *United States v. White*, 401 U.S. 745 (1971); *Osborn v. United States*, 385 U.S. 323 (1966); *Hoffa v. United States*, 385 U.S. 293 (1966)).

(and the related duty of confidentiality explored above),³⁹⁷ perhaps the false-friend problem cries for a different solution in a polity properly attuned to the needs of friendships.

The entrapment defense could similarly be made sensitive to the friend's privilege of privacy. In *Sherman v. United States*,³⁹⁸ Joseph Sherman claimed that the government's informant abused the friendship between them, inducing him to commit a crime he likely would not have otherwise committed if he had not been so concerned for his friend's well-being.³⁹⁹ Sherman met the informant at a doctor's office where they were both being treated for drug addiction; they quickly bonded, owing to their similar struggles to overcome the addiction.⁴⁰⁰ Ultimately, the informant tried to get Sherman to obtain drugs for him, which Sherman did (after refusing several requests).⁴⁰¹ He did so without profit⁴⁰² and was subsequently arrested.⁴⁰³

A jury rejected Sherman's entrapment defense, finding that Sherman was "predisposed to commit the act and exhibited only the natural hesitancy of one acquainted with the narcotics trade."⁴⁰⁴ The Court reversed the jury, finding that

397. The "secrets" view of friendship discussed in Cocking & Kennett, *supra* note 45, might be especially relevant in developing this area.

398. 356 U.S. 369 (1958).

399. *Id.* at 371-72.

400. *Id.* at 371.

401. *Id.*

402. *Id.* This actually raises another interesting intersection of the law and friendship: whether doing a favor for a friend is a type of profit that accrues to the gift giver. The inquiry is especially relevant in the context of "tipper liability" for those who improperly tip their friends and colleagues by conveying material nonpublic information. For Rule 10b-5 liability to lie against a tipper under the "classic relationship" theory, a "personal benefit" must pass to the tipper on account of the tip. See *Dirks v. SEC*, 463 U.S. 646, 666-67 (1983); 1 WANG & STEINBERG, *supra* note 271, § 5:2.8. Courts have held that a tipper passes the personal-benefit test when the benefit is merely vicarious and the tipper feels good because the tippee feels good; these courts contemplate that a seemingly gratuitous tip to a friend can nevertheless constitute a substantive personal benefit. See *Dirks*, 463 U.S. at 664 ("The elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend."); 1 WANG & STEINBERG, *supra* note 271, § 5:2.8[C] (citing *SEC v. Warde*, 151 F.3d 42, 48-49 (2d Cir. 1998), and *SEC v. Maio*, 51 F.3d 623, 633 (7th Cir. 1995), as examples where the personal-benefit test was met between friends).

Perhaps we need to debate more carefully whether tips between friends are part of an exchange in which a real personal benefit accrues to the friend offering the tip, or whether we ought to view tips by certain friends as fully gratuitous, to which no presumption of personal benefit should apply. The law, at least in *SEC v. Downe*, 969 F. Supp. 149, 156 (S.D.N.Y. 1997), seems to take the "exchange theory" to be appropriate, consistent with the views about friendship and mutual assistance *supra* Part I.B. (For sources on "exchange theory," see *supra* note 59.) But it may be that we do not want our law to endorse this exchange-theorist or "use" (from Aristotle's typology) conception of friendship. We might also want the law to recognize that there are some friendships where gifts are, in fact, given purely gratuitously. More thinking about this matter is surely warranted.

403. *Sherman*, 356 U.S. at 371.

404. *Id.* at 371.

the entrapment defense was established as a matter of law: The informant's "resort to sympathy"⁴⁰⁵ was exactly the "evil which the defense of entrapment is designed to overcome."⁴⁰⁶ Justice Frankfurter, concurring in the reversal of the jury's decision, was particularly disdainful of the government's appeal to friendship in ensnaring the defendant, and argued that Sherman's entrapment defense should have been predicated upon the informant's appeal to friendship rather than Sherman's supposed lack of criminal predisposition.⁴⁰⁷

Testimonial privileges, Fourth Amendment jurisprudence, and the entrapment defense are all legal domains where more sensitivity to friendship could be usefully developed to protect a friendship's privilege of privacy. Of course, a regime of complete "non-recognition of the friend"⁴⁰⁸ might give friends more privacy in a sense, but the form and range of privacy protections enumerated here would arguably pay friendship more respect.

