I. INTRODUCTION

Though an unlikely place for such a profound exchange on the nature of friendship, these lines from the movie *Rocky* raise questions that philosophers have contemplated for centuries: What is the nature of friendship, what do our friends expect of us, and what should we expect of our friends? Beginning in classical antiquity, philosophers have understood there is an intimate connection between friendship among citizens and the health of the political community. In the *Nicomachean Ethics*, Aristotle observed, “Friendship also seems to be the bond that holds communities together, and lawgivers seem to attach more importance to it than to justice.” Classical thinkers viewed friendship in connection with justice and virtue, and thus citizens who interacted with one another in a spirit of civic friendship strengthened the moral health of the state.

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3. See ARISTOTLE, supra note 2, at 1159b25-1160a30 (discussing friendship and community); CICERO, supra note 2, at vii. 23 (declaring how great power of friendship is); see also SUZANNE STERN-GILLET, ARISTOTLE’S PHILOSOPHY OF FRIENDSHIP 150 (1995) (stating well-being of community depends on extent of friendly feelings among members); John M. Cooper, Aristotle on the Forms of Friendship, 30 REV. METAPHYSICS 619, 645-48 (1977) (describing Aristotle’s conception of “civic friendship”); Mary P. Nichols, Friendship and Community in Plato’s Lysis, 68 REV. POL. 1, 18 (2006) [hereinafter Nichols, Friendship and Community] (suggesting Platonic conception of friendship might serve as model for political communities); Sibyl A. Schwarzenbach, On Civic Friendship, 107 ETHICS 97, 105-08 (1996) (analyzing Aristotle’s understanding of friendship connected to political community).
4. ARISTOTLE, supra note 2, at 1155a23-24.
5. See ARISTOTLE, supra note 2, at 1159b25 (commenting on relationships between friendship and justice). Aristotle states, “Friendship and justice seem . . . to be exhibited in the same sphere of conduct and between the same persons, because in every community there is supposed to be some kind of justice and also some friendly feeling.” Id. at 1159b25-28; CICERO, supra note 2, at vii. 23 (describing necessity of friendship
In modern times, however, governments and philosophers have given little thought to the relationship between friendship and the state.\(^6\) Laws give special preference to family members through tax incentives for marriage, special testimonial privileges for spouses, and inheritance rights, but the law overlooks the important role that friends have in our lives.\(^7\) Websites like Facebook and Twitter allow us to stay in almost constant contact with the people in our lives, but although these new technologies allow us to experience our friends in new ways, some scholars, such as MIT professor Sherry Turkle, have wondered whether reliance on these technologies has reduced the quality of our interaction with friends.\(^8\)

Moreover, during this time of recession and high unemployment—when friendships should be more vital than ever—it appears that friendship has become a new source of stress and anxiety, as layoffs and reduced incomes cause feelings of embarrassment and inadequacy relative to friends who have weathered these difficult times unscathed.\(^9\) We may not place the same emphasis on friendship, or think as critically about its significance as classical philosophers once did, but recently, both academic and legal communities have begun to reconsider the importance of friendship and what the state’s role to stable community). Likewise, Cicero observes that without friendship, “what house is so strong, or what state so enduring that it cannot be utterly overthrown by animosities and division?” Cicero, supra note 2, at vii. 23; see also Cooper, supra note 3, at 647 (writing civic friendship natural outcome of “decently structured civic community”). Because friends act justly towards each other, by dealing with fellow citizens as civic friends, one acquires a disposition to act justly towards them. Cooper, supra note 3, at 647.


7. See Leib, Friendship & Law, supra note 6, at 632-33 (describing preferences given to family members under law).

8. See Sherry Turkle, Alone Together: Why We Expect More From Technology and Less From Each Other 11 (2011) (addressing how people are changed as technology substitutes for face-to-face interaction). Turkle suggests that the bonds formed through the internet are not the “ties that bind,” but rather the “ties that preoccupy.” Id. at 280. We have reached a point where people are in almost constant contact with each other, but when they communicate, they rarely do so with full attention. Id.

9. See Emily Bazelon, The Recession Wrecks Friendships, DOUBLE X (June 11, 2009, 8:40 AM), http://www.doublex.com/print/2508 (discussing effects of recession on friendships). Bazelon notes that friendships “have now turned into trickier relationships between one person who still has money and one person who doesn’t.” Id. Bazelon believes people often avoid relationships where the parties tend to spend differently because such relationships cause feelings of inadequacy. Id.; Megan McArdle, Nominal Versus Real Friendship, ATLANTIC (June 12, 2009, 11:46 AM), http://www.theatlantic.com/business/archive/2009/06/nominal-versus-real-friendship/19274/ (commenting and elaborating on Bazelon piece). McArdle recalls from her own experience that when she lost her job and worked odd jobs to make ends meet, she often avoided her friends from business school. McArdle, supra. Yet McArdle also writes that her most valuable friendships persisted through her difficult times. Id. With those close friends, she was able to be honest about her financial difficulties, and they responded by doing activities that did not involve money. Id.
WHAT GOVERNMENTS CAN DO FOR FRIENDSHIP

should be in promoting this relationship. Ethan Leib, professor of law at Fordham University School of Law and the most prolific writer in the area of law and friendship, has argued that courts should recognize legal obligations stemming from a friendship when adjudicating disputes. If the indictment is that modern society has not done enough to promote the value of the friendship, this approach seems problematic because by the time two parties are locked in a dispute, the most important thing—the friendship itself—has been damaged beyond repair or lost completely. Creating new legal duties between friends invites a twist on that opening exchange between Rocky and Paulie: Would we prefer that our friends act because the law commands them to do so, or is it better to allow friends to act selflessly, to “do ‘cause they wanna do”?

This Note will analyze whether the law should do more for the institution of friendship. Throughout Part II of this Note, I will provide an overview of different works of classical philosophy to help familiarize the reader and to understand their relevance to a present-day analysis of friendship. Part II.A will analyze the problem of defining what a friend is. Part II.B will consider the personal nature of friendship and its significance for the greater community. Part II.C will describe recent trends toward extending legal recognition to different kinds of relationships that the law had previously overlooked. Part III.A will demonstrate the weaknesses of some of the existing proposals for attaching legal significance to friendship. In the last section of this Note, I will narrow my focus to one political community—the Commonwealth of Massachusetts—and, by drawing upon themes contained in the landmark decision of Goodridge v. Department of Public Health.


11. See Leib, Contracts and Friendship, supra note 10, at 704 (considering hypothetical about informal lease arrangement between friends). Where one friend has taken unfair advantage of an informal agreement, Leib suggests for example, contract law could be employed to police such opportunistic behavior. Id.; Leib, Friends as Fiduciaries, supra note 10, at 707-20 (discussing ways law could treat friends as fiduciaries).

12. See Leib, Friendship & Law, supra note 6, at 680 (acknowledging objection to concentrating on friendship’s dissolution).


