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Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-Blood Statutes to Reflect the Evolving Family

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CONSANGUINITY, SIBLING RELATIONSHIPS, AND THE DEFAULT RULES OF INHERITANCE LAW: RESHAPING HALF-BLOOD STATUTES TO REFLECT THE EVOLVING FAMILY

*Ralph C. Brashier**

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I. INTRODUCTION

WHEN the National Conference of Commissioners on Uniform State Laws and the American Bar Association approved the Uniform Probate Code ("UPC") in 1969,[1] consensus was that inheritance statutes favoring whole-blood over half-blood relatives perpetuated historical rules for no good reason.[2] Since then, probate scholars have not seriously questioned the undiscriminating view advocated by the UPC,[3] and today the intestacy laws of most states assume that the typical decedent would treat his whole-blood and half-blood survivors the same.[4]

Just at the time the UPC was promulgated, however, family structures were beginning a profound evolution. In the last decades of the twentieth century, men and women increasingly began to have children by different

1. *See* JOEL C. DOBRIS ET AL., ESTATES AND TRUSTS 25 (2d ed. 2003) (providing a brief introduction to and a history of the UPC); LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 28-29 (3d ed. 2002) (discussing promulgation of the UPC and the manner in which it is monitored and revised). The UPC is intended "to facilitate modernization, simplification, and uniformity of state inheritance laws." Richard V. Wellman & James W. Gordon, *Uniformity in State Inheritance Laws: How UPC Article II Has Fared in Nine Enactments*, 1976 BYU L. REV. 357, 357 (1976) (prefatory comments).

2. *See* Wellman & Gordon, *supra* note 1, at 360 (noting that many of "today's case results are explainable only by reference to notions that clash with current mores" and observing that the 1969 UPC helps eliminate such results by ending, among other things, "discrimination" against half-bloods).

3. *See, e.g.*, RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. f (1999) (devoting more than 100 pages to intestacy, but providing just one cursory paragraph for the discussion of half-blood relations). The only recent article to focus exclusively on a half-blood statute is Professor Nancy Kenderdine's article discussing Oklahoma's ancestral property/half-blood law. *See* Nancy I. Kenderdine, *Oklahoma's Archaic Half-blood Inheritance Statute—Still Going Strong: A Plea for Repeal*, 49 OKLA. L. REV. 81 (1996). Other articles have mentioned half-blood statutes as part of a larger plea for reform of state probate laws. *See, e.g.*, Frederick R. Schneider, *Recommendations for Improving Kentucky's Inheritance Laws*, 22 N. KY. L. REV. 317, 346-47 (1995). Professors Kenderdine and Schneider both advocate the superiority of the UPC half-blood provision. *Id.* at 348; Kenderdine, *supra*, at 121. Although casebooks in the field of decedents' estates cannot fully address the intricacies of current half-blood statutes, at least some hint at the problems posed by their underlying assumptions. *See, e.g.*, DOBRIS ET AL., *supra* note 1, at 93-94 (providing example about the propriety of equal-inclusion approach).

4. *See infra* note 24 (indicating states that follow the majority approach of equal treatment). *See also* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. f (1999) (noting that half-bloods generally receive the same treatment as whole-bloods in modern intestacy schemes); WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, WILLS, TRUSTS AND ESTATES 58 (3d ed. 2004) (discussing treatment of half-blood relatives for inheritance purposes).

partners.[5] Serial marriage is now common, divorce rates hover near fifty percent, and nonmarital birthrates have moved towards that mark.[6] Transportation technology allows us to establish two or more simultaneously-existing families far removed from each other.[7] People unaware that they have half-siblings may intentionally refrain from making a will under the mistaken belief that they know all of their relatives and that only those known relatives will take their estate.[8] Virtually foolproof genetic testing, however, can demonstrate the existence of half-blood relatives even after the decedent's death and can destroy the default estate plan anticipated by the intestate decedent.[9] Even when half-blood relatives know each other, the relationship between them appears more likely

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5. For changes in modern family structures and their treatment under inheritance law, see generally RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 1-2 (2004) (discussing recent census statistics); *see also* John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 310-12 (1987) (discussing the phenomenon of serial polygamy and noting that it is now "increasingly common for people to have more than one spouse—alas, not simultaneously as in the good old days, but in a series").

6. *See* JASON FIELDS & LYNNE CASPER, U.S. CENSUS BUREAU CURRENT POPULATION REPORTS 2000: AMERICA'S FAMILIES AND LIVING ARRANGEMENTS 3 (June 2001) (noting that family households declined from 81% of the population in 1970 to 69% in 2000). By 2000, 3.8 million households were unmarried-partner households. *Id.* at 13. More than two-fifths of these unmarried-partner households included minor children. *Id.* Single-parent households also continue to increase. In 2000, the number of single-mother families had grown to 10 million, more than a 300% increase since 1970; the number of single-father families had grown to 2 million, more than a 500% increase since 1970. *Id.* at 7. *See generally* BRASHIER, *supra* note 5, at 1-3 (discussing changes in family structures). In this world of changing family patterns, the number of half-blood relations is increasing rapidly. *See infra* note 10 (noting survey in which almost one-third of students in recent decedents' estates classes indicated that they had one or more half-siblings). *See also infra* note 66 (discussing increase in nonmarital birthrate).

7. The creation of simultaneously-existing families in disparate parts of the country—or even the world—is not a new phenomenon. Individuals, particularly men, whose military service, jobs, or wealth resulted in or allowed frequent travel have always had the opportunity to create multiple, disparate families. A recent revelation of such a scenario involved the families created by aviator Charles Lindbergh. *See* Melissa Eddy, *DNA Ties Lindbergh to Germans*, CBS News.com, Nov. 28, 2003, *at* http://www.cbsnews.com/stories/2003/11/28/national/main585939.shtml (discussing DNA test results that prove Lindbergh fathered six children by his wife Anne and three children by a German woman with whom he had a long-running secret relationship; also noting the meeting between some of the half-siblings); *Lindbergh's Double Life Proved?*, WorldNetDaily.com, Nov. 29, 2003, *at* http://www.wnd.com/news/printer-friendly.asp?ARTICLE_ID=35867 (noting that Lindbergh's German family "apparently remained hidden from his wife"). The wide availability of affordable air travel in recent decades provides many opportunities for people to create multiple families.

8. *See infra* notes 75-93 and accompanying text (discussing a California scenario in which the decedent died unaware of existence of half-siblings who were entitled to part of his intestate estate under state law).

9. *See, e.g.*, Reed v. Boozer, 693 A.2d 233, 236-39 (Pa. Super. Ct. 1997) (discussing accuracy of DNA and HLA testing). For a general discussion of modern blood and genetic testing, see Angela R. Arkin, *Evidentiary and Related Issues in Paternity Proceedings*, *in* 1 DISPUTED PATERNITY PROCEEDINGS app. 3A (Sidney B. Schatkin ed., 1995) (discussing admissibility of DNA testing in individual states); *id.* app. 3B (discussing admissibility of HLA testing in various other states). *See also supra* note 7 (discussing DNA testing that proves half-sibling link between Charles Lindbergh's American and German children).

than in prior times to be distinctly uncordial.[10] What had once been an occasional concern—divvying up the estate between whole-blood and half-blood relatives—will become more important as the number and percentage of children with half-siblings continues to grow.[11]

In a perfect world, perhaps half-blood relatives would know and love each other. Perhaps half-siblings—who share the closest half-blood relationship and from whom all other half-blood relationships stem—would indeed consider each other family. In the real world, however, growing numbers of people who have one common parent have no social or emotional ties with each other.[12] They may not know of each other's existence, and consanguinity alone does not truly make them a family.[13] In the current milieu of evolving relationships, people are often surprised (and occasionally appalled) to learn that most states provide a default rule that entitles half-relatives to share equally in a decedent's intestate estate regardless of their actual family relationship with the decedent. For most of these surprised observers, disapproval of the majority default rule has little to do with antiquated notions that half-blood relatives are somehow inferior to those of the whole-blood.[14] Rather, disapproval stems from the refusal of probate law to recognize a central truth concerning modern half-blood relationships: family ties among half-blood relatives runs the gamut, and as families fracture and regroup, a default rule mandating universal inclusion is unduly broad. The view from 2004

10. For several years, I have conducted surveys of students in my decedents' estates classes concerning their family structure and their attitudes towards half-siblings. The surveys are on file in my office. The results of those surveys and an interpretation of the students' narrative responses will appear in a future article. The surveys indicate that many of the respondents do not feel kindly toward their half-siblings and do not consider them part of their family.

11. Judges, too, have noted this development. *See In re* Estate of Cleveland, 22 Cal. Rptr. 2d 590, 594 (Ct. App. 1993) (observing an increase in half-blood survivors).

12. Although this article shows that current half-blood statutes have failed to account for changes in modern family structure, the article does not in any way seek to minimize the potential importance of sibling relationships. A childhood shared with siblings, half-blood or whole-blood, can be one of life's greatest blessings. As a New Jersey judge stated, "[s]urely, nothing can equal or replace either the emotional and biological bonds which exist between siblings, or the memories of trials and tribulations endured together, brotherly or sisterly quarrels and reconciliations, and the sharing of secrets, fears and dreams." L. v. G., 497 A.2d 215, 218 (N.J. Super. Ct. Ch. Div. 1985) (Krafte, J.S.C.) (holding that adult siblings had the right to visit their minor siblings). Concerning the case holding, see Herbst v. Swan, 125 Cal. Rptr. 2d 836, 841 (Ct. App. 2002) (warning that, "[w]hatever . . . [the sibling right to visitation is] under New Jersey law, it appears that the fundamental liberty interest of a parent trumps that right absent a compelling state interest" (citing Troxel v. Granville, 530 U.S. 57 (2000))). I first came across the quoted language in a thought-provoking piece on the protection of sibling relationships. *See generally* Barbara Jones, Note, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187 (1993) (positing that siblings' right to associate and maintain relationships should be recognized as a fundamental right under the Constitution).

13. *See infra* notes 75-93 and accompanying text (discussing California case in which decedent died intestate unaware of the existence of his half-siblings).

14. *See supra* note 2 and accompanying text (indicating that one rationale underlying the UPC approach was their view that probate laws had historically engaged in improper discrimination against half-bloods).

is far different from that in 1969.[15]

The question of how to treat half-blood relatives raises difficult and far-reaching concerns of inheritance theory. This article examines the propriety of bright-line inheritance statutes for survivors in modern families, focusing particularly on half-sibling relationships, their variety, and their meaning.[16] This article demonstrates how the generally uncompromising, equal-inclusion principle of the majority default rule easily leads to unjustifiable results.[17] It also evaluates other objective approaches to half-blood inheritance in the United States and concludes that two compromise positions, while not perfect, are superior to all-or-nothing approaches.[18] In suggesting alternatives, this article shows how states could adopt a more flexible, but still primarily objective, approach that examines interaction between the decedent and half-blood claimants to the estate.[19] Finally, this article suggests that states could invest probate courts with discretion in determining the intestate share of half-blood survivors.[20] Adopting such an approach would be an unusual departure for American probate law, but such discretion would enable courts to make decisions that more accurately reflect the needs and desires of today's families. Moreover, a discretionary approach in this discrete area of probate law could serve as a testing ground for the broader use of judicial discretion in other questions of estate distribution for the evolving family.

II. BACKGROUND

A. A "MODERN" LAW OUT OF TOUCH WITH THE MODERN FAMILY

All states give special recognition to the relationship of brothers and sisters by making siblings potential heirs of each other.[21] Thoughtful observation quickly belies the rosy picture of sibling relationships painted by such inheritance laws. This is particularly so for brothers and sisters who share few or no life experiences and are related only by the blood of one parent. As society elevates emotional commitment over biological

15. *See supra* notes 5-7, 10-11 and accompanying text (noting change in family structures and increase in half-blood lines).

16. *See infra* notes 63-95 and accompanying text (discussing the wide variety and quality of half-sibling relationships that commonly exist today).

17. *See infra* notes 105-19 and accompanying text (discussing the UPC/majority approach to half-bloods and inheritance).

18. *See infra* notes 120-42 and accompanying text (discussing half-blood statutes that provide whole-blood relatives with a double portion and half-blood statutes under which siblings split the portion of the estate their predeceased parent would have taken from the decedent). The article also discusses a third compromise approach, that of ancestral property, see *infra* notes 143-82 and accompanying text, and an approach that generally excludes half-blood relatives when whole-blood relatives of the same degree exist, see *infra* notes 183-208.

19. *See infra* notes 231-37 and accompanying text (discussing an objective approach that examines relationship between decedent and half-blood claimants).

20. *See infra* notes 218-30 and accompanying text (discussing purely discretionary approach to inheritance rights of half-blood claimants).

21. *See, e.g.*, MCGOVERN & KURTZ, *supra* note 4, at 56 (noting that parents and siblings are usually next in line as heirs when decedent leaves no surviving spouse or issue; noting also that in most states today parents take to the exclusion of decedent's siblings).

connections in defining the family, can probate law maintain credibility if it unquestioningly assumes that, regardless of circumstances, a half-sibling is a part of the decedent's family?

The UPC—generally considered progressive—provides without comment, "[r]elatives of the half blood inherit the same share they would inherit if they were of the whole blood."[22] This approach—considered modern in the 1940s[23]—has dominated probate law for decades.[24] In

22. Both the prior Article II and the revised Article II of the Uniform Probate Code use this language in their half-blood provision. UNIF. PROBATE CODE § 2-107 (1969), 8 U.L.A. 269, 283 (1998); UNIF. PROBATE CODE § 2-107 (amended 1993), 8 U.L.A. 87 (1998). There is no comment to the section under either version of Article II. *See also* RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 2.4 cmt. f (1999) (noting nondiscriminating approach of original and revised UPC provisions).

One of the problems in writing objectively about half-blood relationships is the seeming harshness of the term "half-blood." The mathematical connotations that spring from "half" and "whole" imply that half-blood relatives are inevitably inferior to (or less than) whole-blood relatives. Regrettably, I have found no happy substitute for these terms. I rejected "german" as a substitute for "whole-blood," although an occasional opinion uses that term. *See, e.g.*, *In re* Estate of Donovan, 55 Cal. Rptr. 758, 760 (Ct. App. 1966) (discussing inheritance claim of appellants based on their relationship as cousins german—meaning whole-blood cousins); BLACK'S LAW DICTIONARY 695 (7th ed. 1999) (defining german as "having the same parent or grandparents; closely related" and noting that a "brother-german" is "[a] full brother; a child of both of one's own parents").

23. *See* Comment, MODEL PROBATE CODE § 24, *in* LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW 64 (1946) (noting the mid-1940s "modern tendency" to end inheritance distinctions between persons of the half-blood and the whole-blood; noting that twelve states had ended all such distinctions at that time).

24. Among the states using language based on the UPC, see ALA. CODE § 43-8-46 (1975); ALASKA STAT. § 13.12.107 (Michie 1998); ARIZ. REV. STAT. ANN. § 14-2107 (West 1991); CAL. PROB. CODE § 6406 (West 2003); COLO. REV. STAT. § 15-11-107 (1987 and Supp. 1996); CONN. GEN. STAT. ANN. § 45a-439(e) (West 1993); DEL. CODE ANN. tit. 12, § 506 (1995); IDAHO CODE § 15-2-107 (Michie 1979); IND. CODE ANN. § 29-1-2-5 (Michie 2000); ME. REV. STAT. ANN. tit. 18-A, § 2-107 (West 1998); MICH. COMP. LAWS ANN. § 700.2107 (West 2002); MONT. REV. CODE ANN. § 72-2-117 (1999); N.J. STAT. ANN. § 3B:5-7 (West 1983); N.M. STAT. ANN. § 45-2-107 (Michie 1978); N.D. CENT. CODE § 30.1-04-07 (1999); OR. REV. STAT. § 112.095 (1990); S.C. CODE ANN. § 62-2-107 (Law. Co-op. Supp. 1999); S.D. CODIFIED LAWS § 29A-2-107 (Michie 1997); TENN. CODE ANN. § 31-2-107 (1984); UTAH CODE ANN. § 75-2-107 (1993); W. VA. CODE § 42-1-3e (1997).