4. The Privilege of Vindicating Rights

Finally, there may be an argument for conferring upon friends the privilege of third-party standing in our federal legal system. Although no federal court fully recognizes such a form of standing, it may be yet another way to have the legal system give the status of friend more visibility and respect in the law.

405. *Id.* at 373.

406. *Id.* at 376.

407. *Id.* at 383–84 (Frankfurter, J., concurring). Justice Frankfurter's sensibility was also given expression in *Pascu v. Alaska*, 577 P.2d 1064 (Alaska 1978). There, Gordon Pascu raised the defense of entrapment because his friend of five years, a government informant, induced him to buy drugs to alleviate his pain. *Id.* at 1067. The informant repeatedly reminded Pascu of their long-standing friendship. *Id.* The court was thoroughly disgusted with this abuse of friendship and the informant's appeals to Pascu's "sense of obligation and sympathy," and found for Pascu. *Id.* at 1068.

There is, of course, another valence to these entrapment cases, one that dovetails with the privilege of giving care explored earlier. Perhaps these defendants deserve special consideration not because someone else "abused" friendship but because friendship is evidence of mitigated culpability. Helping out our friends, perhaps, earns us goodwill within the criminal law. A bill recently introduced in the U.S. Senate is illustrative: The bill offers sentencing reductions for minor participants in drug conspiracies if they "acted on impulse, fear, friendship, or affection." Drug Sentencing Reform Act of 2006, S. 3725, 109th Cong. § 202(2)(B) (2006), available at http://sentencing.typepad.com/sentencing_law_and_policy/files/senate_cocaine_bill.pdf.

Notably, the proposed bill also furnishes an enhancement for friendship abuse, when a drug conspirator uses "impulse, fear, friendship, affection, or some combination thereof" to ensnare others into a conspiracy. *Id.* § 201(2)(A)(ii). This indicates that abuse of friendship and being motivated by friendship are seen by Congress as culpability factors. For more on friendship and sentencing, see *supra* note 324.

Thanks to Carissa Byrne Hessick for very smart interventions on this subject.

408. Goodrich, *The Immense Rumor*, *supra* note 18, at 203.

It is, of course, a truism of standing doctrine that people must seek to vindicate their own rights and must sue only upon their own injuries. The constitutional prerequisites to standing that are deemed to flow from Article III's purported "case or controversy" requirement are "injury, causation, and redressability."⁴⁰⁹ But there is also a "prudential" limitation that the Court has imposed: the prohibition against third-party standing, sometimes termed the rule against *jus tertii*.⁴¹⁰ The central ideas in this prudential doctrine are (1) that third parties are not well situated to protect vigorously the interests of the "true" parties to a dispute; (2) that the justice system will work more efficiently if it limits third-party standing; and (3) that third parties may seek to vindicate a right that the real party-in-interest wishes to forego.⁴¹¹

Still, the Court has carved out a set of exceptions to the rule against *jus tertii*. Two of these exceptions could, perhaps, become the basis of a true third-party "friend" standing.⁴¹² The first exception is that when there are substantial obstacles preventing a party from asserting her rights, a third party—if the third party can prove that she will adequately represent all the interests of the original party—may overcome the presumption against third-party standing.⁴¹³ One way to respect friends may be to fit them into this exception, conferring upon them a presumption that they will adequately represent their friends' interests.

The second exception is similarly susceptible to recognizing friends' privilege of vindicating their counterparts' rights. This exception "permits an individual to assert the rights of third parties where there is a *close relationship* between the advocate and the third party."⁴¹⁴ This category has been applied to allow third-party standing for doctors to represent the interests of their patients,⁴¹⁵ for lawyers to be named parties on behalf of their clients,⁴¹⁶ for

409. ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 83–84 (3d ed. 1999).