15. See infra Part II.A (examining attempts to provide definition of friendship).


17. See infra Part II.C (discussing reciprocal-beneficiary statutes, same-sex marriage, and family leave statutes).

18. See infra Part III.A (revisiting effort to define friendship and treating friends as fiduciaries).

argue that the Commonwealth would be a logical place for moving forward with this friendship agenda by making limited, public-policy changes that would create protections and incentives that would make it easier for friends to help one another during times of difficulty.20

II. HISTORY

A. The Difficulty of Defining Friendship

1. Plato’s Lysis

The Lysis is the only Socratic dialogue in which Plato directly addresses the nature of friendship.21 The complexities of the dialogue are so great that some scholars of Greek philosophy have effectively thrown up their hands in frustration and concluded that Plato missed his mark.22 In the dialogue, Socrates is drawn into a conversation by a group of young Athenians.23 Socrates marvels at his interlocutors because, despite their young age, they appear to have acquired in each other “a true friend.”24 Socrates confesses that he has not been so lucky, and although he truly values friends above all other material possessions, he is so far from possessing a friend that he does not even know how two people go about becoming friends.25 He then settles on his subject: he will question the boys about the nature of friendship with the hope of gaining a better understanding of this relationship.26

21. See Nichols, Friendship and Community, supra note 3, at 1 (noting this fact may be attributed to difficulty of defining friendship). While not addressing the nature of friendship explicitly, other Platonic dialogues, such as the Crito, the Symposium, and the Phaedrus, can be read as offering insights into the nature of friendship. See generally MARY P. NICHOLS, SOCRATES ON FRIENDSHIP AND COMMUNITY: REFLECTIONS ON PLATO’S SYMPOSIUM, PHAEDRUS, AND LYSIS (2009) [hereinafter NICHOLS, SOCRATES ON FRIENDSHIP]; Frederick Rosen, Obligations and Friendship in Plato’s Crito, 1 POL. THEORY 307 (1973).
22. See Laszlo Versenyi, Plato’s Lysis, 20 PHRONESIS 185, 185 (1975) (discussing W.R.M. Lamb’s introduction to Loeb edition). Lamb concluded that Socrates “is content to lead his young friend into a maze of analogical reasoning from which neither of them can find certain egress.” Id.; see also James Haden, Friendship in Plato’s Lysis, 37 REV. METAPHYSICS 327, 330 (1983) (pointing to view of Platonic scholar W.K.C. Guthrie). Haden references W.K.C. Guthrie who wrote in his A History of Greek Philosophy, “There are many opinions about this dialogue, and I must confess my own, which is simply that it is not a success. Even Plato can nod.” Haden, supra.
23. See PLATO, supra note 2, at 203 (describing scene and setting of dialogue). Initially, Socrates is invited into a conversation with Hippothales and Ctesippus. Id. This group is later joined by Lysis and Menexenus. Id. at 207b.
24. Id. at 212 (observing interaction between Lysis and Menexenus).
25. Id. This is a strange statement coming from Socrates who, from other dialogues, appears to acquire friends with relative ease. See BOLOTIN, supra note 6, at 66.
26. PLATO, supra note 2, at 212. Bolotin argues that while the main question of the text can be stated simply, the deeper inquiry of the Lysis asks, “Is there a friendly love which is wholly free of need? That is to say, does all friendship depend upon the friends’ deficiencies, or is there a higher type of friendship that unites those who admire and cherish each other simply because of one another’s goodness?” BOLOTIN, supra note 6, at 11.
As the dialogue proceeds, the difficulty of defining precisely what a friend is becomes apparent.\textsuperscript{27} Socrates leads his participants through a series of twisting examinations that seem to move toward a resolution just before he points out a weakness in the argument that sends the inquiry back to where it started.\textsuperscript{28} The \textit{Lysis} has been described as one of Plato’s aporetic dialogues that leaves the reader in a state of perplexity about the subject of the work.\textsuperscript{29} By the dialogue’s end, the nature of friendship remains elusive, with Socrates concluding that those who have observed the group’s conversation might conclude that they are all friends, but he explains, “what a friend is we have not yet been able to find out.”\textsuperscript{30} These final lines suggest that while a precise definition of friendship might not be possible, it is a relationship that is best understood by people who have shared some experience together.\textsuperscript{31} While Socrates appears to admit defeat, it is possible that the shared activity of trying to understand the relationship has, in fact, made those in the discussion friends.\textsuperscript{32}

\textbf{2. Defining What a Friend Is in Modern Law}

Any attempt to give friendships a firmer legal footing runs into the problem of defining precisely who a friend is.\textsuperscript{33} Legislators may be able to develop a

\textsuperscript{27} See Haden, supra note 22, at 332 (stating “major obstacle” of the \textit{Lysis}). Haden argues that the problem of arriving at a unified view of the dialogue lies in synthesizing the proposals that are made and then refuted. \textit{Id.} For example, Haden notes, one proposal is that friendship exists between two people who are good, but then this is refuted because people who are good should be self-sufficient, free of wants, and therefore free of the need for friends. \textit{Id.}

\textsuperscript{28} See Bolotin, supra note 6, at 11-12 (providing an overview of dialogue’s progression). In the introduction to his translation of the \textit{Lysis}, Bolotin provides a simplified account of the reasoning and arguments in the dialogue, which I will attempt to summarize: the first proposal is that friendship can only exist between people who are alike, specifically people who are good. \textit{Id.} at 11. But Socrates points out that those who are good want for nothing and do not need friends. \textit{Id.} Then, Socrates proposes that people who are neither good nor bad are friends to those who are good because those who are good can help the majority of us who are imperfect become happier. \textit{Id.} Accordingly, friendship would seem to depend on the presence of bad in the world and our desire to associate with good people in order to protect ourselves from what is bad. \textit{Id.} But if this were the case, those who are perfectly good would have no reason to return the love they receive, and thus friendship would not be a reciprocal relationship. \textit{Id.} Socrates then asserts that friendship could exist even if there was no evil in the world. \textit{Id.} This proposition returns the dialogue to where it started because in the absence of evil, friendship could only exist between those who are good, a theory that Socrates has already rejected. \textit{Id.} at 12.

\textsuperscript{29} See Nichols, Supra note 21, at 153 (discussing dialogue’s perplexity).

\textsuperscript{30} Plato, supra note 2, at 223b.

\textsuperscript{31} See Nichols, Supra note 3, at 16. Nichols argues that the inconclusive nature of the \textit{Lysis} is appropriate because “whether or not anyone can say what a friend is, only friends can know whether a friend exists.” \textit{Id.}

\textsuperscript{32} See Bolotin, supra note 6, at 66-67 (discussing dialogue’s conclusion). Bolotin notes that by the dialogue’s end, the reluctance to end the conversation suggests that the participants now see Socrates as their friend. \textit{Id.}

general definition, and Florida and New York have crafted broad legal
definitions of a friend for the purposes of making healthcare proxy decisions.34
Ethan Leib has noted that our friends, unlike our immediate family members,
do not lend themselves to an easy definition because we choose our friends for
many different reasons.35 Although every person feels they could say with
precision who their closest friends are, the vague standards and individual
preferences by which we all make these judgments present a significant
challenge for any public-policy maker.36

In his article, Friendship & the Law, Leib proposes a set of characteristics
for determining the boundaries of what constitutes a friendship.37 These traits
are not intended to be exhaustive or mutually exclusive; rather, they would
serve to aid judges and lawmakers in deciding who should be thought of as a
friend.38 According to Leib, friendship is a relationship in which people
voluntarily seek to associate with one another; there is a great deal of trust and
intimacy; friends also reciprocate care and emotional support; true friends treat
one another with a sense of equality, and these relationships should be durable
enough to withstand the passage of time.39

One way around the challenge of defining friendship is to follow the path
proposed by David Chambers, professor of law at the University of Michigan,

34. See FLA. STAT. ANN. § 765.101 (West 2010); N.Y. PUB. HEALTH LAW § 2961(5) (McKinney 2007).
The Florida statute reads

“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 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.

FLA. STAT. ANN. § 765.101. The New York statute reads similarly:

“Close friend” means any person, eighteen years of age or older, who is a close friend of the patient,
or relative of the patient (other than a spouse, adult child, parent, brother or sister) who has
maintained such regular contact with the patient as to be familiar with the patient’s activities, health,
and religious or moral beliefs and who presents a signed statement to that effect to the attending
physician.

N.Y. PUB. HEALTH LAW § 2961(5).

35. See Leib, Friends, supra note 33 (comparing friends to family members). There is no precision
to determining when a friendship starts and ends. Id.

36. See id. (noting difficulty in persuading lawmakers to assign rights to “amorphous class”).

37. See Leib, Friendship & Law, supra note 6, at 642-47 (describing criteria for delineating friendship
relation).

38. See id. at 642 (outlining usefulness for list of friendship characteristics).

39. See id. at 642-47. I have described a few of Leib’s most important characteristics, but the full list
includes: voluntariness, intimacy, trust, solidarity and exclusivity, reciprocity, warmth, mutual assistance,
equality, duration, and modes of conflict resolution. Id. As Leib describes, his intent is not to reduce
friendship to a “top-ten list,” but rather understanding some of these attributes could be the beginning point for
the law to identify when a friendship exists. Id. at 647.
who suggests that, rather than leaving the task of defining who is a friend to legislators, states could permit friends to register their friendships formally with a government office. This status would only be available to unmarried persons who share a close relationship. Becoming registered as “designated friends” would then allow those friends to share certain rights and responsibilities, such as making financial and medical decisions on behalf of one another if one becomes incapacitated, enabling them to take family leave on the same terms as married persons, and gaining the privilege to refrain from testifying against a friend in criminal or civil cases. This proposal recognizes that individuals are best suited to say who their close friends are.