For other statutory language that treats half-blood relatives the same as whole-blood relatives, see ARK. CODE ANN. § 28-9-213 (Michie 1987) ("An intestate's kinsmen of the half blood will inherit the intestate's real or personal property to the same extent as if they were his kinsmen of the whole blood."); D.C. CODE ANN. § 19-315 (2001) ("There is no distinction between the kindred of the whole- and the half-blood."); GA. CODE ANN. § 53-2-1(a)(2) (2002) ("The half-blood, whether on the maternal or paternal side, are considered equally with the whole-blood, so that the children of any common parent are treated as brothers and sisters to each other."); 755 ILL. COMP. STAT. ANN. 5/2-1 (West 1992 & 2000 Supp.) ("In no case is there any distinction between the kindred of the whole and the half blood."); MD. CODE ANN., EST. & TRUSTS § 1-204 (2002) ("A relative of the half blood has the same status as a relative of the whole blood of the same degree."); MASS. GEN. LAWS ANN. ch. 190, § 4 (West 1990) ("Degrees of kindred shall be computed according to the rules of the civil law; and the kindred of the half blood shall inherit equally with those of the whole blood in the same degree."); MINN. STAT. ANN. § 524.2-107 (West 2002) ("The degree of kindred shall be computed according to the rules of the civil law. Relatives of the half blood inherit the same share they would inherit if they were of the whole blood."); NEB. REV. STAT. § 30-2307 (1995) ("The degrees of kindred shall be computed according to the rule of civil law. Relatives of the half blood inherit the same share they would inherit if they were of the whole blood."); N.Y. EST. POWERS & TRUSTS LAW § 4-1.1(b) (McKinney 1998) ("For all purposes of this section, decedent's relatives of the half

light of changing patterns of marriage, cohabitation, childbirth, and child-rearing, a serious inquiry into the propriety of this once-modern approach is overdue.[25]

To state that family structures have changed rapidly in recent decades is to state the obvious.[26] What is less immediately apparent is the corresponding frequency and complexity of modern half-blood relationships resulting from those changes.[27] The strong opinions voiced by students in my decedents' estates classes first caused me to recognize that many post-baby boomers do not consider their half-siblings as part of their family and roundly reject the UPC's all-inclusive approach.[28] When they have shared no significant life experiences with their half-siblings, they are of-

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blood shall be treated as if they were relatives of the whole blood."); N.C. GEN. STAT. § 29-3 (1999) ("In the determination of those persons who take upon intestate succession there is no distinction . . . (3) Between relations of the whole blood and those of the half blood."); OHIO REV. CODE ANN. § 2105.06 (Anderson 2002) ("When a person dies intestate having title or right to any personal property, or to any real estate or inheritance, in this state, the personal property shall be distributed, and the real estate or inheritance shall descend and pass in parcenary, except as otherwise provided by law, in the following course: . . . (G) If there is no spouse, no children or their lineal descendants, and no parent surviving, to the brothers and sisters, whether of the whole or of the half blood of the intestate, or their lineal descendants, per stirpes"); 20 PA. CONS. STAT. ANN. § 2104 (3) (West Supp. 2000) ("Whole and half blood – Persons taking under this chapter shall take without distinction between those of the whole and those of the half blood."); VT. STAT. ANN. tit. 14, § 552 (2001) ("The degrees of kindred shall be computed according to the rules of the civil law and the kindred of the half-blood shall inherit equally with those of the whole blood, in the same degree."); WIS. STAT. ANN. § 854.21(4) (West 2002) ("Relatives of the half-blood. Subject to sub. (7), terms of family relationship in statutes or governing instruments that do not differentiate between relationships by the half-blood and relationships by the full-blood are construed to include both types of relationships."); WYO. STAT. ANN. § 2-4-104 (Michie 1999) ("Persons of the half-blood inherit the same share they would inherit if they were of the whole blood, but stepchildren and foster children and their descendants do not inherit.").

New Hampshire and Rhode Island have determined *judicially* that half-blood relatives are to be treated the same as whole-blood relatives for inheritance purposes. *See In re* Gault Estate, 366 A.2d 465, 466-67 (N.H. 1965); Prescott v. Carr, 29 N.H. 453 (1854) (concluding that "no distinction [is] to be made between brothers and sisters of the whole blood"); McNeal v. Sherwood, 53 A. 43, 43 (R.I. 1902) (noting that in a will interpretation case "there seems to be no essential distinction left between the whole and the half blood" and that "[t]hey are equally of the blood of the intestate.").

25. *See supra* notes 5-7, 10 and accompanying text (discussing changes in American family structures).

26. This change includes an increasing number of half-blood relationships among people. *See, e.g., In re* Estate of Cleveland, 22 Cal. Rptr. 2d 590, 594 (Ct. App. 1993) (noting that more and more decedents are survived by half-blood relatives).

27. In surveys I have conducted in three of my recent decedents' estates classes, about thirty percent of the respondents had half-siblings. *See supra* note 10 (discussing surveys). The surveys are on file in my office.

28. Consider the following scenarios—loosely taken from those of my students who have volunteered through the years—involving half-blood statutes:

> Recently, I learned that my late father had a kid out of wedlock while he was married to my mother. My sister and I had no clue about the kid until my mother died, and then we only learned about the kid by accident. I don't have a will, but until I read today's assignment I always figured my sister would get everything if I die. I've never even met my dad's kid. For all I know, my dad may have other kids out there. The half-blood statute makes no sense when applied to someone like me.

or

fended by the UPC approach that can turn these emotionally distant relatives into "laughing heirs."[29] Nevertheless, no one can doubt that in many instances warm and loving relationships do exist among half-siblings.[30] Half-siblings who grow up together almost always consider each other family; even when they also have whole-blood siblings, they tend to support an inheritance rule that includes half-blood siblings along with whole-bloods.[31] In sum, along the spectrum of choices—from complete exclusion to complete inclusion as equals—one can find both support and opposition from reasonable people. An inheritance statute that takes an all-or-nothing approach to half-blood relatives seems unnecessarily harsh and old-fashioned in its failure to account for changes in modern family structure.

B. The Role of Default Rules in Inheritance Law

Half-blood provisions, like other distributive statutes for the intestate estate, are default rules. They should reflect a legislature's best guess concerning how the *typical* intestate person would want the estate to be distributed, unless that desire conflicts with a greater societal interest.[32]

> You mean that, because of our half-blood statute, if I die survived by my brother and by my father's kids from his later marriages, then my brother would have to share my estate pro rata with those other kids—kids I never spent any time with and have resented ever since they were born? I can't believe this.

While the number of new half-blood lines is increasing rapidly with the acceptance of serial parenting with multiple partners, the problems caused by over-inclusive half-blood statutes are not limited to post-baby boomers. Modern genetic testing can prove half-blood connections between people of any age and can reveal half-blood connections previously unsuspected. *See supra* note 9 (providing sources concerning accuracy of modern genetic testing).

29. Laughing heirs are heirs who "are personally unaffected by the decedent's death and so (supposedly) laugh all the way to the bank." McGovern & Kurtz, *supra* note 4, at 59. In recent decades, states have tended to exclude remote relatives from intestate succession statutes, primarily to facilitate estate administration. In so doing, they have also reduced the number of potential "laughing heirs."

30. *See supra* note 10 (discussing surveys conducted in recent decedents' estates classes).

31. *Id.*

32. *See* Dobris et al., *supra* note 1, at 62 (noting that many scholars emphasize that the principal purpose of intestacy statutes is "to give effect to the probable intent of [the typical] decedent"); Waggoner et al., *supra* note 1, at 37-38 (discussing policy bases of intestate succession); Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 Law & Ineq. 1, 12 (1998) [hereinafter *Committed Partners*] (noting that the objective of effectuating the decedent's intent is accompanied by the concern that the probate statute will produce a fair distribution and will "not produce disharmony among expectant takers or disdain for the legal system"); Mary Louise Fellows et al., *A Comparison of Public Attitudes About Property Distribution at Death to Intestate Succession Laws in the United States*, 1978 Am. B. Found. Res. J. 319, 323-24 (1978) [hereinafter *Public Attitudes*] (discussing goals of modern intestacy statutes and noting that the decedent's desires must be subordinated if society requires a distributive pattern that conflicts with those desires); John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1116 (1984) (noting that "dispatch, simplicity, inexpensiveness, [and] privacy" are the paramount interests of ordinary people). *See also* John T. Gaubatz, *Notes Toward a Truly Modern Wills Act*, 31 U. Miami L. Rev. 497, 501-16 (1977) (discussing the goals of inheritance law). Drawing from the work of Professor

Historically, American legislatures have used objective rules to determine a survivor's inclusion within an intestacy provision.[33] Objective intestate succession rules simplify and expedite probate administration:[34] a survivor's status as an heir requires no messy inquiry into the subjective quality of the survivor's relationship with the decedent.[35] Although some probate scholars now suggest that states should give judges greater discretion in divvying up the estate, so far state legislatures have been reluctant to follow that suggestion.[36]

A straightforward, objective approach provides predictable and consistent outcomes, but can lead to arbitrary results that send a decedent spinning in his grave.[37] For the departed individual whose distributive desires are thwarted by intestacy laws, we often shrug and say, "everyone should have a will."[38] Our admonition may serve those yet living, but it comes

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Ely, Gaubatz notes the goals of most succession laws to be "(1) continuation of the regime of private property as dominant in the social order; (2) effectuation of the wishes of the individual; (3) provision for the well-being of the family; and (4) provision for the well-being of society." *Id.* at 501 (citing R. ELY, PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH 425 (1914)). The Gaubatz article finds that the well-being of society includes several components: "providing for the needy," "providing for the meritorious," "providing for the decedent," "providing for the stability of society," "providing for the economical use of property," "providing for ease of administration," "providing for constancy and stability of the legal system," and "maintaining respect for the system." *Id.* at 509-16.

33. *See* DOBRIS ET AL., *supra* note 1, at 63 (noting that "American legislatures have universally preferred a mechanical scheme of intestate succession" and avoid inquiry into the preferences of a particular decedent).

34. *See generally* Lawrence W. Waggoner, *The Multiple-Marriage Society and Spousal Rights Under the Revised Uniform Probate Code*, 76 IOWA L. REV. 223, 242 (1991) ("ease of administration and predictability of result are prized features of the probate system").

35. *See generally* Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1165-68 (1986) (providing an excellent discussion of the advantages and disadvantages of objective and subjective distributive rules in inheritance law).

36. *Compare* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS & ESTATES 478 (6th ed. 2000) (noting fear of judicial discretion in American probate law) *and* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 306-11 (1989) (stating that "it is far from clear that a system that permits redistribution of decedents' estates according to a judge's own notion of what is reasonable is preferable to either free testation or forced heirship"), *with* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 200, 257-71 (2001) (discussing nontraditional approaches to estate distribution that avoid the rigid objective rules that characterize traditional intestacy laws), *and* Tanya K. Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 1028 (1999) (arguing in the related area of mortal remains that legislation should respect "the individual's autonomy to define for himself or herself who constitutes family beyond biological constraints").

37. For an early, cogent criticism of fixed rules and the lack of discretion in American succession law, however, see Gaubatz, *supra* note 32, at 499-500 (concluding that as long as American wills law lacks flexibility, it will also lack the capacity to address many problems in succession scenarios). For a more recent analysis, see Foster, *supra* note 36, at 206-09, 251-71 (noting ill effects of fixed intestacy rules and discussing inheritance alternatives that involve greater judicial discretion).

38. *See, e.g.*, Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 28-29 (1994) (discussing "common" intention as a basis for formulating intestacy rules). Professor Waggoner notes that "[p]eople whose individuated intention differs from [the] common intention must accept the responsibility of making a will." *Id.* Of course, one observation of the instant article is that the modern majority half-blood statute does not represent the common intention. A second and more problematic observation is that

too late for a decedent. Moreover, the state develops intestate succession laws precisely to account for the innocent, ignorant, or lazy decedent who dies will-*less*.[39] If the distributive scheme of the state intestacy statute

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perhaps no common intention exists with regard to half-blood relationships in modern society. *Id.* at 73-74.

At any rate, testators do indeed exclude half-blood relations, and we can expect instances of exclusion to increase. *See, e.g.*, Sharp v. Broadway Nat'l Bank, 761 S.W.2d 141, 143 (Tex. App.—San Antonio 1988) (excerpting a will provision in which the testator explicitly states a desire to favor relatives of the whole blood and not relatives of the half blood), *aff'd as modified*, 784 S.W.2d 669 (Tex. 1990); *In re* Estate of Farber, 204 N.W.2d 478, 478 (Wis. 1973). In *Farber*, the testatrix left one-half of her realty and personalty to a whole-blood sister (Mary) and one-fourth to each of two nieces (Ida and Erna) who were the daughters of a predeceased whole-blood sister. *Id.* The will specifically provided that nothing was to go to her half-blood siblings. *Id.* At death, the testatrix was survived only by Ida and some half-blood nieces and nephews. *Id.* No antilapse statute was applicable. *Id.* The court acknowledged the common law rule against negative disinheritance, but concluded that the positive language of the will overwhelmingly indicated the testatrix's intent to favor whole-blood relatives over half-blood relatives. *Id.* at 480-81. Thus, Ida received the entire estate. *Id.* at 482.

Ida was fortunate. A testator's attempts to disinherit half-blood relations can fail even when the will is otherwise valid and contains a clause apparently intended to disinherit half-blood relatives. In *In re Estate of Jetter*, 570 N.W.2d 26, 27 (S.D. 1997), Jetter's will left everything to his full-brother Martin. The will also contained the following disinheritance clause:

> I have intentionally omitted all of my heirs and all other persons whomsoever, who are not specifically mentioned herein, and I hereby generally and specifically disinherit each and all persons whomsoever claiming to be my heirs-at-law and each and all persons whomsoever who, if I died intestate, would be entitled to any part of my estate except those herein provided for.

Id. at 27. Martin's will similarly left his estate to Jetter. *Id.* The two brothers, who were bachelors, amassed a sizable fortune. *Id.* Martin predeceased Jetter, leaving no issue. *Id.* When Jetter died, the state of South Dakota argued that Jetter's estate escheated by virtue of his will provisions. *Id.* South Dakota made this argument because the state has adopted section 2-101(b) of the 1990 Uniform Probate Code, which allows a testator to limit the succession rights of an individual or a class who would otherwise take under state intestacy laws. *Id.* at 28-29.

Evidence indicated that Jetter had wanted the disinheritance clause to apply to the children of his half-brother. Jetter had informed his attorney that he and Martin were "getting kind of tired of loaning money" to the half-relations and that the half-relations "think we're a couple of crazy old bastards . . . and we don't want them to have a f-k-g thing." *Id.* at 32. A sharply divided court concluded that the disinheritance clause was ambiguous because Jetter may have meant the disinheritance provisions to apply *only if Martin survived*. *Id.* at 32-33. Since Martin did not survive, the court refused to hold the provision applicable to Jetter's heirs. *Id.* at 33-34.

39. Intestacy statutes are also necessary for the unsuspecting testator whose will ultimately proves invalid. The number of individuals dying intestate is substantial. *See* DOBRIS ET AL., *supra* note 1, at 62 (noting that a majority of Americans die intestate); EUGENE F. SCOLES & EDWARD C. HALBACH, JR., PROBLEMS AND MATERIALS ON DECEDENTS' ESTATES AND TRUSTS 14 (5th ed. 1993) (stating that most Americans die intestate and estimating that there is no estate proceeding in about eighty-five percent of adult deaths); *but see* WAGGONER ET AL, *supra* note 1, at 33-36 (discussing surveys and suggesting perhaps a more accurate view is that "most people who die prematurely die intestate"). The principal survey casting doubt on the belief that most people die intestate is discussed in Fellows et al., *Public Attitudes*, *supra* note 32, at 336-39 (discussing frequency of testation and providing a table of demographic characteristics of respondents with and without wills). *See also* John Astrachan, *Why People Don't Make Wills*, TRUSTS & ESTATES, Apr. 1979, at 45, 45-50 (noting estimate by a clerk in the New York Surrogates' Court that about fifty percent of Americans die intestate). The Astrachan article provides a psychiatrist's view about some of the reasons people avoid making wills.

conflicts with the desire of the *typical* decedent, the statute is probably flawed, and public skepticism concerning the fairness of the probate process results.[40]

Despite the availability of testamentary succession, the public is entitled to assume that the default rules of intestacy will avoid distributive results that most people consider unnatural.[41] Relying upon this assumption, individuals often do not know that they *need* to execute a will to prevent emotionally distant or unknown half-blood relatives from inheriting.[42] In truth, most people (including most lawyers whose practice does not include probate matters) do not know precisely how their state intestacy statute would distribute their property. To facilitate estate administration and eliminate the claims of distant relatives who are unlikely to be "natural" objects of the decedent's bounty, states in recent years have tended to narrow the categories of potential heirs under their basic intestate succession statutes.[43] Half-blood inheritance statutes, however, are generally found separate and apart from the basic intestate succession statute.[44] States have failed to consider the ill effects of inclusive half-blood statutes and whether they represent the wishes of the typical decedent today.[45]

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40. *See* Fellows et al., *Committed Partners*, *supra* note 32, at 12 (indicating that probate law should not foster disharmony among surviving family or "disdain for the legal system").

41. *See* Waggoner, *supra* note 38, at 28-29 (discussing intestacy statutes as a reflection of the common intention).

42. *See infra* notes 75-93 and accompanying text (discussing scenario in which unknown half-blood siblings were entitled to part of decedent's estate).

43. For example, the 1990 Uniform Probate Code's basic provisions do not provide for heirship of an ancestor beyond the decedent's grandparents. Also, collateral relatives are excluded from heirship unless they are the descendants of the decedent's parents or grandparents. *See* UNIF. PROBATE CODE § 2-103 (amended 1993), 8 U.L.A. 83 (1998); *see also supra* note 29 (noting laughing heir provisions). Under the UPC, if the decedent is not survived by a spouse, issue, or relatives that fall within the preceding categories, the estate escheats. The UPC escheat provision is as follows: "If there is no taker under the provisions of this Article, the intestate estate passes to the [state]." UNIF. PROBATE CODE § 2-105 (amended 1993), 8 U.L.A. 84 (1998). Under escheat statutes in some states, the estate may escheat to a local state governmental unit, such as a county. *See generally* Scoles et al., Problems and Materials on Decedents' Estates and Trusts 13 (6th ed. 2000) (noting tendency among states to narrow class of potential heirs and expand occasions of escheat).

