



Why Can't We Be (Legally-Recognized) Friends?

The legal benefits of same-sex marriage should be expanded to other relationships, argues *Elizabeth Brake*

In 2012, Canada's *The Globe and Mail* reported that the 73-year-old American companion of an 83-year-old Canadian woman had been deported from Canada despite their relationship of many years: 'She and her friend of three decades, Ms. Sanford, 83, are inseparable. In addition, Ms. Sanford suffers from a heart condition and dementia and Ms. Inferrera looks after her.'^[1] The American woman had been refused permanent residency in spite of numerous appeals, even though she performs extensive caregiving for her friend. The two women are not romantically involved. They are 'just friends'. As such, their relationship, no matter how long-term or caring, received no legal protection. (In a happy turn of events, the Canadian government relented once the women's plight was publicised.)

Arguments for same-sex marriage often invoke similar sad cases, where longstanding relationships are ignored in contexts such as immigration, visitation rights, inheritance, bereavement and caretaking leave, tax status, spousal relocation, and eligibility for third-party benefits. Defenders of same-sex marriage argue that same-sex relationships deserve these protections as much as different-sex relationships do. But, applying the same reasoning, one can ask why a relationship should lack legal recognition because its members are 'merely' friends—even friends, as in the Canadian case, who have cohabited for three decades and taken care of one another. Such a friendship serves one of the primary purposes of marriage—mutual long-term caretaking and companionship. As such, it deserves legal protections similar to those in marriage.

Opponents of same-sex marriage charge that once same-sex marriage is recognised, we will be on a slippery slope to recognising other undesirable relationships. The common invocation of bestiality, pedophilia, and oppressive polygyny is absurd: there is no reason that recognising same-sex marriage will lead to countenancing criminal acts (marriage with children), impossible contracts (with non-human animals), or oppressive communities. But the rush to respond to such charges has too often prevented same-sex marriage advocates from asking why, exactly, equal rights for personal relationships should stop with same-sex marriage. Indeed, the same principles of equal treatment and non-discrimination which call for recognising same-sex marriage also imply that some other non-traditional relationships deserve legal recognition and support as well. While it might be confusing to label such relationships 'marriage'—after all, Ms. Sanford and Ms. Inferrera, who could have legally married in Canada, presumably do not consider themselves married—such relationships deserve equal access to the many rights, legally accessible exclusively in marriage or kinship, which protect relationships.

What conservative critics have right is that the fundamental arguments for same-sex marriage do imply that other neglected constituencies also deserve marriage-like entitlements. This would include seniors cohabiting for companionship and support, single mothers who co-parent, or close friends who build a life together. The central state interest in marriage is to support such stable caring relationships; the fact that people are 'merely' friends—and not sexually or romantically involved—does not diminish their ability to engage in mutual long-term care.

Furthermore—and less comfortably, for many—this reasoning equally applies to small groups of friends, or adult care networks, whose members provide one another with stable care and companionship. Once again, what is pertinent is the provision of mutual care. The goods of care that the state rightly promotes in marriage can be found equally in these other forms of relationship. Whether the relationships are platonic or romantic and sexual is beyond the remit of a liberal state's concern. Polyamorists and polygamists—when their relationships arise from the free choice of consenting adults—should likewise have access to marriage-like protections for their relationships. The preference for monogamy, like the preference for romantic sexual relationships, cannot be justified by the core interest in supporting caring relationships.

Marriage law, like the wider culture, privileges monogamous sexual, romantic partnerships far above the many other forms of relationship in which lives unfurl—long-term friendships and care networks, polyamorous triads and quads. But significant caretaking can occur in platonic friendships, as much as in marriages; and mutual caretaking can occur between three as well as between two. The demographic shift away

from marriage corresponds with a shift into other ways of arranging intimate life. The principles of equal treatment that require recognising same-sex marriage also require extending marriage-like protections to other long-term caring relationships, since the best rationale for state involvement in marriage is supporting such relationships.

The deep question raised by marriage reform is why the state should be involved in marriage at all. According to the ideals of public reason and political liberalism, in important matters law should be justifiable to citizens in terms they could endorse from their diverse religious, philosophical, and ethical backgrounds. The ideal requires not that everyone agree with every law and policy—an impossible standard—but that political reasons, reasons that don't rely on a narrow and contested view of the good, can be given for law, at least in important matters. On this standard, it is not acceptable to restrict marriage on the basis of a particular religious view, but more general political values can be appealed to: women's equality, child welfare, the good of caring relationships.

The good of caring relationships is what provides political reason for marriage law. Children's welfare itself is not enough to justify the exclusive and substantial entitlements of legal marriage: child welfare—especially that of children outside marriage—can be promoted in other ways, and not all marriages involve children. The best reason for state support of marriage is that long-term caring relationships are themselves a widely shared good, one which transcends religious and ethical differences; most plans of life involve such relationships as central goods. And caring relationships are good for us, psychologically and, when parties take care of one another, materially. (Although the potential for abuse means that exit options should be available.)

It might be thought that long-term caring relationships need no special support or recognition. But in an array of contexts, such as immigration, caring relationships need state protection to enable the parties to play key roles in each other's lives. Some such entitlements are currently only available through marriage, and while others can be contracted independently, this involves lawyer's fees far in excess of the cost of the marriage license. Abolishing the conflicted term 'marriage' as a legal status may be the best way to treat everyone equally, without drawing hierarchical distinctions between relationships. But abolishing marriage-like legal entitlements would leave caring relationships unprotected.

So do arguments for same-sex marriage lead down a slippery slope? Indeed, they imply that friends and small groups should have access to legal benefits. All caring relationships equally deserve support, regardless of their romantic or sexual nature—and

debate over the contested term 'marriage' has distracted attention from this important point.

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[1] I also discuss this case in my paper 'Recognizing Care: The Case for Friendship and Polyamory', *Syracuse Law and Civic Engagement Journal*, 2015.