B. Friendship and Its Implications for the Larger Community

1. Aristotle’s Nicomachean Ethics

In the Nicomachean Ethics, Aristotle, Plato’s former pupil, considers the nature of friendship and how it relates to the larger community. For Aristotle, friendship is critical for every kind of citizen—old and young, rich and poor. In the personal sphere, friends rely upon one another and are better disposed to recognize opportunities and seize them. In the political sphere, friendship

40. See Chambers, supra note 10, at 1353 (describing mechanics of his proposal). The form for registering a friendship would tell the parties that they are accepting a set of “mutual responsibilities.” Id. But see Richard Stith, Keep Friendship Unregulated, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 263, 271 (2004) (arguing against Chambers proposal). Stith argues a “State Friendship Registry” would be a significant intrusion into private life. Id.

41. Chambers, supra note 10, at 1352 (writing new status would be available to “any unmarried pair with a close relationship”).

42. See id. at 1353 (describing responsibilities associated with “designated friend status”). Chambers’s status would not permit the pair to receive financial support from the state, and no financial obligations would arise between two people who registered their friendship. Id. at 1355. Rather, Chambers’s proposal addresses a concern shared by single people regarding who will care for them and make decisions on their behalf in the event of sickness. Id.

43. See supra note 30 and accompanying text (describing view of Lysis that only friends can know when friendship exists).

44. See ARISTOTLE, supra note 2, at 1159b27 (writing every community should be characterized by justice and friendly feeling); Schwarzenbach, supra note 3, at 97 (contending Aristotle’s theme suggests citizens in just society experience friendship toward each other). Aristotle’s ethical theory regarding friendship has been applied by other disciplines to modern dilemmas. See generally Mary Catherine Sommers, Useful Friendships: A Foundation for Business Ethics, 16 J. BUS. ETHICS 1453 (1997) (arguing Aristotle’s notions of friendship provide context for understanding virtue in business setting).

45. ARISTOTLE, supra note 2, at 1155a5-16 (discussing need for friendship among variety of citizens). For the rich, friends help to guard and preserve prosperity. Id. at 1155a7. For the poor, and through times of misfortune, friends are “the only refuge.” Id. at 1155a12. Friends keep the young from making mistakes and provide care for each other when old. Id. at 1155a13-14.

46. Id. at 1155a13 (stating friendships during prime of life enable “fine achievements”). Michael Eisner, former CEO of Disney, recently offered a modern interpretation of this idea. See generally MICHAEL D. EISNER, WORKING TOGETHER: WHY GREAT PARTNERSHIPS SUCCEED (2010). Eisner profiles a series of different partnerships and describes how these partnerships enabled success in business. Id. On his partnership with Frank Wells at Disney, Eisner writes, “There were never any hurt feelings or ego trips or secret signals of
bonds communities together, becoming even more important than justice because where friendship exists there is no need for justice.47

Aristotle explains that friendship only emerges when the friendly feeling exhibited by one party is reciprocated in a mutual exchange of goodwill for the sake of the other person.48 This mutual exchange of well-wishing is a condition for any friendship, but Aristotle recognizes that people become friends for different reasons.49 In Aristotle’s ethical theory, there are three forms of friendship: friendship based on utility, friendship based on pleasure, and friendship based on goodness.50 In friendships of utility, each side gains some advantage from the relationship.51 Likewise, friendships based on pleasure exist because people see in another some quality that is pleasurable.52 But friendships of utility and pleasure are fragile; they cease when they are no longer useful or pleasurable.53

The highest form of friendship is based on goodness.54 In more modern terms, we might think of these people as our best and closest friends.55 Unlike

47. ARISTOTLE, supra note 2, at 1155a23-27 (discussing friendship and justice); see also Schwarzenbach, supra note 3, at 106 (arguing justice willingly acknowledged among friends superior to justice imposed by force). Schwarzenbach expands on Aristotle’s conception of justice and friendship, arguing that while people are prone to favor themselves, true justice develops from a friendly feeling that makes us more inclined to yield our, at times, unreasonable positions. Id.

48. ARISTOTLE, supra note 2, at 1155b34 (writing only friendships of those who are good and similar in goodness are perfect). Does Aristotle suggest here that this perfect friendship can only exist among the most moral and virtuous people? See Cooper, supra note 3, at 625-26 (discussing Aristotle’s views on three forms of friendship). Cooper notes if Aristotle intends that only the perfectly virtuous can have friendships of the highest form, then he would adopt a depressing view of humanity since there are “few or no paragons of virtue in the world.” Id. at 626. Cooper argues that Aristotle does not limit the highest form of friendship to “moral heroes” and does not intend for friendships of utility and pleasure to be “wholly self-centered.” Id. Even though Aristotle states that friendships of utility and pleasure end when they cease to be useful or pleasurable, Cooper argues that these lower forms of friendship are more complex and involve a “subtle mixture of self-seeking and unself-interested well wishing and well-doing.” Id.

49. See id. at 1156a4-5 (stating friends must be recognized as wishing each other’s good).

50. Id. at 1156a23-1156b35.

51. Id. at 1156a11. Aristotle writes that people who are friends because of utility “do not love each other for their personal qualities, but only in so far as they derive some benefit from each other.” Id. at 1156a12-13.

52. ARISTOTLE, supra note 2, at 1156a14.

53. Id. at 1156a29.

54. Id. at 1156b6 (writing only friendships of those who are good and similar in goodness are perfect).
friendships of utility or pleasure, friendships based on goodness are rare.\textsuperscript{56} These friendships do not develop quickly, but only come into being after enough time has passed to build up trust and intimacy.\textsuperscript{57} Aristotle discusses another form of friendship that he does not label explicitly, but which modern scholars have described as “civic friendship.”\textsuperscript{58} This form of friendship is related to friendships of utility because, as Aristotle describes, political communities exist for the purpose of securing mutual advantage among their citizens.\textsuperscript{59} The importance of cultivating civic friendships becomes clear because, in communities characterized by an attitude of civic friendship, citizens interact with an understanding of how their actions contribute to the overall well-being of the community.\textsuperscript{60} Friendship becomes more critical than cultivating justice because people can be just towards one another and yet do no more for each other than the minimum of what justice demands.\textsuperscript{61} But in communities that exhibit this quality of civic friendship, there is already a concern for the well-being of others and a willingness to go beyond the minimum requirements that justice demands so that these citizens refrain from doing harm because of their shared feelings of good will and not simply because of fear of the law’s punishment.\textsuperscript{62} In a city characterized by civic friendship, the ordinary citizen understands the benefits he derives from living in a community are the product of a collaborative effort by his fellow citizens.\textsuperscript{63}

\textsuperscript{56} See \textsc{Aristotle}, supra note 2, at 1156b25 (describing friendships of most perfect kind are naturally rare).

\textsuperscript{57} Id. at 1156b26-30. Aristotle writes that these kinds of friendships are not formed until two people get to know each other and eat “the proverbial quantity of salt together.” Id. at 1156b27. These friends win each other’s trust only after proving their worth. Id.

\textsuperscript{58} See \textsc{Cooper}, supra note 3, at 645.

\textsuperscript{59} \textsc{Aristotle}, supra note 2, at 1160a11 (writing political associations formed and continue for sake of advantage); Id. at 1160a28-30 (describing political associations correspond to secondary friendships or utility and pleasure).

\textsuperscript{60} See \textsc{Cooper}, supra note 3, at 646 (civic friendship exists when citizens understand they are regularly benefitted by actions of others).