Some states still employ broader approaches to the determination of heirship. For example, the intestate succession statute may provide for certain categories of close relatives and then state that, should no taker be found in those categories, heirship is to be determined according to the civil law or that the estate passes to the "next of kin." *See, e.g.*, DOBRIS ET AL., *supra* note 1, at 66-67 (discussing distribution among collaterals in state intestate succession schemes).

44. *See, e.g.*, UNIF. PROBATE CODE § 2-107 (1969), 8 U.L.A. 269, 283 (1998); UNIF. PROBATE CODE § 2-107 (amended 1993), 8 U.L.A. 73, 87 (1998) (half-blood provisions existing separately from basic intestate succession scheme).

45. Of course, even under the UPC's inclusive half-blood inheritance statute, a collateral half-blood relative may be excluded from heirship status because the degree of relationship she shares with the decedent is too remote; however, the exclusion stems from the basic intestacy statute, not the half-blood statute. For example, a great aunt of the half-blood cannot take under the UPC because the common ancestor she shares with the decedent is one of the decedent's great-grandparents. The basic intestacy provisions of the UPC do not permit the descendants of the decedent's ancestors beyond the grandparent

C. The Importance of Half-Blood Statutes

When half-blood survivors exist, they often are among the claimants to the intestate estates of single adult decedents without issue or to the estates of infants and adolescents who survive their parents.[46] Although such decedents constitute a small part of the intestate population, for them half-blood rules are significant indeed. Moreover, modern changes in family structures mean that their numbers are growing.

Nonetheless, most decedents are survived by a spouse or descendant, either of whom takes to the exclusion of collateral relatives such as half-bloods under most intestacy schemes.[47] Moreover, in most states parents of a decedent take to the exclusion of his collateral relatives, including siblings and their issue.[48] As a result, in the typical intestate estate proceeding the probate court is not concerned with questions about distribution to half-bloods.[49] Thus, while the number of half-blood relations is growing, even in tomorrow's world half-blood statutes will play at most a supporting role in the world of probate distribution. The limited applicability of half-blood statutes is perhaps one reason that probate scholars and legislators have largely ignored them in recent decades.

Yet this limited applicability is precisely what makes them fertile testing ground for exploring ways to improve probate's default approaches to estate distribution. The treatment of half-blood relatives implicates fundamental policy concerns about identifying and acknowledging members of the decedent's family when the family form is not a traditional one. While probate's notion of family expanded long ago to include half-relations in some fashion, only recently have probate scholars seriously begun considering whether and how to include step-relations,[50] surviving un-

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level to claim as heirs. *See supra* note 32 (discussing the basic intestacy provisions of the UPC).

46. In most states, minors have no power to execute a valid will and thus die intestate. *See* Brashier, *supra* note 5, at 106-08 (discussing the inability of a minor to execute a will disinheriting his parent, although a parent typically has testamentary power to disinherit his child).

47. *See, e.g.*, Unif. Probate Code § 2-102 (amended 1993), 8 U.L.A. 73 (1998); Unif. Probate Code § 2-103 (amended 1993), 8 U.L.A. 73 (1998) (limiting categories of remote takers and providing first for spouse, issue, and parents).

48. *See* Dobris et al., *supra* note 1, at 66 (noting common preference for parents over siblings and their issue).

49. Even if half-bloods are among the decedent's heirs, the decedent may have executed a valid will that makes the default rules of intestate succession irrelevant. *See supra* note 38 (noting cases in which testator expressly excluded half-blood relatives).

50. For example, California's unique statute permits a child to inherit from or through a foster parent or stepparent when the relationship began during the child's minority, continued throughout the parties' joint lifetimes and clear and convincing evidence indicates that the foster parent or stepparent would have adopted the child but for a legal barrier. Cal. Prob. Code § 6454 (West 1991 & 2001 Electronic Update); *see* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 Law & Ineq. 1, 57-65 (2000) (discussing California statute that grants intestate succession right to stepchildren even when relatives by consanguinity exist); Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. Davis L. Rev. 917, 930-31 (1989) (criticizing California's requirement that, for a stepchild to inherit, clear and convincing evidence must show that the stepparent would have adopted the stepchild but for a legal barrier); David R. Fine &

married partners,[51] and other persons outside the so-called nuclear family.[52] Objective rules that take an all-or-nothing approach to inclusion of non-traditional family members—including half-bloods, step-relations, and unmarried partners—will face growing criticism in coming years.[53] What we learn from reconsidering half-blood statutes can help us fashion better inheritance rules for the millions of estates in which the decedent is survived by members of his or her nontraditional family.

Mark A. Fine, *Learning From Social Sciences: A Model for Reformation of the Laws Affecting Stepfamilies*, 97 DICK. L. REV. 49, 57-58, 78-79 (1992) (discussing stepfamilies and intestacy and agreeing with Mahoney's proposal); Thomas M. Hanson, Note, *Intestate Succession for Stepchildren: California Leads the Way, But Has It Gone Far Enough?*, 47 HASTINGS L.J. 257, 267-84 (1995) (discussing judicial interpretations of California's probate statute including stepchildren and proposing that the only statutory requirement be that the stepchild prove a legitimate family relationship with the decedent by a preponderance of the evidence).

In a few states, stepchildren may inherit the decedent's estate if there are no other heirs and the estate would otherwise escheat. *See* Mahoney, *supra*, at 920-25 (discussing state intestacy statutes that permit step-relatives to inherit in rare circumstances). Typically, step-relations are included only as a last resort. As Professor Mahoney notes, "[s]tepchildren and stepparents have found their way into the statutory intestacy schemes of a few states, but only as takers by default." *Id.* at 920. A few states provide for stepchildren in this manner. *See, e.g.*, MD. CODE ANN., EST. & TRUSTS § 3-104(e) (1991 & Supp. 2000); OHIO REV. CODE ANN. § 2105.06 (Anderson 1986); S.C. CODE ANN. § 62-2-103(6) (Law. Co-op. 1987). Other states include stepchildren indirectly, through provision for the heirs of the decedent's spouse when the decedent left no heirs. *See, e.g.*, ARK. CODE ANN. § 28-9-215(2) (Michie 1987); CAL. PROB. CODE § 6402(e) (West Supp. 1988); FLA. STAT. ANN. § 732.103(5) (West 1995); KY. REV. STAT. ANN. § 391.010(6) (Michie 1999) (real estate); MO. ANN. STAT. § 474.010(3) (West 1992 & Supp. 2001); R.I. GEN. LAWS § 33-1-3 (1995); VA. CODE ANN. § 64.1-1 (Michie 1995). In Washington, the descendants of a spouse may take the property if it was received from that spouse. WASH. REV. CODE ANN. § 11.04.095 (West 1998). For a more recent discussion of the treatment of stepchildren in intestate succession laws, see Kim A. Feigenbaum, Note, *The Changing Family Structure: Challenging Stepchildren's Lack of Inheritance Rights*, 66 BROOK. L. REV. 167 (2000) (discussing previous proposals and suggesting use of a sliding scale approach).

51. For scholarly commentary, see Waggoner, *supra* note 38, at 61-87 (discussing unmarried cohabitants and partners and proposing an intestacy statute for de facto partners); Fellows et al., *Committed Partners*, *supra* note 32, at 24-89 (discussing proposal to include surviving committed partner and detailing results conducted in Minnesota survey); E. Gary Sptiko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999) (providing a thorough and compelling discussion of the effect of excluding gays and lesbians from intestacy schemes); Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996) (concluding that couples who benefit the state should be afforded legal recognition; thus, the state should redefine marriage or recognize new legal relationships along with marriage); Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417 (1999).

A few states, including Hawaii, Vermont, and California, now provide categories of registered partners spouse-like inheritance rights. Massachusetts currently permits gay couples to wed. For more detailed discussion of these provisions, see BRASHIER, *supra* note 5, at 60 nn.80-88 (examining provisions for spouse-like partners in these states).

52. *See, e.g.*, Foster, *supra* note 36, at 252 (arguing "that reasonable alternatives to family-based inheritance exist and . . . that family-based inheritance is only a paradigm and not a reality").

53. *See infra* note 204 and accompanying text (listing several articles that discuss alternatives to the fixed, objective rules that have long served as the foundation of American intestate succession schemes).

D. Distinguishing Parental Hopes from Sibling Attitudes

The UPC approach to half-bloods and inheritance assumes that a sibling is a sibling is a sibling, even when the sibling in question shares only one parent with the decedent. Yet the social importance of consanguinity when siblings share only one parent is (and always has been) ambiguous. Growing numbers of half-siblings have only a passing acquaintance with each other. They may not know of each other's existence. Children born since the sexual revolution of the late 1960s seem much less willing than their elders to assume that the shared blood of one parent is enough to create a true sibling bond.[54] Today, it is wrong to assume that children who share one parent are just as likely to form true sibling relationships as those who share two.[55]

Nonetheless, most half-blood intestacy laws continue to reflect the unduly optimistic views of those of us who grew up when family relationships were far less fluid.[56] In our desire to foster strong families and encourage strong sibling ties, we want to believe that our choice to parent children by different partners does not adversely affect the relationships among those children. We are turning a blind eye to reality, however, when we ignore the apathy or antipathy that exists in many half-sibling relationships today.

In part, our failure to reassess the proper inheritance treatment of half-blood relatives in modern families may stem from an improper focus on the desires of the common parent. First, we presume that the typical parent who has children by different partners loves those children equally and wants intestacy laws to treat all of them as his potential heirs. The laws in fact do that.[57] Second, we presume that the typical parent wants his children to love each other regardless of the half-blood relationship that may exist between them. As the parent of these children, he would probably support the current inclusive approach that does not distinguish whole- and half-blood relationships among his children. Thus, from the stance of the common parent, the majority approach to half-bloods and inheritance seems reasonable as applied to the estates of his children.

Legislatures, however, misperceive the purpose of intestacy laws when they base a half-blood statute on the common parent's view of proper estate distribution for his children.[58] Rather, legislatures should base

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54. I derive the two final statements in this paragraph not only from empirical observation, but also from a survey I have conducted of students in my decedents' estates classes over several years. *See supra* note 10 and accompanying text (explaining such surveys).

55. *See supra* note 54 (noting survey of law students).

56. *See supra* note 43.

57. *See supra* note 50.

58. In fact, the statutes would be just as lopsided if they were based on the view of the *other* parent—that is, the parent of the child with half-siblings who is not the parent of his child's half-siblings. Half-blood statutes should reflect the distributive desires of the typical decedent with half-blood relatives, not the desires that his or her parents might hold concerning the ultimate distribution of the estate. Although her desires should also be irrelevant, the "un-common" parent of a child with half-siblings might well oppose the universal inclusion statute. For example, if Al and Betty have two children, Carl and Di-

half-blood statutes on the wishes of the children themselves. Of course, in light of the rapid changes in modern family structures, the experience of older lawmakers with half-siblings may differ significantly from that of many of today's children with half-siblings. Nevertheless, state legislatures eventually must develop default rules for half-bloods that also consider the attitudes of children in these changing families.

In sum, legislators—particularly those who are the common parent of multiple sets of children—must not confuse their hopes for happy, blended families with the actual attitudes held by their sons and daughters.[59]

III. SIBLING RELATIONSHIPS IN MODERN FAMILIES

Until recent decades, legally-acknowledged half-blood relationships typically arose when the common parent had children from two or more marriages. Today, however, the law also frequently recognizes half-blood relationships when the common parent has children by two or more nonmarital partners, or when the common parent has children by one or more spouses and one or more nonmarital partners.[60] In this new world of half-sibling relationships, does the strength of the bond between half-

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ane, and then Al divorces Betty and remarries and has more children, Betty would probably not want Carl's or Diane's estate to be shared by children of Al's later marriage. This is particularly so if Carl or Diane have previously inherited from Betty herself. Even if all of Carl's or Diane's estate came from their own accomplishments or from Al, Betty would still likely prefer to see *her* child take to the exclusion of Al's later set of children.

59. Courts and commentators have sometimes noted that the modern majority approach eliminates discrimination against half-bloods. *See, e.g.*, Singh v. Singh, 569 A.2d 1112, 1121 (Conn. 1990) (noting that the purpose of including half-bloods in inheritance statutes was "to prevent discrimination"); Wellman & Gordon, *supra* note 1, at 359-60 (noting that the 1969 UPC helped to end "discrimination" against half-bloods). While these statements are true, one must carefully note that discrimination against half-bloods in state inheritance statutes is far different from unlawful distinctions based on "illegitimacy." Prior to the last part of the twentieth century, there were several reported cases in which "illegitimate" half-blood claimants were not allowed to inherit. Courts did not deny their claims because they were half-bloods, *but rather because they were "illegitimate."* *See, e.g.*, Penman v. Ayers, 156 A.2d 638 (Md. 1959) (describing a heartbreaking case in which a nonmarital claimant who lived with, worked with, and was considered to be a brother by the decedent could not take because of his nonmarital status, even though the state statute did not distinguish between half-blood and whole-blood relatives); Messer v. Jones, 34 A. 177, 178 (Me. 1896) (holding that children of an "illegitimate" half-brother could not inherit from the decedent, despite a statute that treated half-blood and whole-blood relatives the same; concluding that the half-blood statute only applied to "lawful" relatives). In *In re Estate of Klingaman*, 119 A.2d 748, 750-51 (Del. Ch. 1956), the lower court held that legitimate cousins took the decedent's estate to the exclusion of an "illegitimate" half-sister. The Delaware Supreme Court reversed the decision. 128 A.2d 311, 316 (Del. 1957). Today, United States Supreme Court rulings clearly indicate that a state cannot make the inheritance rights of a claimant entirely dependent upon the marriage of his parents. *See supra* notes 36-39 and accompanying text.

Because intestacy statutes define the family in some fashion, they necessarily engage in discrimination among potential claimants. If typical decedents prefer that their parents take to the exclusion of their siblings, then the state should fashion its intestacy law in that manner. Similarly, if typical decedents prefer that their whole-blood relatives take to the exclusion of their half-blood relatives, then the state should so fashion its intestacy law.

60. *See infra* notes 66-76 and accompanying text (discussing half-blood relationships arising outside marriage).

siblings depend upon the common parent's marital status when the children are born? What objective information indicates that a person is likely to consider a half-sibling a family member?

A. Half-Blood Relationships Arising From Marriage

When divorce and nonmarital birth were uncommon, the half-sibling relationship occurred most often when a marital ("legitimate") child's mother or father died, the child's surviving parent entered into a new marriage, and that surviving parent then had a child or children by the new spouse. Assume, for example, that Janie and Jennie are the marital children of Susan and Rob. Rob dies in an accident when the children are young. A year or so later, Susan marries Tom. The newlyweds have a child, Laura. If Susan rears her three daughters together, the three girls will probably develop a strong family bond. Even if Janie and Jennie ultimately prefer each other's company to that of Laura, they will still consider Laura their sister. The universal inclusion of the UPC's half-blood inheritance statute makes sense in such a setting.

The more common setting for marital half-blood relationships today, however, is that in which the marriage of Susan and Rob ends not by death, but rather by *divorce*. Suppose now that Susan and Rob divorce and Susan obtains custody of Janie and Jennie. Both Susan and Rob remarry, and both have children by their new spouses. If Janie and Jennie grow up in Susan's home, they probably will develop sibling ties to Susan's later-born children with whom they are reared.[61] While Janie and Jennie are also half-siblings with Rob's later-born children, bonding between Rob's two sets of children probably will depend upon their interaction as they grow up.[62] If Rob and his new family do not play an integral role in the lives of Janie and Jennie, the girls are much less likely to develop a deep emotional bond with Rob's later-born children. One could argue that, in this latter setting, Janie and Jennie's preference for their maternal half-siblings over their paternal half-siblings is simply a variation of something that occurs even in nuclear families—after all, many of us prefer one whole-blood sibling over another. Yet the analogy is unconvincing for this reason: while children in a nuclear family may have a favorite brother or sister, they almost always recognize the others as their siblings. In the divorce example involving Janie and Jennie, the girls don't merely *prefer* their maternal half-siblings; rather, lacking any ongoing relationship with their father's later-born children, Janie and Jennie may very well not consider those children as part of their family.[63]

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61. Family histories that my law students share year after year convince me that these examples are not mere conjecture. *See supra* note 10 (discussing students surveys).

62. *See supra* note 10 (discussing surveys of students in decedents' estates classes).

63. Interestingly, the absence of an ongoing relationship among siblings in a nuclear family probably has no bearing on whether the children consider one another siblings. For example, Carl may be grown-up and gone when his whole-blood sister Diane is born, yet their common heritage maternally and paternally makes them likely to recognize one another as siblings.

In both of the preceding examples, the common parent's children were *marital* children. Importantly, however, the interaction among the half-siblings, not the marital status of the children's common parent, determined whether they considered each other as true siblings. We have no infallible bright-line test for gauging the quality of any sibling relationship, whole- or half-blood. Still, it may be that the most reliable factor indicating whether an intestate individual considers a half-sibling to be a family member is whether the two were reared in a common household during a substantial part of their shared childhoods.