410. See RICHARD H. FALLON ET AL., *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 187–95 (4th ed. 1996). The classic cases are *United Food & Commercial Workers Union Local 151 v. Brown Group, Inc.*, 517 U.S. 544, 551–57 (1996), and *Warth v. Seldin*, 422 U.S. 490, 498–501 (1975). Some academic commentary on the subject can be found in Henry P. Monaghan, *Third Party Standing*, 84 COLUM. L. REV. 277 (1984).

411. These considerations are evident in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 80–81 (1978), and *Singleton v. Wulff*, 428 U.S. 106, 113–15 (1976).

412. Recall the material on next friend standing, *supra* note 3.

413. See CHEMERINSKY, *supra* note 409, at 84 (furnishing examples and citations).

414. *Id.* at 85 (emphasis added).

415. See *Singleton*, 428 U.S. at 117–18 (doctor); *Doe v. Bolton*, 410 U.S. 179, 188–89 (1973) (same); *Griswold v. Connecticut*, 381 U.S. 479, 480–81 (1965) (same). But see *Tileston v. Ullman*, 318 U.S. 44, 46 (1943) (declining to allow a doctor to assert the constitutional rights of his patients, at least in part because the doctor did not assert any injury of his own).

416. See *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720–21 (1990); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 623–24 (1989).

political organizations to represent the interests of their membership,⁴¹⁷ and for vendors to sue on behalf of their customers.⁴¹⁸

To be sure, the Court refused to allow third-party standing in the context of a mother trying to gain standing to challenge the death penalty exacted upon her son in the famous Gary Gilmore case.⁴¹⁹ And it has been suggested that perhaps the cases where the *jus tertii* exceptions apply can “be explained as involving the assertion of the plaintiff’s own right to engage in . . . constitutionally protected relationship[s].”⁴²⁰ But it may, nevertheless, be possible to develop a jurisprudence that would allow friends to vindicate the rights of their counterparts. And since the rule against third-party standing is prudential rather than a firm constitutional limitation on standing, perhaps Congress could confer standing upon friends (as long as those friends also meet the constitutional standing requirements). Finally, obviously state courts and legislatures do not labor under Article III constraints.

CONCLUSION

This Article shows that the status of friend *does* make a difference to the law in a number of previously unnoticed ways. Ira Ellman recently argued that “[w]e do not . . . have a law of close friends.”⁴²¹ That’s not quite right, after all. Although conventional wisdom suggests that the friend does not matter at all to the law and that friendship carries no legally enforceable duties or privileges, doctrinal evidence does not bear out that supposition. These moments where friendship is relevant to the administration of law are not substantial, consistent, or systematic; yet, they are pervasive enough to conclude that the law does not wholly stay out of our friendships. Thus, those who insist on the law’s nonrecognition of the friend (either for the law’s sake or for friendship’s sake) must acknowledge that our current legal regime does occasionally take notice of friendships and, indeed, regulates them.

To be sure, this Article just as surely shows that the law has no self-conscious, consistent, or well-considered approach to friendships and its role in regulating them. The law neither seeks to support friendships nor leaves friendships fully alone. There is something haphazard about the law’s approach to

417. See *NAACP v. Alabama*, 357 U.S. 449, 458–60 (1958).

418. See *Craig v. Boren*, 429 U.S. 190, 193–97 (1976). But see *McGowan v. Maryland*, 366 U.S. 420, 429–30 (1961) (declining to allow shop employees to assert an Establishment Clause claim on behalf of customers who may have been constitutionally harmed through “Blue Laws”).

419. *Gilmore v. Utah*, 429 U.S. 1012, 1012–13 (1976). This case may be aberrational, if only because Gary Gilmore himself made it clear that he did not wish to assert his own rights. *Id.* at 1014–15.