\textsuperscript{61} Id. (noting justice as respect for law consistent with “hard, and unsympathetic character”). There can be justice in communities where people have little concern for one another and who only assist each other to the extent that justice might require them. Id.

\textsuperscript{62} Id. (discussing obligations of friendship in contrast with obligations justice requires). Friends exhibit concern for each other’s welfare and therefore do not aim to harm or disadvantage the other, and they are also more willing accommodate each other because of this mutual concern rather than resorting to the strict rules of justice. Id.

\textsuperscript{63} Id. at 647 (writing benefits of civic life derive from cooperative efforts of citizens). On the value of civic friendships that aim at mutual advantage, \textsc{Cooper} writes:

To have friendly feelings towards someone is thus to have the disposition to treat that person virtuously in all respects, because one loves and values him as a person. So the process by which one comes to acquire friendly feelings towards one’s fellow-citizens is the acquisition of a disposition to act in all respects morally toward them, and not merely a disposition to act justly. The
2. Cicero’s De Amicitia

In *De Amicitia*, Cicero sets his discussion of friendship against the backdrop of troubled times in ancient Rome. The dialogue takes place in the year 129 B.C.E., shortly after the mysterious death of the famous Roman military leader Scipio Africanus Minor. In the dialogue, Scipio’s friend Laelius expounds upon the nature of friendship. The dark period in which the dialogue is set mirrors the precarious position of the Roman state during the time Cicero was writing. *De Amicitia* was written around the fall of 44 B.C.E, after Julius Caesar’s assassination and as Rome was steadily advancing toward civil war.

Echoing the views of Aristotle in the *Nicomachean Ethics*, Laelius describes how friends are needed just as much in times of prosperity as in times of difficulty. Certain qualities of friendship become apparent: friends are drawn together by love and the recognition of virtue in the other. True friends do not try to leverage their friendship for the sake of gaining some advantage. Friendship also has limitations. A friend has no duty to support another in acts that will harm the state. Because virtue brings friendship into being, a friendship cannot be sustained if that virtue is disregarded.

Given the tumultuous time in which Cicero was writing, as the dialogue progresses, one of friendship’s virtues becomes clear: friends should support each other during times of difficulty. When a friend is dejected, it is the other’s responsibility to “arouse his friend’s prostrate soul and lead it to a sentiment of civic friendship, in short, transforms what might be hard and narrow forms of all the virtues. By grounding the disposition to act virtuously on love and disinterested good will towards others as persons with whom one shares social life to one’s own and their mutual benefit, civic friendship is a necessary supplement to the virtues themselves, since only through it does a person come to have the warmth and the sympathetic attachment to other persons which one rightly demands of a perfect and fully moral person.

*Id.* at 647-48.

64. See H. H. Scullard, *Scipio Aemilianus and Roman Politics*, 50 J. ROMAN STUD. 59, 59 (1960) (cataloguing many political and social problems facing Rome in decade prior to 129 B.C.E.). Scullard characterizes the Roman political scene as “bristling with perplexing problems,” including the relation of the Senate to the people and problems relating to agrarian and military policy. *Id.*


66. See CICERO, supra note 2, at iv. 16 (asking Laelius to discuss friendship in theory and practice).

67. See Keith, supra note 65, at 56 (describing political scene in Cicero’s day as “very tense”).


69. CICERO, supra note 2, at vi. 22.

70. See id. at viii. 27 (writing friendship springs from inclination of soul rather than expectation of profit).

71. See id. at ix. 30-31 (describing origin of friendship with Scipio). As Laelius describes, the beginning of his friendship did not come from the hope of gain, but because of the admiration of the other’s character. *Id.*

72. See id. at xi. 36 (asking how far love should go in friendship).

73. See CICERO, supra note 2, at xi. 38 (writing friendship no defense to acts against state).

74. See id. at xi. 38 (stating friendship does not remain when virtue is forsaken).

75. Id. at xvi. 64 (quoting Ennius). “When Fortune’s fickle the faithful friend is found.” *Id.*
livelier hope.” During troubled times, the false friend will not be found, but Laelius praises those friends who are firm during times of misfortune as a truly exceptional and rare class of men. Additionally, friends must always be loyal, and have the freedom to give advice freely and accept advice without hard feelings. Laelius closes his discourse with some reflections on his friendship with Scipio; in it he found a person with whom he could enjoy times of leisure and someone he could turn to for counsel on both public and private matters. Although his friend has passed, Laelius remarks that he will face “the larger tasks of life” by keeping in his mind the “memory and example” of his friend.

3. Comparing Friends with Fiduciaries

In contrast to the attention that writers of the classical period gave to the significance of friendship, in the modern period, friendship has often been overlooked as a relationship that has any serious connection to the well-being of the state. With the emergence of modern democracy, philosophers and political thinkers turned their attention elsewhere, looking to the desire for security and the ability to pursue one’s self interest as the bonds that held communities together. But modern law’s treatment of duties associated with fiduciaries offers a starting point for contemplating how courts might approach friendship.

There is scant case law dealing directly with the nature of friendship, but when considering fiduciaries, courts readily discuss traits often associated with

76. Id. at xvi. 59.
77. See Cicero, supra note 2, at xvii. 64.
78. See id. at xxv. 91 (describing ability to give and receive advice as characteristic of “true friendship”).
79. See id. at xxvii. 103.
80. See id. at xxvii. 102.
81. See Schwarzenbach, supra note 3, at 108-17 (discussing modern developments overshadowing value of friendship to state). Schwarzenbach identifies social changes including the Reformation, the rise of notion of individual rights, and the development of a free market economy as becoming the central forces that produced the modern state. Id. These forces overshadowed ideas concerning the value of friendship to the community. Id. at 112 (stating notions of friendship “fell by the wayside”); see also C. S. Lewis, The Four Loves 57-58 (1960) (explaining friendship often ignored in modern period). Lewis juxtaposes the careful treatment given to friendship by Aristotle and Cicero with what he regards as a less-serious modern view that friendship is something that “fills up the chinks of one’s time.” Lewis, supra, at 58.
82. See Schwarzenbach, supra note 3, at 98 (discussing modern views on problem of political unity); see also Thomas Hobbes, Leviathan 186 (C.B. Macpherson ed., Penguin Books 1985) (1651) (describing motivations to form society). Without government, Hobbes argues, man’s natural state is war, of every man against every man. Hobbes, supra, at 185. In this state, man is in continual fear of death and this fear inclines him to seek the peace and security of civil society. Id. at 188; John Locke, Second Treatise of Government 66 (C.B. Macpherson ed., Hackett Publ’g Co. 1980) (1690) (discussing ends of political communities). Men voluntarily give up some of their natural liberty and consent to live under governments in an effort to preserve their property. Locke, supra.
83. See Leib, Friends as Fiduciaries, supra note 10, at 669 (arguing fiduciary law provides framework for friends to understand their duties to each other).
friends, such as loyalty, trust, and candor. Some relationships always carry fiduciary obligations; these relationships include: attorney-client, trustee-beneficiary, partner-partner, physician-patient, and agent-principal. In these kinds of relationships, courts have identified duties inherent in the relationship, including a duty of loyalty, in which the fiduciary puts the interests of the beneficiary ahead of his own, and duties of candor and confidentiality that promote trust between the fiduciary and the beneficiary.