B. Half-Blood Relationships Arising Outside Marriage

Some reports indicate that as late as 1960, the nonmarital birthrate was no greater than five percent.[64] Today, however, almost one in three newborns is a nonmarital child.[65] Like divorce, nonmarital childbirth is now commonplace.[66] The marital status of mothers and fathers, of course, plays no role in determining the biological relationship among their children. Whether married or unmarried, a parent with children by different partners has children who are biological half-siblings.[67] Nonetheless, some practical problems are more likely to occur when the half-sibling relationship arises outside marriage—particularly when the common parent is the *father.*

Earlier we observed that half-siblings reared by the common parent are likely to consider each other family. This observation is unaffected by the

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64. *See* Elizabeth Mehren, *American Family Steadily Eroding, Researchers Find*, L.A. Times, July 20, 1988, at 1 (observing increase in nonmarital birth rate from 5% in 1960 to 23% by 1986).

65. *See* Marsha Garrison, *The Technological Family: What's New and What's Not*, 33 Fam. L.Q. 691, 694 (1999) (noting that by 1993 births to unmarried mothers had jumped to 31% of the annual total and citing U.S. Dep't of Commerce, Bureau of the Census, Statistical Abstract of the United States: 1998 80, tbl. 100 (1998) (providing 1990s data)). In Shelby County, Tennessee (which includes the City of Memphis), more than one-half of all births in 1992 were to unmarried women. Sam Fulwood III & Mary Powers, *Census Finds Surge in Births Out of Wedlock*, Com. Appeal (Memphis), July 14, 1993, at A1 (citing statistics compiled by local health department).

66. *See* Brashier, *supra* note 5, at 121-47 (discussing nonmarital birth and its implications for inheritance law); *see also* Richard B. v. Sandra B.B., 615 N.Y.S.2d 955, 957 (Sup. Ct. 1994) (noting that today's single woman may view motherhood as "a source of pride and empowerment rather than of stigma and deprivation"). For a breakdown of unmarried motherhood by age and ethnicity, see S.J. Ventura et al., U.S. Dep't of Health & Hum. Servs., *Trends in Pregnancies and Pregnancy Rates by Outcome: Estimates for the United States, 1976-96*, 7-8 (2000). Among other things, the report notes that the birth rate attributable to unmarried women increased by forty-nine percent from 1980 to 1990 and then remained constant during the first part of the 1990s. *Id.* at 8 (noting that one reason for the increase in the nonmarital birth rate was the decline of the "shotgun" wedding). The report also attributes most of the increase in births to unmarried women between the early 1980s and early 1990s to births by unmarried but *cohabiting* women. *Id.* at 18. Fewer unmarried women are choosing abortion. *Id.* at 12 (noting that, among unmarried women, "the proportion of pregnancies ending in live birth has increased from thirty-three percent in 1980 to forty-seven percent in 1995").

67. Biological half-siblings may, of course, be *legal* whole-siblings, for example, as a result of adoption or because of presumptions of paternity. *See* Brashier, *supra* note 5, at 121-67 (discussing paternity presumptions, nonmarital birth, and adoption).

children's status as marital or nonmarital children. Suppose that Betty is an *unmarried* mother who has two children, Ron and Sarah, by John. Betty also has one child, Tess, by Ken. If Betty rears the three children together, they will probably consider themselves a family.

Suppose instead that Betty is *married* to John when she gives birth to Ron, Sarah, and Tess. The children grow up in the same home; however, several years later the children learn that Ken, not John, is Tess's genetic father. Despite the revelation, Ron and Sarah probably love Tess the same as before the genetic information came to light. This affection is unlikely to cease even if John's presumed paternity of Tess is legally disestablished and the law subsequently recognizes Tess as the half-sibling of Ron and Sarah.

How are Ken's marital children likely to feel towards Tess, their recently discovered half-sibling? If Ken's marital children grew up in a household headed by Ken and his wife, without knowledge of Tess's existence, will the later revelation of Tess's paternity cause a sibling bond to arise between Ken's marital children and Tess? Should they be Tess's potential heirs if she considers only Ron and Sarah her true siblings? If Tess played no role in the life of Ken's marital children, should she be their potential heir? If Tess legally establishes Ken's paternity, would it be morally objectionable for the law to deny Ken's marital children and Tess default inheritance rights to each other's estates? Would it be constitutionally objectionable?

The last of these questions is particularly important from the legislator's standpoint, for if a state were constitutionally bound to treat half-bloods as whole-bloods, then the question of what the typical decedent wants would become irrelevant. Suppose then that a state legislature enacted a half-blood statute that excludes half-siblings from receiving part of the intestate estate if the decedent and the half-siblings were not reared together during any part of their minority. Under such a statute, Tess would be a potential heir of her maternal half-siblings but not of her paternal half-siblings even after legally establishing Ken's paternity. If one of Tess's paternal half-siblings subsequently died intestate, survived only by siblings, Tess might be tempted to attack the statute as unconstitutional for impermissibly discriminating against her as a *nonmarital* child. She would point out that reviewing courts must give heightened scrutiny to state classifications based on "illegitimacy."[68] Though her ar-

68. The landmark case for intestate succession purposes is *Trimble v. Gordon*, 430 U.S. 762 (1977) (5-4 decision). Following the *Trimble* opinion, commentators generally recognized that classifications based on illegitimacy would receive a heightened level of scrutiny—somewhere between "rational basis" and "strict scrutiny." *Trimble* did not formally adopt this heightened level of scrutiny, however. Dissenting in *Trimble*, Justice Rehnquist noted that prior Court opinions suggested that laws treating illegitimates differently would receive "a more far-reaching scrutiny under the Equal Protection Clause than would other laws regulating economic and social conditions." Justice Rehnquist also observed, however, that even after *Trimble*, "the unanswered question remains as to the precise sort of scrutiny to which classifications based on illegitimacy will be subject." *Id.* (Rehnquist, J., dissenting). That question was answered in *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (for-

gument might seem initially plausible, it would fail. The half-blood probate statute she attacks—under which inclusion or exclusion is based on *shared childhood relationships*—does not raise any constitutional red flags. Although Tess is a nonmarital child, her nonmarital status has nothing to do with her exclusion. Rather, exclusion under the statute applies equally to marital and nonmarital half-siblings reared apart from the decedent. A court reviewing such a statute would thus have no basis for applying heightened scrutiny to the statute. Instead, the court would properly conclude that the principal task of intestacy law is to accomplish the probable intent of the typical decedent and that a state legislature could rationally conclude that the typical decedent would not wish to share his estate with a half-sibling reared apart from him.[69]

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mally adopting the intermediate scrutiny review for state classifications based on illegitimacy). *See* Pace v. La. State Employees Ret. Sys., 648 So. 2d 1302, 1306 (La. 1995) (discussing standard of review in cases involving illegitimacy classifications). Among the cases involving nonmarital child decisions preceding *Trimble* are the following: *Glona v. Am. Guar. & Liab. Ins. Co.*, 391 U.S. 73, 76 (1968) (holding that the state denied equal protection when it withheld relief from the mother of a child wrongfully killed merely because the child was born out of wedlock); *Levy v. Louisiana*, 391 U.S. 68, 72 (1968) (holding that the denial to illegitimate children of the right to recover for wrongful death of their mother, on whom they were dependent, constituted invidious discrimination against them); *Labine v. Vincent*, 401 U.S. 532, 537-40 (1971) (holding that Louisiana intestate succession provision that precluded illegitimate children, though acknowledged, from claiming rights of legitimate children was choice of the state and did not violate the Equal Protection and Due Process Clauses); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 175-76 (1972) (holding that the Louisiana workmen's compensation statutes denying equal recovery rights to dependent, unacknowledged illegitimate children violated the Equal Protection Clause because inferior classification of those dependent children bore no significant relationship to recognized recovery purposes of workmen's compensation statutes); *Davis v. Richardson*, 342 F. Supp. 588, 593 (D. Conn. 1972) (holding a provision of the Social Security Act discriminating against illegitimate children in the payment of benefits on the death of the wage-earning parent constituted "invidious discrimination, unrelated to the purpose of the law"), *aff'd*, 409 U.S. 1069 (1972); *Griffin v. Richardson*, 346 F. Supp. 1226, 1237 (D. Md. 1972) (holding a Social Security Act section reducing illegitimate children's priority in insurance benefits violated the Due Process guarantee of the Fifth Amendment), *aff'd*, 409 U.S. 1069 (1972); *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (per curiam) (holding once a state grants "a judicially enforceable right on behalf of children to needed support from their natural fathers there [was] no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father [was] not married [to] its mother"); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973) (per curiam) (holding New Jersey's "Assistance to Families of the Working Poor" program that denied illegitimate children benefits that were granted to legitimate children violated the Equal Protection Clause); *Jimenez v. Weinberger*, 417 U.S. 628, 635-36 (1974) (holding that a provision of the Social Security Act barring disability benefits to non-legitimated children born after the onset of the insured's disability was not related to a valid governmental interest and denied Equal Protection); *Beaty v. Weinberger*, 478 F.2d 300, 308 (5th Cir. 1973) (holding that the Social Security Act's classification violated Equal Protection because it denied benefits to an illegitimate child born after his father's period of disability and almost always granted benefits to legitimate children), *aff'd*, 418 U.S. 901 (1974); *Mathews v. Lucas*, 427 U.S. 495, 516 (1976) (holding that the failure of Social Security Act provisions "to extend any presumption of dependency" to certain illegitimate children did not "impermissibly discriminate against them as compared with legitimate children or [other] illegitimate children who [were] statutorily deemed dependent").

69. *See supra* notes 32-35 (discussing purpose of intestate succession laws as default rules).

In sum, in today's world the common parent's marital status is often meaningless in evaluating family ties between half-siblings. The most important difference between half-blood relationships arising from nonmarital relationships and those arising from successive marital relationships is the increased likelihood that "secret" half-blood siblings may exist when the shared parent is the father and at least one of the half-siblings is born to him outside marriage. If state probate statutes were to use *shared life experiences* as a gauge of "true" sibling status among half-bloods, they would often exclude a father's nonmarital children by two or more partners from each other's intestate estate; in contrast, these statutes would usually include a mother's nonmarital children by different partners as potential heirs of each other. Why? Because mothers are more likely than fathers to rear their different sets of children in a common household. States adopting such an approach, however, would not engage in impermissible sex discrimination. Mothers may be more likely to rear their children by different partners in a common household, but growing numbers of fathers now rear their different sets of children together, too. The distinguishing factor of such a statute is not the marital status or sex of the common parent, but rather the decedent's life experience that provides a basis for inferring his or her probable intent.

C. Attenuated Half-Blood Relationships

The closest half-blood relationship one can have is with a sibling. Half-siblings themselves are likely to have issue, so more distant half-relations also exist. A decedent with a half-sibling may leave surviving half-nieces and -nephews, half-grand-nieces and -nephews, and so forth. A decedent whose *ancestor* was a half-sibling may leave surviving half-aunts and -uncles and various degrees of half-cousins.[70] Attenuated half-blood relationships like these will also become more common as the number of

70. For a general presentation of cases and principles concerning inheritance rights among cousins, including those of the half-blood, see C.R. McCorkle, Annotation, *Descent and Distribution To and Among Cousins*, 54 A.L.R. 2d 1009 (1957).

In *In re Estate of Thiemann*, 992 S.W.2d 255, 256 (Mo. Ct. App. 1999), the court found that the decedent was survived by a whole-blood aunt and two half-blood aunts, easily disposing of the argument presented by the half-blood aunts that "only siblings can be half bloods or whole bloods." For a case involving more attenuated half-blood relationships, see *In re Estate of O'Handlen*, 571 N.E.2d 482 (Ill. App. Ct. 1991). In *O'Handlen*, descendants of the decedent's paternal grandparents disagreed on the proper distribution of part of the intestate estate. The applicable statute provided as follows:

> If there is no surviving spouse, descendant, parent, brother, or sister of the decedent but a grandparent or descendant of a grandparent: . . . ½ of the entire estate [goes] to the decedent's paternal grandparents in equal parts or to the survivor of them, or if there is none surviving, to their descendants *per stirpes*.

Id. at 483 (quoting ILL. REV. STAT. 1989, ch. 110/2, par. 1-1 (current version at 755 ILL. COMP. STAT. 5/1-1 (2004)). Esther, the decedent, died intestate survived by relatives of her maternal and paternal grandparents. *Id.* The one-half passing to the descendants of Esther's maternal grandparents was not in dispute. *Id.* On the paternal side, Esther was survived by her father's whole-blood sister and also by descendants of her father's half-siblings. *Id.* The common ancestor for the decedent and the half-relatives was the decedent's paternal grandfather. *Id.*

half-sibling relationships increase in American society.[71] Because all half-blood relationships stem from the half-sibling relationship, however, this article focuses principally upon siblings.[72] Moreover, the growing

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The court concluded that the one-half of the estate passing to the descendants of Esther's paternal grandparents should also be divided into equal parts by virtue of the statute, with one part passing through the decedent's paternal grandmother and the other part passing through the decedent's paternal grandfather. *See id.* at 484. As the sole surviving heir on the paternal grandmother's side, the decedent's aunt (her father's whole-blood sister) received the part passing through the paternal grandmother—one-fourth of the total estate. *Id.* The part passing through the paternal grandfather was divided *per stirpes* among that whole-blood aunt and the grandfather's descendants from a prior marriage, who were half-blood relations of the decedent. *See id.* The court rejected the argument from the half-blood relatives that the distribution allowed the whole-blood aunt to "double dip" and that it therefore violated the statute providing equal treatment of half-blood and whole-blood relatives. *Id.* The court concluded that the half-blood relatives were not descendants of the decedent's paternal grandmother and were not entitled to take the part that passed through her; moreover, the half-blood relatives were treated exactly as whole-blood relatives with regard to that part of the estate passing through the paternal grandfather. *Id.*

In *Dahood v. Frankovich*, 746 P.2d 115, 116 (Mont. 1987), the residuary provision of Rose's will failed because the residuary beneficiary had predeceased her and had left no issue to take in his stead. Thirty claimants appeared to argue for their part of the residuary estate passing through intestacy. *Id.* The pertinent part of the statute in question provided as follows:

> [I]f there is no surviving issue, parent, brother, sister, or children or grandchildren of a deceased brother or sister, to the next of kin in equal degree, except that where there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearer ancestors must be preferred to those claiming through an ancestor more remote.

Id. at 118 (quoting MONT. CODE ANN. § 72-2-203(4) (1986) (current version at MONT. CODE ANN. § 72-2-113 (1993))). Montana also provided that "[r]elatives of the half blood inherit the same share they would inherit if there were of the whole blood." *Id.* (citing MONT. CODE ANN. § 72-2-211 (1986) (current version at MONT. CODE ANN. § 72-2-117 (1993))). Among Rose's survivors were her mother's two half-brothers and one half-sister, who were all relatives of the third degree. *Id.* at 116. Rose was also survived by a maternal first cousin, who was the child of her mother's full sister, and by three paternal first cousins, who were the children of her father's full brother. *Id.* The first cousins were fourth degree relatives. *Id.* The court concluded that the half-uncles and the half-aunt took the entire estate by virtue of the intestacy statute. *Id.* at 120.

Ana, one of Rose's first cousins, made a creative argument, however. Ana argued that as full first cousins, she and Rose were in fact half-blood relatives—in other words, since Ana's mother and Rose's mother shared the same parents, Ana and Rose themselves shared one-half of a bloodline. *Id.* at 119. Ana further argued that the half-uncles and half-aunt actually shared only one-fourth of a bloodline with Rose—in other words, since Rose's mother shared only one-half of a bloodline with her half-siblings, and Rose shared only one-half of a bloodline with her mother, then Rose and her half-uncles and half-aunt had a one-fourth bloodline interest in common. *Id.* The court rejected this argument. *Id.*

71. The decedent can also be survived by half-relatives descended from a great-grandparent or an even more distant lineal ancestor. In many states today, however, intestacy statutes do not reach beyond the grandparent level in naming heirs. Thus, great-aunts and great-uncles and their issue would not qualify as heirs, whether of the half-blood or whole-blood.

72. Because the inheritance laws of all states recognize adopted persons as legitimate family members, *legal* half-blood relatives (like their whole-blood counterparts) do not necessarily have to share any common blood. *See, e.g.*, *In re* Raymond Estate, 641 A.2d 1342, 1343 (Vt. 1994). In *Raymond*, Joan's parents were Joseph and Helen Raymond. *Id.* During a prior marriage, however, Joseph had adopted a son, Paul. *Id.* At Joan's death, the court concluded that Paul was Joan's half-brother, because they shared the same *legal* father. *See id.*

number of people who do not consider their half-siblings as family members are also unlikely to want the descendants of those half-siblings as potential heirs.[73]

Automatic inclusion of attenuated half-blood relatives as heirs will increasingly complicate the administrator's task of ascertaining the proper distributees for the intestate estate. One of my students, for example, indicated that her father had children by *at least* eight different women. The administrator who must ascertain the identity of her siblings or their issue (if she dies intestate survived only by collateral relatives) faces a formidable task if half-bloods are automatically included. Presumably, in tomorrow's world such cases will still be the exception rather than the rule. Nonetheless, even today many mothers and fathers have children by two or more partners, and the number of paternity and parentage cases in American courts today is staggering.[74] Half-blood relationships now exist in almost all families.