420. RICHARD H. FALLON ET AL., *supra* note 410, at 153.

421. Ellman, *supra* note 267, at 700.

friendship that invites further study by lawyers, lawmakers, judges, and scholars.⁴²² At the very least, Part III begs further exploration of the ways law makes friendship matter, why it makes friendship matter in the ways it does, and whether there are particular areas within the law that are especially appropriate (or inappropriate) for the promotion of friendship. Indeed, it may very well be that friendship-burdening duties would ultimately undermine friendships, and only friendship-strengthening privileges are properly tailored to help promote friendship.⁴²³ But this Article leaves this kind of analysis for second-generation stabs at the subject matter.⁴²⁴

422. It may be haphazard because when presented with disputes involving friendships, courts simply try to “be fair” rather than try “to set incentives for socially desirable intimate behavior.” *Id.* at 707. That may be more or less appropriate because, as Ellman argues, “the law is a minor actor among all the factors that influence people in their intimate behavior.” *Id.* at 702. Ultimately, I tend to think Ellman underestimates the law’s influence and, in any case, I remain convinced that gaining some systematicity about friendship will prove more sound than general attempts to figure out how to “be fair” without guidance about what the status of the friend is and why it is important. Our very sense of equity and fairness emerges from our commitments to the status in the first place; accordingly, I do not think we can avoid the task of attempting to achieve some understanding of the status itself—and its importance.

423. Friendship-burdening duties like the duties of rescue, disclosure, and fair dealing might lead people to issue friendship disclaimers: “I like you alright, Ethan, but I do not want to be your friend for legal purposes.” Perhaps these duties would lead to fewer friendships rather than more general friendship promotion. I am not sure, however, that that would necessarily be a bad result. If people were more honest about how they felt about one another and how close they felt toward their group of acquaintances, people would likely be saved a lot of personal pain.

It is not obvious, in any case, whether such a proclamation should be sufficient to overcome the potential duties of friendship developed here. Perhaps friends should be judged by what they do rather than by what they say. See Anderson, *supra* note 366, at 327–30 (arguing that courts tend to prefer objective evidence and discount subjective evidence in establishing the fiduciary nature of a relationship); *id.* at 330 (“A contract provision denying the existence of a confidential relationship . . . when in fact such a relationship did exist, should always be invalid and unenforceable. It would, in effect, represent a disclaimer of fiduciary liability which, under the familiar rule everywhere, is void as against public policy.”); Westfall, *supra* note 366, at 857 n.142 (highlighting that close friendships are relatively easy to prove with objective evidence and citing cases where Texas courts utilized objective evidence to establish that parties were, in fact, close friends). For the larger debate about whether one should be “contractarian” about fiduciary duties, see, for example, Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1 (1990); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879; Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993); Lawrence E. Mitchell, *The Death of Fiduciary Duty in Close Corporations*, 138 U. PA. L. REV. 1675 (1990). Indeed, it may be that “contract thinking” is a “poor model for intimate relations. Old fashion status rules updated as needed to shed gender role rigidities, are far better.” Ira Mark Ellman, “Contract Thinking” Was Marvin’s *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (2001).

424. An excellent place to begin that project might be Zechariah Chafee’s observations about appropriate policy considerations for which policymakers should account when they are deciding whether to intervene in relationships. See Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 HARV. L. REV. 993, 1021–29 (1930).

It should be fairly obvious from the doctrinal explorations offered in Part III of how certain courts have let (or not let) friendship matter that judges and legislators have spent little time thinking about who should qualify for the status of friend when friendship is deemed relevant. Accordingly, any of the more aspirational or purely speculative ways the law could serve friends that Part III identifies have little guidance from current cases about how to designate friends. How, for example, could a court or legislature identify who should count as a friend sufficient to allow him or her to vindicate the rights of a party through third-party standing? None of the little jurisprudence there is on friendship within the law furnishes a workable definition of the category. Indeed, as Coombs has suggested, "It is difficult . . . to define the boundaries of a 'friendship' category in administrable terms."⁴²⁵ We are back to the very first question with which we began. And we must be careful only to exact special duties and confer special privileges upon those who are friends in a meaningful sense or whose conduct implicates the very institution of friendship. Without such parameters, we may fall prey to what Roberto Unger once called "a stifling despotism of virtue."⁴²⁶

This is exactly where Part I should prove especially useful. If the arguments of Part II were persuasive, there is good reason to expand the ways the law recognizes, promotes, and facilitates friendship. But the law can only do so if it has a workable concept that it is aiming to promote. This Article will serve as a starting point for further efforts to get the law to have a more sophisticated approach to the regulation—and, preferably, the promotion—of friendship.

425. Coombs, *supra* note 387, at 1654.

426. Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 641 (1983).