In Meinhard v. Salmon, the New York Court of Appeals considered whether fiduciary duties were present among “coadventurers” in a business arrangement. Salmon had entered into a twenty-year lease of a hotel and had borrowed money from Meinhard to make improvements to the property. The pair agreed to split the profits generated by the property. Toward the end of the lease, Salmon entered into a new business relationship with the owner of the reversion of the lease without disclosing this new arrangement to his partner, Meinhard. In holding that Salmon had breached his duty to Meinhard by not informing him of his new business arrangement, Chief Justice Benjamin Cardozo famously described the heightened nature of the fiduciary duties that existed between Meinhard and Salmon:

Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm’s length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most

84. See supra notes 57, 78 and accompanying text (highlighting existence of trust, loyalty, and candor between friends).
85. See Leib, Friends as Fiduciaries, supra note 10, at 671 (listing relationships always treated as fiduciary in nature).
86. Id. at 673-78 (discussing nature of various fiduciary duties). The duty of loyalty is the “core” fiduciary duty that prohibits the fiduciary from pursuing self-interested transactions and requires him to subordinate his own interests to those of the beneficiary. Id. at 673-74. The idea of trust is embodied in the fiduciary duty of confidentiality in which fiduciaries, like lawyers or doctors, are forbidden from revealing information communicated to them by clients and patients. Id. at 675. To ensure a fully honest relationship between the fiduciary and the beneficiary, a duty of candor requires fiduciaries to disclose any conflicts of interest. Id.
87. 164 N.E. 545 (N.Y. 1928).
88. Id. at 546 (stating coadventurers subject to fiduciary duties akin to partners).
89. Id. at 545-46 (detailing arrangement between Meinhard and Salmon). Salmon undertook to make changes to the hotel at a cost of $200,000. Id. at 546. Meinhard agreed to lend Salmon half the money needed to implement the renovations and operate the property. Id.
90. Id. In exchange for the money needed to renovate the property, Salmon agreed to pay Meinhard forty percent of the net profits of the lease for the first five years and then fifty percent for the remainder of the lease. Id.
91. Meinhard, 164 N.E. at 546 (describing formation of new lease). The court did not speculate on Salmon’s motive for keeping the new arrangement from Meinhard. Id. The new lease that Salmon negotiated, however, was far more lucrative than the one he had with Meinhard. Id. Under the first lease, the rental value was $55,000, but under the new lease, the rental value was to be $350,000 to $475,000. Id.
sensitive, is then the standard of behavior.  

a. Finding Fiduciary Duties Without a Formal Fiduciary Relationship: Breaches of Confidential Relationships Involving Trust and Confidence

In *Meinhard v. Salmon*, the court imposed a constructive trust on the proceeds of the new lease. The doctrine of constructive trusts developed in England and the United States as an equitable remedy in cases where an express trust did not exist or was unenforceable. A constructive trust is often sought in cases where there has been a breach of a confidential relationship that was based on trust and confidence. Courts have used this theory of a confidential relationship to extend their equity jurisdiction to reach disputes involving relationships that do not fit neatly into one of the formal fiduciary categories like trustee-beneficiary or attorney-client. There is no singular definition for when a confidential relationship arises, but courts may consider a variety of factors, including whether one party placed trust and confidence in another and relied on the other party’s skill or expertise.

Friendship has, at times, been used as the basis for arguing that there was a

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92. *Id.* (explaining duties that exist between fiduciaries). The court discussed the heightened nature of the fiduciary relationship in contrast to other relationships, stressing the need to keep the conduct of fiduciaries at a “level higher than that trodden by the crowd.” *Id.*


94. See Powell, *supra* note 93, at 10 (discussing origin of constructive trusts). In English courts, the finding of a constructive trust is substantively connected to the presence of a confidential relationship, while in the United States, the doctrine developed into a much broader equitable remedy. *Id.* at 11-14.


96. See Roy Ryden Anderson, The Wolf at the Campfire: Understanding Confidential Relationships, 53 SMU L. REV. 315, 315-17 (2000) (discussing origin of confidential-relationship doctrine). The confidential-relationship doctrine is often interpreted broadly and may be applied to a host of relationships, such as business, social, or personal relationships where one party has placed trust and confidence in another. *Id.* at 316. Finding a confidential relationship gives rise to certain obligations that are fiduciary in nature including a duty to disclose and avoid conflicts of interest. *Id.* at 315-16.

confidential relationship between a plaintiff and defendant. In *Holland v. Lesesne*, a pair of families that had been “warm personal friends” planned to purchase a vacation property jointly. After a dispute, Holland, acting without Lesesne’s knowledge, purchased the property on his own and forcefully dispossessed Lesesne. Lesesne sued to impose a constructive trust on his interest in the property. The court reasoned that “informal relationships, such as moral, social, domestic, or merely personal ones” where one person trusts and relies on another may be sufficient to establish a confidential relationship with fiduciary obligations. The court held that, at all relevant times, there was a confidential relationship based on their close friendship in which they frequently visited each other, dined and vacationed together. Other state courts have been hesitant to hold that the mere existence of a friendship is enough to find that a confidential relationship existed.

**b. Relationships of Trust and Confidence in Massachusetts**

Like other state courts, the Massachusetts court recognizes there are many different circumstances that may give rise to a relationship of trust and confidence that creates fiduciary obligations between the parties. In

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98. See Anderson, supra note 96, at 344-52 (discussing friendship as grounds for confidential relationship); see also Leib, *Friendship & Law*, supra note 6, at 695-97 (describing New York cases where confidential relationship depended on friendship).


100. Id. at 861 (describing relationship between parties).

101. Id. (detailing disagreement between parties concerning value of property).

102. Id. at 860 (describing procedure of suit in lower court).

103. Holland, 350 S.W.2d at 862 (stating imposition of constructive trust not dependent on strict or technical relationships).

104. Id. (describing friendship that existed prior to dispute).


106. See Warszofsky v. Sherman, 93 N.E.2d 612, 615 (Mass. 1950) (stating unwise to attempt comprehensive definition of circumstances giving rise to fiduciary duties). The existence of a relationship giving rise to fiduciary duties is determined from the facts of each particular case. Id. The court embraced the basic principles of approaching confidential relationships as described by Lord Chelmsford:

Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the
Broomfield v. Kosow,\textsuperscript{107} the Massachusetts Supreme Judicial Court considered a case where the defendant was able to use his position of trust and confidence to take wrongful advantage of a close personal and business relationship.\textsuperscript{108} The court held that a business relationship is not transformed into a fiduciary relationship simply because the one party places trust and confidence in another.\textsuperscript{109} The court explained, however, that a relationship of trust and confidence can be transformed into one with fiduciary duties when the defendant has knowledge of the plaintiff’s reliance upon him.\textsuperscript{110} When an abuse of trust and confidence is at issue, equity permits the court to review a number of factors, such as the relationship of the parties prior to the incident, the business capacity of the plaintiff relative to the defendant, and the plaintiff’s willingness to follow the defendant’s advice.\textsuperscript{111} When a relationship of trust and confidence has been established, the court has demonstrated it will use its equitable powers to grant a remedy against one who abuses the trust of another, gaining an advantage for himself at the expense of the other party’s reliance upon him.\textsuperscript{112}

\textsuperscript{107} 212 N.E.2d 556 (Mass. 1965).

\textsuperscript{108} Id. at 557-59. The plaintiff, George Broomfield, acting as receiver of a nursing home, brought suit to establish a trust on funds that the defendant had charged in excess of the actual costs of construction work. Id. at 557. Dr. Romano was the owner of all stock in a corporation that operated nursing homes. Id. Kosow, the defendant, ran an investment firm, which Romano had borrowed from periodically. Id. Kosow had intimate knowledge of Romano’s businesses, and the court characterized their relationship as a “close business relationship and friendship.” Id. The dispute arose when Kosow submitted plans to Romano for renovation and construction work that included an estimate that was well in excess of the actual costs of construction. Id. at 558. Kosow kept all money in excess of the actual cost. Id. at 559. Kosow maintained that his relationship with Romano was purely a business one and, as a result, there were no fiduciary duties of disclosure. Id. at 560.

\textsuperscript{109} Id. at 560 (responding to defendant claiming there were no fiduciary obligations).

\textsuperscript{110} Id. The court reasoned that Romano, being unfamiliar with construction costs, relied on the trust and confidence he had placed in Kosow, who used his position for his own personal advantage. Id. at 561; see also Markell v. Sidney B. Pfeifer Found., Inc., 402 N.E.2d 76, 95 (Mass. App. Ct. 1980) (pointing to need for defendant to know of plaintiff’s reliance). The court in Markell considered a relationship between an aunt and her nephew in which the aunt had relied on her nephew’s business judgment in managing her securities. 402 N.E.2d at 96. The court held that the nephew violated the relationship of trust and confidence he had with his aunt when he obtained her signature on trust documents without disclosing all adverse effects of the trust. Id. at 561.