D. THE UNKNOWN HALF-SIBLING

The unknown half-sibling who first appears at the decedent's burial—a scenario once relegated largely to melodrama—is increasingly a part of "true-life" stories. The California Supreme Court addressed a slight variant of this scenario in a 2001 inheritance case.

In *Estate of Griswold*,[75] Denis died intestate survived by his wife

73. Questions of half-blood relationships and inheritance can also be important in class gift scenarios under a will. In such cases, the starting point should be to ascertain the intent of the testator. When the testator's intent cannot be ascertained, however, it is appropriate to defer to a rule of construction that accords with the probable intent of most testators. For example, in many states today a rule of construction often provides that a class gift to someone's children, issue, etc., is deemed to include adopted children if the intent of the testator is not otherwise ascertainable. This rule of construction may be statutorily mandated. *See, e.g.*, TENN. CODE ANN. § 36-1-121(c) (2001). It would seem that whatever approach the state intestacy statute takes to the treatment of half-blood relations, the same approach should serve as the basis of any corresponding rule of construction. Thus, if the state intestacy statute does not distinguish half-blood from whole-blood siblings, then a class gift to someone's "siblings" should include both the whole-blood and half-blood siblings unless the testator has expressed an intent to the contrary.

74. *See supra* notes 64-65 and accompanying text (discussing nonmarital birth statistics). Today, states routinely acknowledge nonmarital children as potential heirs of their parents, rejecting the opprobrium that history once poured on innocent children whose parents did not marry. *See, e.g.*, UNIF. PROBATE CODE § 2-114 & cmt. (amended 1993), 8 U.L.A. 91-92 (1998) (noting that a parent-child relationship may be established under the Uniform Parentage Act in states that have adopted the Act); 2000 UNIF. PARENTAGE ACT § 202, 9B U.L.A. 309 (2001) (stating that "[a] child born to parents who are not married to each other has the same rights under the law as a child born to parents who are married to each other"). In a world of expanding reproductive possibilities both within and outside marriage, states continue their struggle to expand the default rules of inheritance law to acknowledge children of surrogacy, artificial insemination, and post-mortem conception or implantation. *See* BRASHIER, *supra* note 5, at 168-98 (discussing inheritance rights of children created with assisted reproductive technology). As society increasingly acknowledges the validity of committed gay and lesbian relationships, states will almost certainly develop inclusive inheritance rules for these couples, even in states that refuse to recognize gay and lesbian marriage. *See id.* at 55-89 (discussing inheritance rights of committed homosexual partners).

75. 24 P.3d 1191, 1192 (Cal. 2001).

Norma. He left no child or parent. His modest estate consisted entirely of separate property.[76] When Norma sought to receive the entire estate as Denis's surviving spouse, an "heir hunter"[77] appeared and contested her claim.[78] The heir hunter had received an assignment of the interests of Margaret and Daniel, whom he claimed were Denis's paternal half-siblings.[79] If Denis were survived by siblings—half or whole, because California uses the universal inclusion approach—Norma's share would be reduced to fifty percent and the siblings would succeed to the remainder.[80]

The facts revealed that sometime during his thirties or forties, Denis learned that his birth certificate listed one Draves as his father.[81] Denis made no attempt, however, to contact Draves.[82] Draves died in 1993 and the probate documents for Draves's estate identified his wife and two children, Margaret and Daniel, as his only heirs.[83] The documents did not mention Denis, although Draves had indeed fathered Denis out of wedlock, had acknowledged paternity, and had paid court-ordered child support for Denis for eighteen years.[84] Was Draves thus Denis's father, when for decades Denis had not known that Draves existed and had not contacted Draves upon learning of their biological connection? Were Margaret and Daniel half-siblings of Denis when they had not even known of his existence until after his death?[85]

Section 6452 of the California Probate Code provides as follows:

> If a child is born out of wedlock, neither a natural parent nor a relative of that parent inherits from or through the child on the basis of the parent and child relationship between that parent and the child unless both of the following are satisfied: (a) [t]he parent or a relative of the parent acknowledged the child [and] (b) [t]he parent or a relative of the parent contributed to the support or the care of the child.[86]

The court concluded that Draves had satisfied the acknowledgment and

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76. *Id.*

77. *Id.* at 1192-93. As the cases demonstrate, heir hunters may track down heirs unknown or long-forgotten by the decedent, thereby causing distributive results that the decedent almost certainly would not want. For another case involving heir hunters, see *In re* Estate of Peterson, 66 Cal. Rptr. 629, 631 (Ct. App. 1968) (noting that heir hunting firm found decedent's half-sister during probate proceedings).

78. *Estate of Griswold*, 24 P.3d at 1192-93.

79. *Id.* at 1192-93.

80. *Id.* at 1193 (quoting CAL. PROB. CODE §§ 6401-02 (West 2001)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.* (indicating that the half-siblings were unaware of the decedent's existence at the time of his death). The statutory entitlement of the half-siblings to one-half of the decedent's estate—at the expense of his wife and despite the complete absence of emotional ties between the half-siblings and the decedent—shows clearly how surviving half-blood relatives may become "laughing heirs."

86. *Id.* (quoting CAL. PROB. CODE § 6452 (West 2001)).

support prongs of the statute.[87] For inheritance purposes, Draves was Denis's father and Draves's children by another woman were Denis's half-siblings.[88] The "heir hunter" prevailed.[89]

The court appeared less than sanguine about its holding.[90] In a concurrence, Justice Brown stated as follows:

> I believe our holding today contravenes the overarching purpose behind our laws of intestate succession—to carry out "the intent a decedent without a will is most likely to have had." . . . I doubt most children born out of wedlock would have wanted to bequeath a share of their estate to a "father" who never contacted them, never mentioned their existence to his family and friends, and only paid court-ordered child support. I doubt even more that these children would have wanted to bequeath a share of their estate to that father's other offspring. . . .
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> Of course, this court may not remedy this apparent defect in our intestate succession statutes. Only the Legislature may make the appropriate revisions. I urge it to do so here.[91]

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87. *Id.* at 1194-1203.

88. *Id.* at 1203-04.

89. *Id.* at 1204.

90. The court stated as follows:

> Succession to estates is purely a matter of statutory regulation, which cannot be changed by the courts. . . . We do not disagree that a natural parent who does no more than openly acknowledge a child in court and pay court-ordered child support may not reflect a particularly worthy predicate for inheritance by that parent's issue, but section 6452 provides in unmistakable language that it shall be so. While the Legislature remains free to reconsider the matter and may choose to change the rules of succession at any time, this court will not do so under the pretense of interpretation.

Griswold, 24 P.3d at 1203-04 (quoting, in part, Estate of De Cigaran, 89 P. 833 (Cal. 1907)).

91. *Estate of Griswold*, 24 P.3d at 1204 (Brown, J., concurring). Justice Brown also offered the following:

> To avoid such a dubious outcome in the future, I believe our laws of intestate succession should allow a parent to inherit from a child born out of wedlock only if the parent has some sort of parental connection to the child. For example, requiring a parent to treat a child born out of wedlock as the parent's own before the parent may inherit from that child would prevent today's outcome. *See, e.g.*, Bullock v. Thomas, 659 So. 2d 574, 577 (Miss. 1995) (a father must "openly treat" a child born out of wedlock "as his own" in order to inherit from that child.). More importantly, such a requirement would comport with the stated purpose behind our laws of succession because that child likely would have wanted to give a share of his estate to a parent that treated him as the parent's own.

Id. An earlier version of California's statute allowed a natural brother or sister to inherit under all circumstances. This occurred in *Estate of Corcoran v. Gaughan*, 9 Cal. Rptr. 2d 475, 477 (Ct. App. 1992) where the decedent's paternal half-brother was heir over decedent's more distant maternal relatives even though there was no evidence her father ever acknowledged her as his daughter or contributed to her support. The exception for the natural brother or sister was eliminated, however, precisely because it "create[d] an undesirable risk that the estate of the deceased out-of-wedlock child will be claimed by siblings with whom the decedent had no contact during lifetime, and of whose existence the decedent was unaware." *Estate of Griswold*, 24 P.3d at 1200-01 (quoting Assem. Com. on Judiciary, Analysis of Assem. Bill No. 2751 (2005-96 Reg. Sess.) as introduced Feb. 22, 1996, p. 6). Despite this legislative concern, the California Supreme Court concluded that the statutory requirements had been met in the *Griswold* case. *Id.* at 1204.

Griswold clearly demonstrates the problem of unknown half-siblings and their inheritance rights.[92] Men can spread their sperm easily and widely among numerous women, and increasing numbers of them do so. Women are often unsure of their children's paternity. Many of today's children are unaware of the existence of their biological (and perhaps legal) half-siblings. Questions of half-blood relationships will become even murkier when those children die decades from now. Requests for DNA testing—including requests for exhumation—are growing.[93] In this changing world, should we continue to assume that a typical decedent would consider a half-sibling to be a family member?

IV. APPROACHES TO HALF-BLOODS AND INHERITANCE

Under English common law, half-blood relatives shared the intestate decedent's *personalty* along with whole-blood relatives of the same degree;[94] however, the common law always excluded the half-blood relative from the descent of *land*[95]—and for centuries land was what survivors

92. In a 2000 Mississippi case, an elderly man's body was exhumed to determine whether twins who had been born almost sixty years earlier were his nonmarital children. *See In re* Estate of Grubbs, 753 So. 2d 1043, 1045-46 (Miss. 2000). Of course, situations such as this set up the potential for claims based on half-blood relationships. *See also* Estate of Peterson v. Wilber, 66 Cal. Rptr. 629, 631-33 (Ct. App. 1968) (discussing heirship rights of the decedent's half-sister whom the decedent never met).

93. *See, e.g.*, Wawrykow v. Simonich, 652 A.2d 843, 847 (Pa. Super. Ct. 1994) (holding in a case of first impression in Pennsylvania that a court may order exhumation of an alleged father's remains where the petitioner has established "reasonable cause" for exhumation and there is a "good possibility" that exhumation will be revealing). The *Wawrykow* court observed that *Trimble v. Gordon*, 430 U.S. 762, 771 (1977) and its progeny are largely concerned with the historical problem of spurious claims of paternity against a decedent's estate, a problem that medical advances have substantially diminished in recent years. *Wawrykow*, 652 A.2d at 844. Thus, today the principal state interest is the prompt and efficient administration of the estate rather than problems of proof. *See* Nichols v. Horn, 525 A.2d 1242, 1245 (Pa. Super. Ct. 1987) ("[T] he matter of proof is less a consideration than the need to have finality as to liability and reasonable expectation that a life and lives will not be badly disrupted after a certain time."); Gerald Pashall, *Snapshot: Paternity*, U.S. NEWS & WORLD REP., July 17, 1995, at 8 (noting the authorization from a Missouri judge to exhume the body in the grave of Jesse James to determine whether James in fact lived past 1882 and produced "secret descendants in mid-America"). For a helpful discussion of the new demand for exhumation in paternity cases, see generally Charles N. Le Ray, Note, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L. REV. 747, 767-97 passim (1994).

94. *See* THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS 50-52 (2d ed. 1953) (discussing treatment of half-bloods at English common law). Atkinson notes that the Statute of Distribution divided the estate among "the next of kindred in equal degree of or unto the intestate" without mentioning the treatment of half-blood relatives. *Id.* at 51. From this omission, courts concluded that half-bloods are treated the same as full-blood relatives of the same degree. *Id.* at 51-52.

95. 2 WILLIAM BLACKSTONE, COMMENTARIES *224 (providing Canon VI, which states "that the collateral heir of the person last seized must be his next collateral kinsman, of the whole blood"). The discussion further provides the following:

> First, he must be his next collateral kinsman. . . . But, secondly, the heir need not be the nearest kinsman absolutely, but only sub modo; that is, he must be the nearest kinsman of the whole blood; for, if there be a much nearer kinsman of the half blood, a distant kinsman of the whole blood shall be admitted, and the other entirely excluded. . . . [I]f the father has two sons, A and B,

most likely coveted.[96]

No state within the United States uses the English common law approach.[97] Instead, states developed different approaches to the inheritance treatment of half-blood relatives of an intestate decedent. The particular approach used by an American state typically renders one of the following results: (1) the half-blood receives the same share he would receive if he were whole-blood (the majority, or universal inclusion, approach exemplified by the UPC);[98] (2) the half-blood receives one-half of what a similarly-situated whole-blood receives;[99] (3) the half-blood receives a share as a representative of the common parent;[100] (4) the half-blood receives the share he would receive if he were whole-blood, unless the intestate property is ancestral and he does not descend from the an-

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> by different venters or wives; now these two brethren are not brethren of the whole blood, and therefore shall never inherit to each other, but the estate shall rather escheat to the lord. Nay, even if the father dies, and his lands descend to his eldest son A, who enters thereon, and dies seised without issue; still B shall not be heir to this estate, because he is only of the half blood to A, the person last seised. . . .

Id. at *224, *227. Blackstone's discussion further points out that the rule ultimately is an evidentiary convenience, since it helps to ensure that the collateral relatives who inherit the estate share the blood of the first purchaser. *Id.* at *228. Blackstone then admits, however, that "in some instances, the practice is carried farther than the principle upon which it goes will warrant." *Id.* at *231.

96. In *Gradwohl v. Campagna*, 46 A.2d 850, 851-53 (Del. Ch. 1946), the court provides a good discussion of English common law and the treatment of half bloods. The court states that "[i]t is generally accepted that by the so-called English common law rule collateral kindred of the intestate could not inherit *real property* if they were kindred of the half blood only." *Id.* at 851 (emphasis added). The court further notes that as early as 1836, a Delaware court had recognized the nature of the English approach and had indicated that it had not been adopted in the United States. *Id.* The court quoted *Kean's Lessee v. Roe & Hoffecker*, 2 Del. (2 Harr.) 103 (1836), as follows:

> The English rules or canons of inheritance, are of feudal growth, and in their most essential features have not found favor either in this state, or in our sister states: they have been very generally rejected, and each state has adopted its own rules regulating the descent of real estate, which in the main will be found to be the converse of those which have obtained in England. Primo-geniture among the males—the preference of males to females—the exclusion of the lineal ascent of the inheritance—the entire exclusion of the half-blood—have been deemed in this state unreasonable, unnatural and harsh principles, inconsistent with the character and policy of our government, and not calculated to promote the true interests of its citizens.

Id. The court noted that the treatment of personalty under the English common law rules of intestacy "is not free from doubt," but seems to indicate that there was no distinction made between the half-blood and whole-blood. *Id.* at 852. The court concluded that the only exclusion applicable to half-bloods in the state, therefore, was under its ancestral real property statute. *Id.* at 852-53.

97. Perhaps tellingly, England itself no longer uses the approach. *See infra* notes 184-89 and accompanying text (discussing modern English approach).

98. *See infra* notes 105-17 and accompanying text (discussing UPC/majority approach to half-bloods and inheritance).

99. *See infra* notes 118-35 and accompanying text (discussing approach that doubles portion of whole-blood survivors) .

100. *See infra* notes 136-39 and accompanying text (discussing approach that treats siblings as representatives of the predeceased parent).

cestor in question, in which case he is excluded;[101] or (5) the half-blood receives nothing when a whole-blood of the same degree exists.[102]

The following materials investigate these approaches and suggest other approaches that American probate law might use to further the intent of today's intestate decedent who is survived by whole- and half-blood siblings.

A. Inclusion on an (Almost) Equal Basis

If the typical decedent believes that all siblings are the same, then the current majority approach seems to provide a simple, objective solution. The approach circumvents potentially difficult, time-consuming, and embarrassing inquiries that a probate court might have to make to effectuate the precise wishes of a *particular* intestate decedent survived by whole-blood and half-blood siblings.[103] Unlike some other approaches, univer-

101. *See infra* notes 140-78 and accompanying text (discussing ancestral property approach).

102. *See infra* notes 174-202 and accompanying text (discussing Mississippi's unique approach that often completely excludes half-blood relatives when whole-blood relatives survive).

103. In *In re Estate of Peterson*, 66 Cal. Rptr. 629, 630-31 (Ct. App. 1968), Virginia's will left the "residue of [her] estate above a $5,000 bequest and a few small dispositions" to the Arthritis Foundation. The estate, which was valued at over $100,000, was all separate property. *Id.* at 631. California's mortmain statute, however, prohibited a testator from bequeathing more than one-third of her property to charity if the will was made within six months of death and the testator was survived by a spouse or siblings, among others. *Id.* at 631-32. Virginia died within six months of executing her will before her divorce was finalized against her husband, Paul. *Id.* Following her death, during settlement negotiations between Paul and the Arthritis Foundation, an heir-hunting firm discovered that Virginia had a half-sister, Mrs. Wilbur, in Denver. *Id.* at 631. Virginia had never met Mrs. Wilbur, although she knew of Mrs. Wilbur's existence and had talked to her by phone on at least one occasion. *Id.* at 632. The court concluded that since half-bloods inherited equally with whole-bloods under California law (excepting certain ancestral property), then a half-sister was a sister under the mortmain statute. *Id.* at 633. As such, Mrs. Wilbur was entitled to one-third of the residuary bequest. (Under the statute in question, the Arthritis Foundation could keep one third, and the husband would receive the other one third.). *Id.* at 631; *see also In re* Estate of Janussek, 666 N.E.2d 774, 774-75, 777 (Ill. App. Ct. 1996) (ruling that the German paternal half-siblings of an Illinois decedent born out of wedlock in Germany but later legitimated by their father were heirs to the decedent's sizable estate; the opinion contains no discussion of the day-to-day relationships, if any, among the heirs and the decedent: the half-siblings were from two marriages of the decedent's father); *In re* Raymond Estate, 641 A.2d 1342, 1343 (Vt. 1994) (holding that a son adopted by the decedent's father and his first wife was the equivalent of a half-brother to the decedent, who was the child of the father's second wife; thus, the adopted half-brother inherited the decedent's estate to the exclusion of her maternal cousins).

In *In re Estate of Kuhn*, 267 N.E.2d 876, 877 (Ind. Ct. App. 1971), decedent was a minor who died in 1965. She was survived by her parents and her whole-blood sister. *Id.* Decedent's father had divorced her mother and had remarried twice. *Id.* In one of those marriages, the decedent's father produced two other daughters. *Id.* In another of those marriages the decedent's father adopted the two minor daughters of his wife. *Id.* The administrator objected to the inclusion of the half-blood sisters and the adopted sisters in the plan of distribution. *Id.* The court, however, easily dispensed with these objections. The court noted that since a statutory enactment in 1953, adopted children could inherit from the collateral relatives of the adopting parent. *Id.* at 878. Moreover, the Indiana half-blood statute clearly provided that half-bloods inherit the same share they would have received if they had been of the whole blood. *Id.* Additionally, case law dating back to the nineteenth century had provided the same result. *See id.* at 879.

sal inclusion also simplifies the math because half-blood relatives do not receive a partial or reduced share. Moreover, the approach involves no tracing to the source of the decedent's wealth.[104]

At first blush, universal inclusion also seems to be a *nice* approach. It reflects society's hope for inclusive, harmonious relationships among half-relations. Yet while that hope is understandable, that hope has no business dictating rules of intestate succession that flout the desires of the typical decedent. Moreover, the universal inclusion approach is not mandated by public policy concerns for siblings.[105] The spousal relationship is the one relationship in which American probate law has frequently included protective provisions that may trump the intent of the decedent.[106] Even the strongest sibling relationship is far different from that of spouses. Nonetheless, the universal approach is justifiable if it represents the desires of the typical decedent or if legislatures can develop no superior approach.

A number of questions lurk beneath the simple exterior of the majority approach. Is application truly universal? Is the approach completely objective? Does it mean that the state will invariably treat half-blood and

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In *In re Estate of Daniels*, No. 114355, 1998 WL 326603, at *1 (Del. Ch. 1998), Mary died intestate survived by her close friend and first-cousin, Helen, and by a half-nephew, the child of Mary's predeceased half-brother. The court indicated that the half-nephew was entitled to the entire estate, because he was a closer relation *in law*, regardless of the close emotional ties between Mary and Helen. *Id.*

104. *See, e.g.*, *In re* Heffernan Estate, 371 N.W.2d 481, 483 (Mich. Ct. App. 1985) (concluding that decedent's half-blood first cousin is treated the same as decedent's whole-blood first cousins).

Note that even under the majority approach, a biological half-sibling will not always be a legal half-sibling entitled to inherit. For example, in *In re Estate of Fleming*, 21 P.3d 281, 283 (Wash. 2001), Margaret gave up Thomas for adoption in 1947 and her parental rights were terminated. At Thomas's death intestate, Margaret and his half-brother Antonio (Margaret's son) survived. *Id.* Even though Thomas had never been adopted, the earlier termination of parental rights meant that Thomas was not survived by a parent or sibling for inheritance purposes. *Id.* at 286. *But cf.* B.C.S. v. D.A.E., 818 S.W.2d 929 (Tex. App.—Beaumont 1991). In *B.C.S.*, Peggy and her husband gave up their two children for adoption and their parental rights were terminated. *Id.* at 929. During a later marriage, Peggy gave birth to the decedent and another child. *Id.* Upon the death of the decedent, the court held that the biological half-siblings were heirs of the decedent, despite the prior termination of parental rights and subsequent adoption. *Id.* The court noted that, under Texas law, an adopted child can inherit from its biological parent even when the child is adopted into a new family. *Id.* at 930. The court concluded that that right extended to inheriting from the biological half-sibling. *Id.*

105. Public policy largely views spouses as the head of an economic unit who also have specific obligations to each other. Not surprisingly, virtually all states protect the surviving spouse from disinheritance through elective share provisions, dower, or community property principles. No other family member receives such extensive inheritance protection. *See* BRASHIER, *supra* note 5, at 9-39, 106 (discussing inheritance rights of spouses generally and noting particularly special protections against inheritance that probate law extends only to spouses).

106. *See* John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303, 304-05 (1987) (observing that while "America is uniquely the land of testamentary freedom," states have nonetheless imposed restrictions on spousal disinheritance); RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 10-11 (2004) (explaining that the surviving spouse receives "top billing" among probate survivors and "is the *only* family member who consistently receives significant protection from *intentional* disinheritance").

whole-blood relatives the same for inheritance purposes? The answer to these questions, simply put, is no. As a result, outcomes in states employing the universal inclusion approach are often not nearly as nice—or logical—as one might expect.

Suppose that Alice dies intestate survived only by her whole-blood brother Bill and three paternal half-siblings, Cal, Deb, and Eve. Fred was the father of all five children. Cal, Deb, and Eve each have different mothers. In a state using the majority approach, we might expect to divide Alice's estate into fourths, making no distinctions between Bill and the surviving half-siblings. Such an outcome, however, is far from certain in several of these states, even if Fred was the *legal* father of all the children.

The half-blood statute may be trumped by *other* probate statutes—most notably, statutes that make the inheritance rights of the surviving half-siblings dependent upon the common parent's behavior.[107] For example, under the UPC, neither Cal, Deb, nor Eve can inherit from Alice unless Fred openly treated Alice as his child and did not refuse to support her.[108] If Fred was a deadbeat dad who ignored Alice, suddenly the purported equal treatment under the half-blood statute would become irrelevant. This is so even if Alice had a close and loving relationship with her half-siblings.

Should we punish the half-siblings Cal, Deb, and Eve for Fred's wrongful behavior in ignoring Alice? Although the modern majority approach to half-bloods and inheritance originated long before nonmarital birth became an everyday part of American family life,[109] observations from the

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107. *See supra* notes 75-92 and accompanying text (discussing case in which California statute made right of half-siblings to inherit from decedent dependent upon actions of father they shared).

108. UNIF. PROBATE CODE § 2-114(c) (amended 1993), 8 U.L.A. 91 (1998). In *In re Estate of Morrow*, 724 N.Y.S.2d 286, 287 (Sup. Ct. 2001), Frederick died intestate. He was survived by first cousins of the whole-blood and by paternal half-siblings from the second marriage of his father, Thomas. *Id.* When Thomas divorced the second wife, she remarried and Thomas allowed his children by her to be adopted by her new husband. *Id.* Although, because of the adoption, the half-siblings were no longer the "legal" half-siblings of Frederick at his death, the court held that they were entitled to take under New York law. *Id.* at 287-88. The New York law, like that of many states, allows "adopted-out" children (such as Frederick's half-siblings) to inherit from and through the parent (Thomas) who allowed them to be adopted by a stepparent. *Id.* at 288. Thus, the "adopted-out," non-legal half-siblings would take to the exclusion of the whole-blood first cousins. *Id. See also In re* Estate of Seaman, 583 N.E.2d 294, 300 (N.Y. 1991) (holding that a child of the decedent's adopted-out half-brother was an heir).

109. For early twentieth-century cases rejecting the common-law exclusionary approach, see *In re Costello's Estate*, 265 N.Y.S. 905, 912 (Sur. 1933) (discussing New York's statutory rejection of approach that distinguishes half-bloods and whole-bloods); *In re Keen's Estate*, 146 A. 531, 532 (Pa. 1929) (discussing rejection in Pennsylvania). *See also* Shepard v. Wilson, 22 N.E.2d 568, 568 (Ohio Ct. App. 1938) (noting a legislative change that resulted in no distinction among half-blood and whole-blood relatives in the treatment of claimants to the estate of a decedent who died survived by relatives from each of the paternal grandmother's three marriages); *In re* Stephenson's Estate, 75 N.E.2d 834, 839-40 (Ohio Prob. 1946) (following the *Shepard* interpretation where the claimants were descendants of decedent's maternal grandmother's two marriages); Sheeler v. Burkhart, 101 N.E.2d 401, 402-03 (Ohio Prob. 1951) (agreeing ultimately with the interpretations in *Shep-*

Supreme Court on the inheritance rights of nonmarital children are instructive.[110]

For decades, the inheritance laws of many American states ignored a man's nonmarital children. Although such children were technically the half-siblings of his marital children, often the nonmarital children did not inherit anything from their "legitimate" half-siblings, despite the existence of a statute that included half-bloods in some fashion. For example, in the 1971 case of *In re Estate of Caldwell*, the Florida Supreme Court awarded the decedent's intestate estate to her *cousins*, completely ignoring the claims of her "illegitimate" half-siblings.[111]

In the last decades of the twentieth century, however, the United States Supreme Court concluded that inheritance laws had no business automatically excluding nonmarital children as potential heirs of their father.[112] Viewed broadly, the Court's decisions essentially observe that it makes no sense to penalize children for the perceived sins of their parents.[113] After all, why should men and women stop having sex outside marriage if probate's statutory disapproval is aimed not at them, but rather at their

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ard and *Stephenson's Estate* and noting that the civil law rule of descent applied and thus half-bloods were entitled to share with the whole-bloods).

110. *See supra* note 68 (discussing line of Supreme Court cases involving state classifications based on illegitimacy).

111. In *In re Estate of Caldwell*, 247 So. 2d 1, 2 (Fla. 1971), Hortense was survived by descendants of deceased brothers and sisters of her parents. Hortense's father, however, also fathered four children by two different women while he was married to Hortense's mother. *Id.* These children—Hortense's genetic half-siblings—also survived her. *Id.* The half-siblings would have been entitled to take under Florida's intestacy provisions but for the fact that they were illegitimate. *Id.* In this pre-*Trimble* case, the court concluded that the statute preventing inheritance by the illegitimate half-siblings was not unconstitutional. *Id.* at 3. The statute provided as follows: "[An] illegitimate child does not represent his father or mother by inheriting any part of the estate of the parents' kindred, either lineal or collateral, unless his parents have intermarried, in which event such illegitimate child shall be deemed legitimate for all purposes." *Id.* at 2 (citing FLA. STAT. ANN. § 731.29 (West 1964)). A concurring opinion concluded that the constitutionality of the statute was immaterial. *Id.* at 4. Rather, Hortense was entitled to leave her property as she wished. *Id.* Moreover, since she did not execute a will, she was presumed to have wanted her property to pass under the then-existing intestacy laws which excluded illegitimates. *Id.* Thus, the holding would carry out Hortense's intent. The Florida half-blood statute provided as follows:

> [W]here the estate is directed to pass to the collateral kindred of the intestate, if part of such collateral kindred are of the whole blood to the intestate and the other part of the half blood only, those of the half blood shall inherit only half as much as those of the whole blood; but, if all are of the half blood, they shall have whole portions.

Id. at 5 (citing FLA. STAT. ANN. § 731.24 (West 1964) (current version at FLA. STAT. ANN. § 732.105 (West 1995))). Noting that this statute clearly permitted half-siblings to inherit, but that the preceding statute prevented illegitimate half-siblings from inheriting, a dissenting opinion concluded that the statute preventing inheritance by illegitimate collaterals was unconstitutional. *Id.* at 10.

112. *See* Trimble v. Gordon, 430 U.S. 762 (1977); Reed v. Campbell, 476 U.S. 852 (1986).

113. *Trimble*, 430 U.S. at 769 (expressly rejecting "the argument that a State may attempt to influence the actions of men and women by imposing sanctions on the children born of their illegitimate relationships").

children?[114]

Today, one could argue that the UPC statute is similarly misdirected in making Cal, Deb, and Eve's inheritance rights from Alice dependent upon the acts of their shared father. Why should the bad actions of a third person prevent innocent half-siblings from taking when the half-blood statute itself clearly states a legislative decision that half-blood and whole-blood relatives are to be treated alike? The majority approach to half-blood relationships stems from the view that siblings, half-blood or whole-blood, are similarly situated. It implicitly presumes that the typical decedent would want his estate distributed equally among half-blood and whole-bloods. If this is the typical decedent's intent, other probate laws should not qualify the rules of distribution (and punish some half-siblings) based on the inaction or failures of the common parent.

We could attempt to justify the UPC approach by asserting that a *typical* person in Alice's shoes—a child unsupported by her father—would probably not want her paternal half-siblings Cal, Deb, and Eve to take part of her estate. Yet information concerning support and acknowledgment by the common parent may tell us little about the relationship that Alice has with her half-siblings or her probable desires concerning the distribution of her estate. In fact, if Alice had little or no relationship with Cal, Deb, and Eve, she probably would not want them to take anything from her estate regardless of her relationship with Fred—and yet, under the UPC, they would take if Fred had treated Alice as his own and supported her. On the other hand, if Alice were close to Cal, Deb, and Eve, she probably would want them included regardless of her relationship with Fred. Nonetheless, under the UPC they may not take if Fred failed to treat Alice as his own and to support her, despite the UPC's half-blood statute and its policy of equal treatment of whole-bloods and half-bloods.[115] In sum, the UPC's half-blood statute, taken alone, is of dubious value as an indicator of what siblings themselves probably want. As qualified by a parental acknowledgment and support requirement, its credibility sinks further.

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114. *Id.* at 769-70 (noting that "penalizing the illegitimate child is an ineffectual as well as unjust way of deterring the parent [from irresponsible liaisons]" (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 175 (1972))).

115. Interestingly, if a parent has marital and nonmarital children, section 2-114(c) is probably more likely to benefit the *nonmarital* children. UNIF. PROBATE CODE § 2-114(c) (amended 1993), 8 U.L.A. 91 (1998). A father is more likely to support and acknowledge his marital children than his nonmarital children. In such instances, if his children die intestate survived by one another, the nonmarital children would be heirs of their marital half-siblings; the marital half-siblings would not be heirs, however, of their nonmarital half-siblings whom the common father refused to support.

For a discussion of statutes that work a forfeiture of the abandoning parent's intestate share, see generally Anne-Marie Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517, 537-41 (1994) (discussing also the UPC's provision that precludes kindred of an abandoning parent to take through that parent). Professor Rhodes observes that while automatic exclusion of the abandoning parent's kindred may seem proper in some cases, it unfortunately "smacks" of the repudiated "corruption by blood" doctrine and ignores the reality that the abandoning parent's kindred may have played an important, active, and caring role in the decedent's life. *Id.* at 540.

Other benefits—including ease of application and predictable outcomes—that should result from the UPC's purportedly objective approach to half-bloods are compromised by probate statutes that require the court to examine the relationship between the decedent and the parent he shares with the half-siblings. Such examinations can quickly lead a court into murky waters. What constitutes a parent's refusal to support and what does it mean to openly treat a child as one's own?[116] What are the evidentiary limitations that apply to a half-blood claimant who must first establish paternity of the decedent's father to prove her relationship to the decedent?[117] Most important of all is the overarching policy question that remains: what if anything do these factors have to do with the decedent's intent?

Having authorized probate courts to inquire into somewhat subjective determinations of what constitutes parental support and acknowledgment, perhaps state legislatures should authorize those courts to inquire into subjective factors concerning sibling relationships. Such an approach will be discussed later in this article.

B. Inclusion While Doubling the Whole-Blood's Portion

A second objective approach—one that has intuitive appeal—recognizes that the whole-blood sibling shares more "blood" with the decedent than does the half-sibling. Suppose Alice dies intestate survived by her brother Bill and her half-brother Cal. The children share the same father. Since Bill and Alice share two parents, while Alice and Cal share only their father, one plausible solution to the half-blood inheritance question is to award Bill twice as much as Cal. A few states—including Florida, Kentucky, Missouri, Texas, and Virginia—take this approach.[118] Virginia's statute puts the matter succinctly: "collaterals of the half blood

116. For an enlightening discussion of efficiency problems under such a behavior-based provision, see Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. Miami L. Rev. 257, 291-97 (1994). Professor Monopoli's article also provides a good discussion of UPC § 2-114(c). She notes that courts "may have to grapple with applying the [UPC] phrases 'openly treated' and 'has not refused to support' in the context of marital fathers, where they may not neatly fit if such phrases are narrowly interpreted." *Id.* at 272-73. The commentary to section 2-114(c) indicates that the refusal-to-support determination applies "to the time period during which the parent has a legal obligation to support the child." Unif. Probate Code § 2-114 comment (amended 1993), 8 U.L.A. 91 (2003).

117. *See* Brashier, *supra* note 5, at 121-47 (discussing various hurdles faced by a nonmarital child seeking to establish paternity, including those related to posthumous claims, DNA testing, paternity presumptions, and statutes of limitation).