\textsuperscript{111} See Broomfield, 212 N.E.2d at 560 (stating equity weighs whether unjust enrichment resulted from relationship).

\textsuperscript{112} See Warsofsky v. Sherman, 93 N.E.2d 612, 615 (Mass. 1950) (stating constructive trust remedial device imposed to prevent unjust enrichment); Reed v. A.E. Little Co., 152 N.E. 918, 921 (Mass. 1926) (granting equitable relief to inventor who relied on friendly advice of business executive). Reed held various
C. Current Trends toward Recognizing Alternative Relationships

1. Reciprocal Beneficiaries in Hawaii and Vermont

In the late 1990s, as courts moved toward recognizing a legal right for gay and lesbian couples to marry, state legislatures responded by developing new, legal relationships for individuals who were not permitted to marry. These statutes are relevant to this discussion about law and friendship because, as David Chambers notes, the passage of these statutes was historic in that state legislatures, for the first time, created a formal legal status—other than marriage—for adults who had a close relationship. These statutes also provide the model for Chambers’s idea for the “designated friends” legal status discussed earlier.

In 1997, the Hawaii legislature passed the first law allowing same-sex couples and close blood relatives to register as reciprocal beneficiaries. The law was crafted in response to *Baehr v. Lewin*, a Hawaii Supreme Court decision that suggested the Hawaii constitution afforded same-sex couples the right to marry on the same terms as heterosexual couples. Under the reciprocal-beneficiary statute, same-sex couples are granted some of the same benefits that the state has given to married couples, such as hospital visitation, health-insurance coverage, and the right to inherit by intestate succession.
In 1999, the Vermont Supreme Court held that the legal rights associated with marriage must also be extended to same-sex couples. The following year, the legislature created two new legal relationships. The first permitted same-sex couples to form a civil union and receive all the rights and benefits under state law that are accorded to marriages. The second status created a reciprocal-beneficiary relationship. Unlike the Hawaii law, Vermont's reciprocal-beneficiary law applies only to blood relatives and people related by adoption who cannot join together in marriage or in a civil union. The benefits of the reciprocal-beneficiary status are narrow, limited only to hospital visitation rights and the right to make medical decisions if the other person becomes incapacitated.

2. Massachusetts's Goodridge v. Department of Public Health

In Goodridge v. Department of Public Health, the Massachusetts Supreme Judicial Court became the first court in the country to declare that same-sex couples had the right to marry. In extending this right to couples whose obligations provided to married couples; see also HAW. REV. STAT. ANN. § 323-2 (LexisNexis 2008) (stating reciprocal beneficiary has same rights as spouse to hospital visitation); HAW. REV. STAT. ANN. § 431:10A-601 (LexisNexis 2011) (defining reciprocal beneficiary family coverage and availability); HAW. REV. STAT. ANN. § 560:2-102 (LexisNexis 2010) (granting right of intestate succession to reciprocal beneficiaries).
relationships previously enjoyed no legal protection, the court discussed the importance of marriage both as a personal relationship and because of its significance to the greater community.\footnote{See Goodridge, 798 N.E.2d at 948 (noting marriage brings mutual support and stability to society); see id. at 954 (stating three parties to civil marriage: two spouses and approving State).} The court wrote that civil marriage strengthens the “welfare of the community” by promoting “stable relationships over transient ones.”\footnote{Id. at 954 (discussing marriage in relation to community).} It ensures that care and support come from private sources rather than public funds.\footnote{Id. (stating marriage central to certain functions of Commonwealth).} In addition to the legally defined benefits that flow from marriage, including tax benefits, property rights, and inheritance rights, the court described the basic human significance of marriage as a “celebration of the ideals of mutuality, companionship, intimacy, fidelity, and family.”\footnote{Id. (describing personal and public nature of civil marriage).} The court concluded that because of these intensely important personal and societal benefits, marriage is an “esteemed institution” expressing “our common humanity” that could not be denied to same-sex couples.\footnote{Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 955 (Mass. 2003) (stating marriage fulfills yearnings for security, safe haven, and connection). Cardozo writes, “If there were losses, each party was to bear them equally.” Id. He goes on to state, “The two were in it jointly, for better or worse.” Id.; see also, Leib, Friends as Fiduciaries, supra note 10, at 668 n.2 (noting distinct allusion to marital language in \textit{Meinhard v. Salmon}).}

3. The Federal Family and Medical Leave Act and Corresponding State Statutes

In 1993, the United States Congress passed the Family and Medical Leave Act (FMLA), making it easier for employees to care for sick family members without fear of losing their jobs.\footnote{See Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 2, 107 Stat. 6, 7 (1993) (codified at 29 U.S.C. § 2601(b)(2) (2006))). The law entitles employees to take reasonable leave to address personal medical problems, during birth or adoption, and to provide care to a sick child, spouse, or parent. Id.; see also Jane Rigler, \textit{Analysis and Understanding of the Family and Medical Leave Act of 1993}, 45 CASE W. RES. L. REV. 457, 469 (1995) (stating “essence” of FMLA is job security).} The law was passed in recognition of the need to balance the obligations of family and work.\footnote{See 29 U.S.C. § 2601(a)-(b) (describing findings and purposes of FMLA). The FMLA was passed in response to the growing number of single-parent and two-parent households whose work obligations became more significant. See id. § 2601(a)(1). Congress cited a lack of employment policies that adequately addressed the need to balance family and work life. See id. § 2601(a)(3). Among its goals, the FMLA attempts to provide stability and economic security to families in order to preserve the integrity of the family unit. See id. § 2601(b)(1).} The FMLA applies to businesses with more than fifty employees and public agencies at the local, state, and federal levels.\footnote{See id. § 2611(4)(A) (defining which employers are covered under FMLA).} Among its most important protections, the FMLA mandates that an employee have job-protected leave of up to twelve weeks a
year to care for a child, spouse, or parent who is seriously ill.\textsuperscript{136} As states passed laws granting legal protection to individuals who could not marry, they also expanded their own employee-protection statutes to reflect a broader range of family members beyond those included in the FMLA.\textsuperscript{137} The Hawaii legislature included grandparents, parents-in-law, grandparents-in-law, and an employee’s reciprocal beneficiary.\textsuperscript{138} The Vermont statute also includes civil-union partners and parents-in-law.\textsuperscript{139} Similarly, California’s law applies to domestic partners and a domestic partner’s child.\textsuperscript{140} In June 2010, the United States Department of Labor took steps to adjust to different kinds of family arrangements by clarifying its definition of “son and daughter” under the FMLA to apply to employees in a same-sex relationship who care for a child, regardless of whether there is a legal or biological relationship to the child.\textsuperscript{141}

III. ANALYSIS

Technology allows us to interact with our friends in new ways, and friendship is just as vital and important today as it was in the time of classical antiquity.\textsuperscript{142} Yet it must also be acknowledged that a proposal arguing that the law should bolster the institution of friendship will likely be viewed with a considerable degree of skepticism.\textsuperscript{143} Scholars such as Ethan Leib and David Chambers, who have started to write about law and friendship, have put forth

\textsuperscript{136} See id. § 2612(a)(1)(C) (providing leave during times of serious family illness). The protections of the FMLA do not extend to care provided for anyone outside the immediate family. \textit{Id.}
\textsuperscript{138} See Haw. Rev. Stat. Ann. § 398-1 (LexisNexis 2010) (defining “parent” broadly to include extended family member); \textit{see also} \textit{id.} § 398-3 (mandating family-leave coverage for reciprocal beneficiary).
\textsuperscript{140} See Cal. Fam. Code § 297.5 (West 2004) (granting domestic partners same rights and responsibilities of spouses); \textit{see generally} Cal. Gov’t Code § 12945.2 (West 2011) (outlining California’s family-leave protections).
\textsuperscript{142} See Ylan Q. Mui & Peter Whoriskey, Facebook Cements No. 1 Status, WASH. POST (Dec. 31, 2010), http://www.washingtonpost.com/wp-dyn/content/article/2010/12/30/AR2010123004625.html (noting Facebook surpassed Google as most popular site on internet). The significance of this development suggests that receiving information from a more-personal circle of friends and family is becoming more preferable than the results generated by the impersonal algorithms of Google. \textit{See id.} One technology analyst described this shift as a move toward a more “people-centric Web.” \textit{Id.}
\textsuperscript{143} See Stith, supra note 40, at 263 (stating liberals and conservatives would likely view state involvement in friendships as “bad idea”); \textit{see also} Tuhus-Dubrow, supra note 10 (citing opinion of Columbia law professor Katherine Franke). Franke believes people should resist the urge to always involve the law in things that are deemed important. Tuhus-Dubrow, supra note 10.
various proposals for how the law could be better applied to friendship. In this section, I will assess these different proposals and highlight some potential weaknesses. I will argue that other proposals found in the writings of Leib and Chambers merit further attention. Finally, I will argue that Massachusetts might be a logical place for implementing these modest public-policy proposals that would allow friends to do what they do best: be a source of care and support for one another.