118. Florida's statute provides as follows:

> [w]hen property descends to the collateral kindred of the intestate and part of the collateral kindred are of the whole blood to the intestate and the other part of the halfblood, those of the halfblood shall inherit only half as much as those of the whole blood; but if all are of the halfblood they shall have whole parts.

Fla. Stat. Ann. § 732.105 (West 1995). Kentucky's statute simply provides that "[c]ollaterals of the halfblood shall inherit only half as much as those of the wholeblood, or as ascending kindred, when they take with either." Ky. Rev. Stat. Ann § 391.050 (Banks-Baldwin 2003). Interestingly, Kentucky also has a very unusual ancestral property statute

shall inherit only half so much as those of the whole blood."[119] Like states following the majority approach, however, states employing the half-as-much approach may exclude the half-blood sibling under statutes that punish the half-blood sibling for the omissions of the common parent—again most commonly when the decedent is a nonmarital child and the father refused to acknowledge or support him.[120]

Like other objective solutions to the problem, the "half-as-much for half-blood siblings" solution is not perfect. For example, doubling the allotment to the whole-blood sibling penalizes the half-blood sibling even if the decedent would have wanted her to take a full sibling share; however, this approach does prevent a complete windfall to a half-blood sibling whom the decedent did not consider a sibling.

An important concern under the half-as-much approach is the point at which we double the allotment to the whole-blood relatives. Suppose the decedent dies with one whole-brother and four half-sisters. If the statute merely provides that whole-blood relatives take twice what half-blood relatives take, does that mean individually or collectively? In other words, does the whole-brother take two-thirds of the estate while the decedent's four half-sisters split the remaining third? Or do we divide the estate into six portions, one for each of the four half-sisters and two for the whole-brother?

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that can exclude half-blood relations in some circumstances. *See supra* note 50 and accompanying text. Missouri's statute provides as follows:

> [w]hen the inheritance is directed to pass to the ascending and collateral kindred of the intestate, if part of the collaterals is of the whole blood of the intestate, and the other part of the half blood only, those of the half blood shall inherit only half as much as those of the whole blood; but if all collaterals are of the half blood, they shall have whole portions, only giving to the ascendants double portions.

MO. ANN. STAT. § 474.040 (West 2002). The Texas statute provides as follows:

> [i]n situations where the inheritance passes to the collateral kindred of the intestate, if part of such collateral be of the whole blood, and the other part be of the half blood only, of the intestate, each of those of half blood shall inherit only half so much as each of those of the whole blood; but if all be of the half blood, they shall have whole portions.

TEX. PROB. CODE ANN. § 41(b) (Vernon 1980). Virginia's statute is similar to that of Kentucky, but ever terser. It states, "Collaterals of the half blood shall inherit only half so much as those of the whole blood." VA. CODE ANN. § 64.1-2 (Michie 2003).

119. VA. CODE ANN. § 64.1-2 (Michie 2003). The half-as-much solution is not an American innovation. Atkinson cites a 1690 Scottish case and notes the half-as-much solution as the rule in Scotland. ATKINSON, *supra* note 94, at 51 n.4 (citing Crooke v. Watt, 23 Eng. Rep. 689, 690 (1690)); *but cf.* Kenderdine, *supra* note 3, at 87 & n.46 (1996) (concluding that although the attorney in *Crooke v. Watt* apparently stated that the half-as-much approach was the rule in Scotland, the case itself does not actually cite authority on the point). Professor Kenderdine notes that almost all modern treatises cite the half-as-much solution as originating in Scotland; however, she concludes that the approach probably originated in civil law. *Id.*

120. *See, e.g.*, KY. REV. STAT. ANN. § 391.105 (Michie 2003) (providing that the right of a father and his kindred to inherit from his nonmarital children requires (1) "an adjudication of paternity before the death of the child," *or* (2) "an adjudication of paternity after the death of the child based on clear and convincing proof *and the evidence in such adjudication shall have demonstrated that the father openly treated the child as his, and the father did not follow a consistent policy of refusing to support the child on the ground of nonpaternity.*") (emphasis added); VA. CODE ANN. 64.1-5.1(3)(b) (Michie 2003).

In *In re Estate of Ferguson*, Ethel Eula died with an estate governed by Missouri law.[121] The court observed that, among her survivors, the closest degree of kinship to her was the first-cousin level; seventeen class members at that level were either living or had issue who would take by representation.[122] Fifteen of the seventeen were half-blood relatives; two were whole-blood relatives.[123] Because of the half-blood statute, the lower court doubled the share of the two whole-blood relatives and thus divided the estate into nineteen parts.[124]

Ethel Eula's whole-blood relatives argued that the statute meant that the *class* of whole-bloods should take twice as much as the half-blood relatives—resulting in a division of the estate into three parts with the whole-blood relatives taking two of the three parts.[125] The appellate court rejected this argument, affirming the understanding of the lower court that each *individual* whole-blood relative at the level of apportionment should take twice as much as each *individual* half-blood relative.[126] Courts in states using a half-as-much statute have typically agreed with this interpretation.[127]

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121. 723 S.W.2d 24 (Mo. Ct. App. 1986).
122. *Id.* at 25-26.
123. *Id.* at 26.
124. *Id.* at 29.
125. *Id.* at 26.
126. *Id.* at 29-31; *see also* Vreeland v. Vreeland, 296 S.W.2d 55 (Mo. 1956). In *Vreeland*, the decedent died survived by a full brother, a half-brother, and the son of a half-sister. (The half-sister was the adopted child of the decedent's mother.) *Id.* at 56. The court awarded the full brother one-half and the half-brother and nephew one-fourth each. *Id.* at 59.
127. In *In re Estate of Thiemann*, 992 S.W.2d 255 (Mo. Ct. App. 1999), the court quoted the following passage from a state practice manual to demonstrate the proper distribution under a half-as-much statute when no ascendants survive the decedent:

> [a] convenient method of determining the share of collaterals of the half blood when no ascendants are involved is to double the number of collaterals of the whole blood and add the result to the number of collaterals of the half blood. The resulting figure will be the denominator of the fractional share to which each half blood is entitled. Heirs of the whole blood will be entitled to twice that amount. . . .

Id. at 257 (quoting 5A JOHN A. BORRON, JR. & FRANCIS M. HANNA, MISSOURI PRACTICE § 1232 (1990)).

In *Rogers v. First Nat'l Bank*, 448 S.W.2d 149, 150 (Tex. Civ. App.—El Paso 1969), the court addressed the division of the intestate decedent's estate among her paternal cousins. The decedent was survived by one cousin who was the descendant of both of her predeceased paternal grandparents. *Id.* Ten other cousins (or their issue) were the descendants of the decedent's paternal grandmother only. *Id.* at 152. Six additional cousins (or their issue) were the descendants of decedent's paternal grandfather only. *Id.* Because under Texas law the whole-blood relative takes twice as much as the half-blood, the court counted the full-blood relatives twice, thus creating eighteen lines. *Id.* The whole-blood cousin received two-eighteenths and the remaining sixteen cousins (or their lines) received one-eighteenth each. *Id.* at 150, 153.

For other case discussions, see *Kieke v. Harmel*, 297 S.W. 286, 287 (Tex. Civ. App.—Fort Worth 1927) (dividing sibling portion of decedent's estate among two whole-blood sisters and eight half-blood siblings; whole-blood sisters each received one-sixth and half-blood siblings each received one-twelfth of the part of the estate awarded to siblings); *In re Glasco*, 619 S.W.2d 567, 572 (Tex. Civ. App.—San Antonio 1981) (dividing part of decedent's separate property so that each of three surviving full-siblings took twice as much as that provided to the issue of each of two predeceased half-siblings); *Blunt v. Gee*, 9 Va. (5

When survivors descend from the decedent's predeceased grandparents, many states divide the intestate estate into halves.[128] One half passes to the descendants of the paternal grandparents and the other half passes to the descendants of the maternal grandparents.[129] When this scenario also involves half-blood statutes, the half-as-much statutes typically apply separately to each share.[130] Thus, if the decedent dies survived by a maternal first cousin of the whole-blood, a maternal first-cousin of the half-blood, and a paternal first cousin, the paternal first cousin would succeed to half as the only surviving issue of the paternal grandparents. The maternal half is divided into thirds. The maternal whole-blood first cousin thus ends up with one-third of the estate (two-thirds of one-half) and the maternal half-blood cousin ends up with one-sixth (one-third of one-half).[131]

Other interpretative questions have arisen under the half-as-much approach. In *Ragland v. Shrout*, Milard died survived by the issue of his paternal half-brothers and also by maternal uncles and aunts of the whole-blood.[132] The Kentucky half-blood statute in question provided simply that "[c]ollaterals of the halfblood shall inherit only half as much as those of the wholeblood, or as ascending kindred, when they take with either."[133] Under Kentucky's principal intestacy statute, whole-blood brothers and sisters and their issue would clearly have taken to the exclusion of the uncles and aunts. The Kentucky court concluded that half-bloods are included under that basic intestacy statute even though they are not specifically mentioned.[134] Thus, the nieces and nephews were en-

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Call) 481 (1805), 1805 WL 458, at *16, *18 (awarding a whole-sister twice the amount awarded to decedent's two half-siblings); *Morris v. Sparrow*, 459 S.W.2d 768, 769 (Ky. 1970) (indicating that Kentucky's half-blood statute required the decedent's whole-blood niece to share decedent's estate with decedent's two half-sisters, but that niece would take a double portion because of the statute), *cert. denied*, 403 U.S. 939 (1971), *and cert. denied*, 411 U.S. 985 (1973); *Esper v. Gray*, No. 83-C-75, 1990 WL 751098, at *1-2 (Va. Cir. Ct. Mar. 19, 1990) (describing the method of distribution and concluding that a whole-blood collateral took one-half while two half-blood collaterals each took one-fourth of the estate, thus rejecting the whole-blood's argument that he should take two-thirds) (citing Moore v. Conner, 20 S.E. 936 (1890))). For commentary, see Carolyn S. Bratt, *A Primer on Kentucky Intestacy Law*, 82 KY. L.J. 29, 76-79 (1993-94) (noting that under Kentucky's half-blood statute, every whole-blood collateral counts twice, and every half-blood collateral counts once).

128. This is also the approach of the UPC. UNIF. PROBATE CODE § 2-103(4) (amended 1993), 8 U.L.A. 83 (1999).

129. *Id.*

130. In *Brown v. Saunders*, 389 S.W.2d 77, 78 (Ky. 1965), the decedent's survivors were a maternal half-blood first-cousin and several paternal cousins. Noting Kentucky's laws that divided the estate into maternal and paternal halves when the decedent had no close survivors, the court concluded that the maternal half-blood first-cousin succeeded to the entire maternal half and that the paternal whole-blood cousins had to be content dividing the paternal half. *Id.* at 79. The half-blood statute would only have come into play had there been other whole-blood *maternal* cousins entitled to take.

131. *See* Bratt, *supra* note 127, at 79-82 (discussing Kentucky half-blood statute); Brown v. Sanders, 389 S.W.2d 77 (Ky. 1965).

132. 476 S.W.2d 820, 821 (Ky. Ct. App. 1972).

133. *Id.* at 822 (quoting KY. REV. STAT. ANN. § 391.050 (Banks-Baldwin 1972)).

134. *Id.* at 822-23.

titled to the estate.[135] The half-blood statute itself did not come into play because there were no whole-blood brothers or sisters or descendants of them.

The half-as-much solution is arguably consistent with basic inheritance schemes that even today continue to gauge collateral family relationships primarily by blood. Their very names—*half*-blood and *whole*-blood siblings—indicate that they do not stand on equal footing regarding consanguinity. Again, however, the real question is not whether the half-as-much approach is logically defensible, but whether it accomplishes the desires of most decedents dying with half-blood and whole-blood relatives.

Ascertaining what most decedents want in this scenario may be impossible as families splinter, blend, and continue to evolve. Yet if no typical decedent exists to answer our question, and if we must have an objective solution to the problem of half-bloods and inheritance, then the half-as-much solution makes more sense than the universal inclusion scheme employed by the majority of states.

C. Inclusion as a Representative of the Parent

Three states—Iowa, Kansas, and Louisiana—treat siblings as representatives of the decedent's parents for intestate succession purposes.[136] Because brothers and sisters take from the decedent only through a de-

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135. *Id.* at 823.

136. The Iowa statute provides as follows:

> [i]f there is no person to take under either subsection 1 [providing for distribution to issue] or 2 [providing for distribution to parents] of this section, the estate shall be divided and set aside into two equal shares. One share shall be distributed to the issue of the decedent's mother per stirpes and one share shall be distributed to the issue of the decedent's father per stirpes. If there are no surviving issue of one deceased parent, the entire estate passes to the issue of the other deceased parent in accordance with this subsection.

IOWA CODE ANN. § 633.219 (3) (West 1992 & Supp. 2000). Kansas employs a somewhat similar approach:

> If the decedent leaves no surviving spouse, child, issue, or parents, the respective shares of his or her property which would have passed to the parents, had both of them been living, shall pass to the heirs of such parents respectively (excluding their respective spouses), the same as it would have passed had such parents owned it in equal shares and died intestate at the time of his or her death; but if either of said parents left no such heirs, then and in that event his or her property shall pass to the living heirs of the other parent.

KAN. PROB. CODE ANN. § 59-508 (West 1994). Note that, unlike the Iowa statute, the Kansas statute passes the parental share to the parent's *heirs*. It's distribution is not limited to a parent's issue.

Louisiana statute states as follows:

> The property that devolves to the brothers or sisters is divided among them equally, if they are all born of the same parents. If they are born of different unions, it is equally divided between the paternal and maternal lines of the deceased; brothers or sisters fully related by half-blood take each in his own line. If there are brothers or sisters on one side only, they take the entirety to the exclusion of all relations in the other line.

LA. CIV. CODE ANN. art. 893 (West 2000).

ceased shared parent, these states first divide the estate into halves, one for each deceased parent. Once the estate is divided into halves, each parent's issue takes. Suppose Alice dies intestate survived by her whole-blood brother Bill and her half-blood brother Cal. The three shared a father. Under this approach, Alice's estate is divided into two parts, one for each parental line.[137] The part allocated to Alice's mother's line passes to Bill alone, since Cal was not the son of Alice's mother. The part allocated to Alice's paternal line passes equally to Bill and Cal, since they shared a father. Thus, Bill ends up with three-fourths of Alice's estate and Cal receives one-fourth.[138]

When the decedent is survived by half-blood siblings on one side only (that is, maternal half-blood siblings or paternal half-blood siblings, but not both), the "representative-of-the-parent" approach ensures that whole-blood siblings will receive a majority of the intestate estate. In contrast, the overall percentage of the estate that whole-blood siblings take under the majority approach or half-as-much approach is often small. For example, suppose Alice dies survived by her whole-blood brother Bill and five paternal half-blood siblings. The majority, universal-inclusion approach provides Bill with one-sixth of the estate. The half-as-much approach provides Bill with two-sevenths of Alice's estate. The representative-of-the-parent approach, however, provides Bill with seven-twelfths of the estate—the entire maternal half and one-sixth of the paternal half.[139]

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137. Many states divide the intestate estate into maternal and paternal halves when the decedent is survived by no closer relatives than grandparents or their issue. *See, e.g.*, UNIF. PROBATE CODE § 2-103(4) (amended 1993), 8 U.L.A. 83 (1998) (splitting the estate into halves for maternal and paternal grandparents or their issue). The approach discussed textually here simply brings that maternal/paternal division to the parent generation.

138. For cases interpreting the Kansas statute and its predecessors, see *Genschorck v. Blumer*, 14 P.2d 722, 725 (Kan. 1932) (concluding that where the decedent died survived by a maternal half-sister and paternal first cousins, the half-sister succeeded to the maternal one-half of the estate, and the first cousins succeeded to the paternal half); *In re Brown's Estate*, 215 P.2d 203, 209 (Kan. 1950) (holding that where the decedent died and was survived by maternal half-siblings and no paternal heirs, the paternal one-half escheated to state). The current version of the Kansas statute disfavors escheat, and thus today the maternal half-siblings in the latter case would succeed to the entire estate. *See supra* note 136 (providing text of current Kansas statute); *see also* Jay Scott Brown, *Intestate Succession in Kansas*, 8 WASHBURN L.J. 284, 306-08 (1969) (discussing half-blood inheritance).

139. Representative-of-the parent statutes may apply only to the decedent's siblings and their issue or, alternatively, may extend to collaterals claiming through the decedent's grandparents or more distant ancestors. In *Succession of Dubos*, 508 So. 2d 920, 921 (La. Ct. App. 1987), the survivors at the decedent's death were a maternal half-blood uncle and paternal first cousins. Although the common ancestors were the decedent's grandparents, the court did not apply a representative-of-the-parent approach. Instead, the court concluded that the half-blood uncle would prevail, because he was a third-degree relative and the cousins were fourth-degree relatives. In contrast, Iowa's intestate succession statute explicitly contemplates a representative-of-the-parent approach in such situations. The Iowa statute provides as follows:

> If there is no person to take under subsection 1, 2, or 3 of this section, and the decedent is survived by one or more grandparents or issue of grandparents, half the estate passes to the paternal grandparents, if both survive, or to the surviving paternal grandparent if only one survives. *If neither paternal grandparent survives, this half share shall be further divided into two equal*

As with the equal treatment and half-as-much approaches, this third objective approach may not provide the distribution that Alice would want. If Alice grew up with her half-blood siblings, there is a good chance that she would not want Bill to receive the bulk of her estate. Nonetheless, the results of the representative-of-the-parent approach are also defensible. Like the half-as-much approach, the representative-of-the-parent approach is a compromise that includes half-blood siblings while recognizing that decedents often do not view half-blood and whole-blood siblings the same.