A. Critiquing the Law and Friendship Agenda

1. The Persistent Problem of Providing an Adequate Definition of a Friend

As Socrates and his interlocutors discovered over two thousand years ago in ancient Athens, friendship is a relationship that defies easy characterization. This inability to move beyond a vague and general legal understanding of friendship presents a significant problem in trying to convince a skeptical public that the law should have a greater presence in our friendships. Because people become friends for a variety of reasons, at best, we can only do what Ethan Leib has already attempted: develop a list of qualities by which an outsider could objectively understand whether two people are friends. Leib’s attempt to state the broad characteristics of friendship serves as a useful theoretical exercise, but it is unclear how practical this is to a policymaker charged with the task of developing new legislation. Leib’s writing recently attracted the attention of the California Law Review Commission in considering whether the California Probate Code should exempt friends who provide care to a dependent adult from the presumption that any gift received from the dependent adult is invalid. While the commission acknowledged Leib’s attempt to provide a legal definition of friendship, the commission

144. See supra Part II.A.2. (discussing work of Leib and Chambers); see also Leib, Friends as Fiduciaries, supra note 10, at 707 (arguing close friendships should carry fiduciary obligations).
145. See infra Part III.A.
146. See Leib, Friendship & Law, supra note 6, at 682 (raising idea of family leave and tax incentives for friends); see also Chambers, supra note 10, at 1353 (stating “designated friends” could be entitled to leave on same terms as married persons).
147. See infra Part III.B.2.
148. See supra Part II.A.1 (discussing Plato’s Lysis).
149. See supra note 33 and accompanying text (noting challenge of providing sufficient definition of friendship).
150. See supra notes 37-39 and accompanying text (discussing qualities found in friendships).
151. See supra note 36 and accompanying text (describing difficulty in persuading lawmakers to grant rights to ill-defined group).
152. See CAL. LAW REVISION COMM’N, MEMORANDUM 2008-13, DONATIVE TRANSFER RESTRICTIONS: CARE CUSTODIAN AS DISQUALIFIED PERSON 18 (2008), available at http://www.clrc.ca.gov/pub/2008/MM08-13.pdf (discussing exemption of friends). In prohibiting gifts made to individuals who provide care to a dependent adult, lawmakers wanted to limit the opportunity for care givers to take advantage of the person they are caring for. See id. at 2 (discussing legislative history of probate-code provision).
concluded that these “academic attempts” failed to provide a “clear standard,” and instead, courts should determine on a case-by-case basis whether a friendship existed.  

2. Should Friendship Have Fiduciary Duties?

Both Aristotle and Cicero wrote at length about the need for honesty, loyalty, and trust among friends. Leib has recognized the parallels between the qualities of a lasting friendship and the duties associated with the fiduciary. After all, we expect that we can trust our friends, that they will keep what we tell them in confidence, and that they will not use us for their own personal advantage. Chief Justice Cardozo’s description of fiduciaries as owing a “duty of the finest loyalty” and an “honor most sensitive” could also apply to our closest friends. Given this resemblance, one of Leib’s proposals for strengthening the intersection of law and friendship is for courts to embrace the idea that friendship creates fiduciary duties between friends. This proposal is certainly alluring; one who has betrayed the trust and intimacy of a friend seems particularly worthy of condemnation, and even in ancient Greece, Aristotle recognized, “It is natural that the claims of justice should increase with the intensity of friendship.”

But a theory of creating new legal duties, springing solely from the mere existence of friendship, may not be warmly received by the courts, and it also misses what should be the goal of this project: to advance ways in which the modern state can promote and facilitate friendship. Under Leib’s proposal, friendship would likely become a subject of litigation, as parties try to downplay the nature of their relationship to avoid the obligations imposed on fiduciaries. Furthermore, this approach does little to strengthen friendships...
among citizens because by the time the law intervenes, the friendship has likely already dissolved.162

For those concerned about what the law can do to police opportunistic friends and provide a remedy for one who has been taken advantage of, more attention should be given to the doctrine of confidential relationships rather than to the creation of fiduciary duties due solely to the existence of a friendship.163 There is little consistency among state courts as to how they consider confidential relationships, but the approach of the Texas court in *Holland v. Lesesne* is instructive.164 The Texas court recognized that the doctrine of confidential relationships is flexible and may be found in a variety of informal relationships where one has abused the trust of another.165 Likewise, in Massachusetts, the court has expressed a flexible approach, stating that equity allows for a review of the parties’ prior relationship and whether unjust enrichment resulted from the circumstances of that relationship.166 Both the Texas and Massachusetts courts look to see not just whether the plaintiff placed trust and confidence in the defendant, but also whether the plaintiff relied on the defendant in some way.167 This second inquiry is critical in order to prevent every friendship in which there is trust and confidence from becoming fiduciary in nature and therefore exposing potential legal liability between friends.168

3. Permitting Friends to Register as Reciprocal Beneficiaries

David Chambers’s proposal to allow close friends to formally register their friendships with the state avoids the dilemma of trying to develop a statutory definition of friendship.169 But in limiting this designated-friend status only to unmarried people, Chambers’s proposal would offer no benefit to a large

162. See Leib, *Friendship & Law*, supra note 6, at 681 (responding to criticism of focusing on friendship’s failure). Leib responds to this critique by arguing that penalties associated with taking advantage of friends might deter such behavior, but does not address whether one who is contemplating some wrongful behavior against another should actually be considered a friend in the first place. See id. Leib further argues that the law’s intervention might aim toward reconciliation, but more likely, Leib’s other example is more on point: like in divorce, the law will only step in when the relationship is broken. *Id.* at 682.

163. See supra notes 98-104, 107-112 and accompanying text (discussing Texas and Massachusetts approaches to confidential relationships).

164. See supra note 105 (pointing to state court decisions holding friendship not confidential relationship).

165. See supra note 103 and accompanying text (noting different relationships that could give rise to confidential relationship).

166. See *Broomfield*, 212 N.E.2d at 560 (describing court’s equitable powers).

167. See supra notes 103, 110 (discussing reliance as important factor in determining fiduciary duties existed between parties).

168. See Leib, *Friends as Fiduciaries*, supra note 10, at 702 (suggesting additional inquiry prevents friendship itself from creating fiduciary duties).

169. See supra note 40 and accompanying text (noting Chambers’s proposal bypasses legislative determination of friendship).
portion of the population, specifically people who have close friends, but who are also married.  

Chambers permits a variety of unmarried couples to register as friends, even couples who have a sexual relationship. This is not to say that people who are romantically involved could not also share a close friendship, but by allowing people who are romantically involved to register as “designated friends,” Chamber’s proposal becomes susceptible to the criticism that his new status is simply an alternative to marriage for people who, for a variety of reasons, may not want to marry. Politically, it would be difficult to garner support of state legislators because this new status might be viewed as weakening the institution of marriage. Chambers seems more concerned with finding a legal solution for unmarried couples, rather than developing a public policy that would be beneficial for all kinds of friends, married and unmarried alike.

B. Promoting Friendship Through Targeted Legislative Measures

1. Amending State Family and Medical Leave Statutes to Include Friends and Creating Tax Incentives for Friendship Expenditures

In considering what the law can do for friends, it is worth asking a fundamental question: Why are our friends so important? Returning to the writings of ancient philosophy might help us to think about this question; Aristotle and Cicero understood that in addition to being loyal and honest, friendship was a vital relationship because friends have a duty to help one another during life’s tougher times. States should act to promote friendship because, as Chambers rightly points out, one of government’s most significant functions is to act as a facilitator to make the lives of its citizens easier. Two proposals, briefly mentioned in Chambers’s and Leib’s works, make it easier

170. See supra note 41 and accompanying text (highlighting who is eligible for “designated friend” status).

171. See Chambers, supra note 10, at 1352 (stating any unmarried pair, whether cohabitating or romantically involved, could register).

172. See Leib, Friendship & Law, supra note 6, at 683 n.267 (describing Chambers’s proposal as fundamentally a “marriage substitute”).

173. See Chambers, supra note 10, at 1358 (noting politicians’ concerns over weakening institution of marriage). Chambers points to Paul Cellucci, former Governor of Massachusetts, who vetoed a bill extending health benefits to same- and opposite-sex partners of state employees, citing a concern over discouraging marriage. Id.

174. See id. at 1361-64 (comparing “designated friend” status against other proposals for unmarried couples).

175. See ARISTOTLE, supra note 2, at 1155a4 (stating friendship “necessary for living”). Friendship matters because, as Aristotle writes, “Nobody would choose to live without friends even if he had all other good things.” Id. at 1155a5-6.

176. See id. at 1155a12 (writing, in times of misfortune, friends serve as refuge); see also supra notes 75-77 and accompanying text (describing Cicero’s view on friendship during difficult times).

177. See Chambers, supra note 10, at 1354 (articulating functions of government in relation to citizens).
for friends to act for one another during difficult times: amending family-leave statutes so that friends may provide care in times of serious illness and creating tax credits for expenditures made on behalf of friends.  

In order to understand who would be entitled to these benefits, we could borrow from Chambers’s idea and permit friends to register their friendships with a government agency. This formal registration would serve as a proof of friendship for employees, wishing to take leave to care for a friend, to present to their employers. Unlike Chambers’s proposal, this friendship registry would be open to any pair of friends, including friends who are married and those who are not.

Amending these family-leave statutes to include friends would recognize that in times of serious illness, caregiving comes from a variety of sources, both family members and close friends. Friends are often needed for a variety of functions, from spending time with a sick loved one to carrying out ordinary household matters like preparing meals, washing dishes, and doing laundry. Including friends in these statutes would make it easier for friends to act on behalf of one another, and giving friends the ability to provide greater care for each other could alleviate the considerable stresses and burdens on family members during times of difficulty.

Governments regularly use the tax code to create incentives for a range of behaviors; a friendship deduction could likewise incentivize acts of friendship. Particularly in this time of economic hardship, friends should be a source of support instead of anxiety, and friendship expenditures—which might include a loan to start a new business or the cost of a ride to a job interview or medical appointment—could provide a significant benefit.

A skeptical public might be more favorable to these policy changes because they are modest and narrow in scope. Unlike Leib’s theory concerning

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178. See supra note 146 (discussing family-leave coverage and tax incentives for friends).
179. See supra note 40 and accompanying text (describing Chambers’s proposal).
180. See supra notes 148-153 and accompanying text (discussing difficulty of crafting statutory definition for friends).
181. See supra note 41 and accompanying text (limiting “designated friend” status to unmarried couples). Under my proposal, because married friends could also take advantage of this status, it might withstand criticism that this friendship registry is actually a marriage substitute. See supra notes 172-174 (critiquing “designated friend” status as interfering with marriage).
182. See supra note 177 and accompanying text (noting function of government to make lives easier).
186. See supra note 9 and accompanying text (discussing how recession affects friendships).
187. See supra note 40 (citing concern regarding intrusion into private life).
friends and fiduciary law, these proposals do not create any new legal burdens or obligations arising simply because of the existence of a friendship. Like Chambers’s designated-friend proposal, the decision to take advantage of these benefits is purely voluntary, and friends can make these decisions as they see fit.

2. Should Massachusetts Be the First State to Use the Law to Promote Friendship?

The Goodridge decision marked a dramatic step in bestowing legal benefits upon different kinds of relationships that had gone unrecognized under the law. But for our purposes, the Supreme Judicial Court’s discourse on the personal and societal benefits that flow from civil marriage is relevant to this discussion of friendship. The court’s description of marriage as a “social institution of the highest importance” that enhances “the welfare of the community” and promotes stability, and the ideals of mutuality, intimacy, and fidelity evokes Aristotle’s description of friendship and its relationship to the broader community. Through friendships, based on concern for the well-being of another, Aristotle believed citizens gained a disposition that carried into their dealings with other citizens; they interact with each other in a spirit of civic friendship that promotes the moral health of the community. To paraphrase a question repeatedly raised by Leib: Why are judges and policymakers so preoccupied with the institution of marriage, when the same kinds of personal and communal benefits can flow from friendship, which has been ignored by the law?

Lawmakers in Massachusetts could build on the historic legacy of the Goodridge decision by implementing the two policy measures outlined above. Such a move would be a step toward recognizing the important role friends have in our lives. These policy measures make it easier for friends to provide support to each other during life’s challenging times. By getting

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188. See supra notes 158-162 (discussing Leib’s proposal to treat friends as fiduciaries).
189. See Chambers, supra note 10, at 1356 (noting reciprocal duties likely unenforceable but would have moral force for participants).
190. See Burge, supra note 127 (noting how Goodridge paved way for historic moment in Massachusetts).
191. See supra note 132 (noting allusion to marriage in Meinhard v. Salmon).
192. See supra Parts II.B.1, II.C.2 (discussing Aristotle’s conception of friendship and Goodridge decision).
193. See supra note 63 (quoting Cooper on how attitude of civic friendships leads to disposition to act morally).
194. See Leib, Friends, supra note 33 (stating friends no less important than family and deserve legal protection); see also Leib, Friendship & Law, supra note 6, at 632-33 (citing legal preferences given to family members but not friends).
195. See Burge, supra note 127 (describing historic significance of Goodridge).
196. See supra notes 175-176 and accompanying text (discussing Aristotle’s and Cicero’s views on importance of friendship).
197. See supra note 177 and accompanying text (noting government’s function to ease lives of citizens).
citizens to think more seriously about their friends, perhaps that sentiment will grow, and people may be better suited to interact in a spirit of civic friendship with others in their neighborhoods and communities.198

IV. CONCLUSION

Returning to the opening quotation, it seems that Rocky Balboa is an Aristotelian at heart. In stating that friends “do ‘cause they wanna do,” he recognizes the beauty of friendship, which is, as Aristotle observed, “each [friend] loves the other for what he is, and not for any incidental quality.”199 Friendship is a most-basic human relationship that allows us to live better lives, and it deserves careful consideration. Classical philosophers understood the value of friends, both on a personal level and, more broadly, for the rest of the community.

But in modern times, the value of friendship has been overlooked by serious thinkers, and yet, at the same time, the most-popular new technologies allow us to be in almost constant, instantaneous contact with our friends. What the growth of websites like Facebook and Twitter seems to demonstrate is that our friends still matter to us, that what Aristotle observed centuries ago remains true: “Nobody would choose to live without friends even if he had all other good things.”200

Maybe our approach to thinking about friends is starting to change. Scholars of both philosophy and law are beginning to think seriously about the place friends have in our lives. Lawmakers should pick up this conversation. While the law does much for family members, extending certain legal measures to include friends would be a realistic acknowledgment that in times of difficulty, we often depend on the selfless acts of friends as well as family.

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198. See supra note 63 (quoting Cooper on civic friendship).
199. ARISTOTLE, supra note 2, at 1156b11-12.
200. Id. at 1155a5-6.