D. Inclusion Other Than for "Ancestral" Property

Well into the twentieth century, the intestate succession laws of a substantial minority of states discriminated against half-blood relations when the property in question was *ancestral*.[140] Virtually no one seems willing to defend these ancestral property statutes today, but they still exist in Hawaii, Nevada, Oklahoma, and Washington.[141] Kentucky has a narrower ancestral property statute that can exclude half-blood siblings,

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> *subshares. One subshare shall be distributed to the issue of the decedent's paternal grandmother per stirpes and one subshare shall be distributed to the issue of the decedent's paternal grandfather per stirpes.* If there are no surviving issue of one deceased paternal grandparent, the entire half share passes to the issue of the other deceased paternal grandparent and their issue in the same manner. *The other half of the decedent's estate passes to the maternal grandparents and their issue in the same manner.* If there are no surviving grandparents or issue of grandparents on either the paternal or maternal side, the entire estate passes to the decedent's surviving grandparents or their issue on the other side in accordance with this subsection.

IOWA CODE ANN. § 633.219(4) (West 1992 & Supp. 2000) (emphasis added). *See also* JULIE L. PULKRABEK & GARY J. SCHMIT, 13 IOWA PRAC. SERIES § 14.6 (2004 ed.) (discussing treatment of half-bloods under Iowa succession law).

140. A comment in the 1932 Yale Law Journal notes that at least thirteen states employed this approach at that time. *See* Comment, *Statutory Treatment of Ancestral Estate and the Half Blood in Intestate Succession*, 42 YALE L.J. 101, 104-05 (1932) (citing statutes from Alabama, California, Idaho, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Oklahoma, South Dakota, Utah, and Wisconsin); *see also* SIMES & BAYSE, *supra* note 23, at 406 & nn. 44-46 (discussing groups of states that in 1928 distinguished ancestral from nonancestral lands, noting particularly Minnesota's half-blood statute).

141. Hawaii's statute provides as follows:

> [t]he kindred of the half blood shall inherit equally with those of the whole blood in the same degree; provided that where the inheritance came to the intestate by descent, devise, or gift, of some one of his ancestors, all those who are not of the blood of the ancestor, shall be excluded from such inheritance.

HAW. REV. STAT. § 532-8 (1985). Nevada's statute states as follows:

> [k]indred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance comes to the decedent by descent or devise from an ancestor, in which case all those who are not of the blood of the ancestor are excluded from the inheritance.

NEV. REV. STAT. ANN. § 134.160 (Michie Supp. 1999). Oklahoma's statute provides the following:

> [k]indred of the half-blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

OKLA. STAT. ANN. tit. 84, § 222 (West 1990). Washington's statute states as follows:

even though the statute does not mention half-blood relations explicitly.[142]

As Professor Nancy Kenderdine has indicated in an excellent study of Oklahoma's provision, these statutes are an unfortunate union of two distinct common-law inheritance principles: first, that realty should descend within the bloodline of the ancestral source and, second, that realty does not descend to half-blood relatives.[143]

The doctrine of ancestral property is ancient, probably antedating the feudalism that provided much of our modern property law.[144] Under the

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> [k]indred of the half blood shall inherit the same share which they would have inherited if they had been of the whole blood, unless the inheritance comes to the intestate by descent, devise, or gift from one of his ancestors, or kindred of such ancestor's blood, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance: *Provided, however*, That the words "kindred of such ancestor's blood" and "blood of such ancestors" shall be construed to include any child lawfully adopted by one who is in fact of the blood of such ancestors.

WASH. REV. CODE ANN. § 11.04.035 (West 1998) (emphasis added).

142. Kentucky's basic intestacy provision for half-bloods awards whole-bloods twice as much as half-bloods. *See supra* note 120. Yet Kentucky also has an ancestral property statute that can exclude half-blood relatives if those half-bloods are not relatives of the ancestor. For a helpful discussion of the statute, see generally Bratt, *supra* note 127, at 128-40. Under the statute, if a minor dies having received ancestral property from a parent and having survived that parent, then the ancestral property passes to that parent's kindred. A half-blood relative not of the blood of that parent would obviously be excluded. Specifically, the statute provides as follows:

> [i]f a person under the age of eighteen dies without issue, having the title to real estate derived by gift, devise or descent from one of his parents, the whole shall descend to that parent and that parent's kindred, and if there is none, then in like manner to the other parent and his kindred. The kindred of one parent shall not be so excluded by the kindred of the other parent, if the latter is more remote than the grandfather, grandmother, uncles and aunts of the intestate and their descendants.

KY. REV. STAT. ANN. § 391.020(2) (Banks-Baldwin 2003). Under the statute, a half-sibling might be an heir if the decedent dies after reaching adulthood, yet be excluded if the decedent dies during infancy (and unmarried). For cases that discuss the infant's ancestral property statute, see *Gaddie v. Hogan*, 205 S.W. 781, 782 (Ky. 1918) (holding that an infant's realty inherited from his mother descended at his death to the mother's siblings to the exclusion of his paternal half-siblings); *White v. Hogge*, 291 S.W.2d 22, 25 (Ky. 1956) (holding that where an infant decedent had inherited paternal realty and was survived by two whole-siblings and four paternal half-siblings, descent is determined by the relationship of the survivors to the parent, not to the deceased child; thus, the estate was divided into sixths). *See also* Schneider, *supra* note 3, at 347-48 (recommending abolition).

143. *See* Kenderdine, *supra* note 3, at 89-90. Professor Kenderdine notes two developments that led states to move away from hybrid ancestral property/half-blood statutes towards the modern majority approach exemplified in the UPC. *Id.* at 93. First, the hybrid statutes led to irrational results. *Id.* Second, once states provided adopted children with full rights of intestate succession, the half-blood exclusion to ancestral property seemed archaic. *Id.* For a listing of cases employing various approaches to half-bloods and inheritance, but concentrating on ancestral property/half-blood statutes, see Francis M. Dougherty, Annotation, *Descent and Distribution: Rights of Inheritance as Between Kindred of Whole and Half Blood*, 47 A.L.R. 4TH, 561 (1986). The most likely reason that the annotation primarily lists ancestral property/half blood cases is because that particular approach to half-bloods and inheritance has spawned by far the greatest amount of litigation.

144. *See* Comment, *Statutory Treatment of Ancestral Estate and the Half Blood in Intestate Succession*, 42 YALE L.J. 101, 102 (1932) (refuting Blackstone's claim that ancestral property originated in feudalism, citing 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 300 (2d ed. 1898), 2 WILLIAM HOLDSWORTH,

pure doctrine, collaterals could not inherit ancestral property unless they shared blood with the "first purchaser" who brought the land into the family.[145] Suppose Al purchased land that descended on his death to his son Bob and that descended upon Bob's death to Bob's son Charles. Suppose further that Charles died intestate survived by cousins. Under the doctrine of ancestral property in its pure form, only Charles's cousins also related to Al—the first purchaser—could inherit the land. Charles's other cousins would be out of luck, even if one or all of them were of a closer degree of kinship to Charles than the nearest cousin sharing Al's blood. Like the common-law half-blood exclusion, the doctrine of ancestral property applied only to realty.[146]

In the United States, jurisdictions using ancestral property approaches usually concluded that the important ancestor for determining the rights of collateral relatives was not the first purchaser, but rather *the ancestor from whom the decedent directly inherited the land.*[147] In the previous example, although Al was the ancestor who brought the land into the family, his ownership would be irrelevant under the typical American statute. Because Charles inherited the land directly *from Bob*, Charles's collateral relatives *who shared blood with Bob* could inherit. Courts generally interpreted the statutes this way even when the statutes used language that seemed to invoke the first purchaser rule. This American approach is certainly easier to apply than the common law first purchaser approach, for the American approach greatly simplifies tracing title within the family.[148] Yet by bastardizing the first purchaser rule, Ameri-

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A HISTORY OF ENGLISH LAW 93 (3d ed. 1927), and 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 179 (3d ed. 1923)). For a concise history of the treatment of half-bloods under early English inheritance law, see 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 183-85 (5th ed. 1942) (noting early confusion in development of half-blood approach and noting that exclusion of half-blood could be unreasonable in some circumstances).

145. Gray v. Chapman, 243 P. 522, 523 (Okla. 1926) (discussing the pure form of the doctrine of ancestral property before acceptance of the competing approach that views the important ancestor as the immediate ancestor from whom the decedent inherited the estate).

146. *See* 3 HOLDSWORTH, *supra* note 144, at 562 (stating that the House of Lords decided in 1690, after much discussion, that half-bloods rank equally with whole-bloods of the same degree under the Statute of Distribution 1670). Holdsworth notes the statement of Chief Justice Holt on the matter: "I am of opinion that the half blood ought to have the same share. I confess it is hard, but we are bound by the Statute . . . the law has been constantly held so, and though it is hard, yet the words of the Act bind us up." *Id.* at n.6.

147. *See infra* note 151.

148. *See, e.g.*, Rountree v. Pursel, 39 N.E. 747, 751 (Ind. Ct. App. 1895) (noting that focusing on immediate ancestor simplified difficulties of tracing title to ancestral property); Lessee of Prickett v. Parker, 3 Ohio St. 394, 396 (1854) (stating that "the ancestor meant by our statute, is any one from whom the estate is inheritable, and that the ancestor from whom it must, in law, be understood to 'have come to the intestate,' is he from whom it was immediately inherited"); Gray v. Chapman, 243 P. 522, 523 (Okla. 1926) (concluding that the important ancestor for determining whether land is ancestral is the immediate ancestor from whom the decedent inherited the estate), *overruled on other grounds*, *In re* Yahola's Heirship, 285 P. 946, 949 (Okla. 1930); Amy v. Amy, 42 P. 1121, 1133 (Utah 1895) (construing ancestor to mean "the last possessor before the decedent; that is, the person from whom the land immediately descends to the decedent"), *aff'd*, 171 U.S. 179 (1898). *Cf.* Childress & Mullanphy v. Cutter, 16 Mo. 24, 43-44 (1852) (recognizing decedent's ma-

can jurisdictions largely defeated the principal goal of the original ancestral property doctrine, because property could thereafter easily pass outside the bloodline of the first purchaser. For example, Bob's maternal collateral relatives would be unlikely to share the blood of Bob's father Al. Yet under the American interpretation, Bob's maternal relatives are included along with the paternal relatives in the pool of eligible takers.[149] Acknowledging the irrationality of such results, the question inevitably became whether states should simply abandon the ancestral property doctrine, allowing the property to pass outside the bloodline to any of Charles's collateral relatives, half-blood or whole-blood. Ultimately, that is what the great majority of states did.[150]

Those American jurisdictions still using the adulterated ancestral property approach distinguish *half-blood survivors* only when the property in question is ancestral. Of course, reasonable people may strenuously disagree on the proper treatment of half-blood survivors under any circumstances. Adding complex and historically inaccurate ancestral property principles to the mix with half-blood proscriptions, however, inevitably generated (and still generates) substantial confusion over the proper application of these statutes.[151]

Some of the commonly litigated questions include the following: What makes property ancestral?[152] Can ancestral property include person-

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ternal half-siblings as heirs to decedent's paternal ancestral estate where decedent's father left no other heirs).

149. *See, e.g.*, *In re* Estate of Chilton, 520 N.W.2d 910 (S.D. 1994) (interpreting South Dakota's then-existing ancestral property/half-blood statute and noting an argument concerning the difficulty of tracing sources). In the case, Parker died intestate with an estate valued at more than $1 million. *Id.* at 914. He was survived by three whole-blood cousins of the fourth degree and by seven half-blood cousins of the fourth degree. *Id.* at 911. The South Dakota statute provided as follows:

> [k]indred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance c[a]me to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

Id. at 912 (quoting S.D. CODIFIED LAWS § 29-1-13 (Michie 1994)). The whole-blood cousins were descendants of the decedent's maternal relatives. *Id.* at 916. The half-blood relatives descended from the decedent's paternal grandfather. *Id.* The court concluded that the bulk of Parker's estate came from his maternal relatives, and thus the half-blood cousins were not entitled to share as heirs in that part of his estate. *Id.* at 914-15 (tracing provenance of the decedent's wealth and implicitly rejecting the argument of the half-blood cousins that it was "not merely difficult but impossible" to trace the ancestral source of that wealth). Today, South Dakota follows the modern majority approach to inheritance by half-blood relations. *See* S.D. CODIFIED LAWS § 29A-2-107 (Michie 2003) (employing Uniform Probate Code language).

150. Not all American courts abandoned the English common law approach. Some American courts continued to interpret "ancestor" to mean "the first purchaser." *See, e.g.*, Johnson v. Phillips, 107 S.W. 170, 171 (Ark. 1908), *overruled in part*, 195 S.W. 1184 (1917).

151. *See* Kenderdine, *supra* note 3, at 90-91 (providing a long list of interpretative arguments that lawyers have made regarding proper treatment of ancestral property/half-blood inheritance statutes similar to that of Oklahoma).

152. *See, e.g.*, *In re* Moran's Estate, 51 P.2d 277, 279 (Okla. 1935) (concluding that property received by *partition* deed under a will was ancestral); *In re* Yahola's Heirship, 285 P. 946, 949 (Okla. 1930) (holding that an Indian allotment was not ancestral property).

In *Estate of Hoegler*, 147 Cal. Rptr. 289 (Ct. App. 1978), appellants unsuccessfully argued for application of an ancestral property statute that excluded half-blood relatives. *Id.*

alty?[153] Is inheritance of ancestral property limited to lands *descended* to the decedent?[154] Should the inheritance of ancestral property exclude whole-blood relatives not of the blood of the ancestor when whole-blood relatives of the ancestor exist?[155] Does the statute exclude half-blood relatives not of the ancestor when whole-blood relatives exist of a more

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at 294 (noting also that an earlier case had limited application of the ancestral property statute to ancestral *real* property). The principal discussion in the case dealt with the interpretation of the term "separate property" under a different probate statute. *Id.* at 291-92. The court concluded that although the decedent had received property by gift from her mother, the property was not the mother's separate property, at least in the context of the probate proceeding. *Id.* at 294. Rather, because the property had been community property during the marriage of the decedent's parents, for purposes of the probate statute in question it remained community property when the mother acquired sole ownership at her husband's death. *Id.* at 294. Because the decedent did not truly acquire a title derived solely from her mother, the decedent's half-siblings (her father's children from a prior marriage) were entitled to inherit her estate to the exclusion of her maternal relatives, who were of a more remote degree of kinship. *Id.* at 294.

153. Most courts took the common-law view and limited application of the ancestral property concept to realty. *See, e.g., In re* Estate of Donovan, 55 Cal. Rptr. 758, 761 (Ct. App. 1967) (interpreting California's then-existing statute and noting that the exclusion applied only to realty). At least, some courts extended the concept to personalty, however. Purcell v. Sewell, 134 So. 476, 480 (Ala. 1931) (including personalty among the estate classified as ancestral property); Rountree v. Pursell, 39 N.E. 747, 753 (Ind. Ct. App. 1895) (concluding "somewhat reluctantly" that the legislature intended that personalty could be ancestral property); *In re* Hullett's Estate, 89 N.E. 509, 510 (Ind. Ct. App. 1909) (noting that ancestral property in Indiana could be personalty or realty).

154. All four states with ancestral property statutes pertaining to half-bloods expressly include "devise" along with descent in their current statutes. Moreover, three of the four—all but Nevada—include "gift" in the property covered. *See, e.g.*, HAW. REV. STAT. § 532-8 (1985); NEV. REV. STAT. ANN. § 134.160 (Michie Supp. 1999); OKLA. STAT. ANN. tit. 84, § 222 (West 1990); WASH. REV. CODE ANN. § 11.04.035 (West 1998).

155. The exclusion typically applies *only* to half-blood relatives. In *In re Estate of Kurtzman*, 396 P.2d 786, 787 (Wash. 1964), the intestate decedent had inherited 1,499 shares of capital stock and certain furniture from his maternal aunt Sophia. He died survived by nine paternal first cousins (fourth degree relatives) and two maternal cousins once removed (fifth degree relatives). *Id.* The Washington statute provided

> [t]he degree of kindred shall be computed according to the rules of the civil law, and the kindred of the half blood shall inherit equally with those of the whole blood in the same degree unless the inheritance comes to the intestate by descent, devise, or gift from one of his ancestors, or kindred of such ancestor's blood, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance.

Id. at 789 (quoting WASH. REV. CODE § 11.04.100 (1963)).

The maternal cousins claimed that under the last part of the statute, they should take the property in question since it was maternal ancestral property and the first cousins were paternal relatives of the decedent. *Id.* at 789. The court concluded that the ancestral property statute must be read as a whole and therefore applied to exclude only certain *half-blood* relatives. *Id.* at 791-92. The paternal cousins were the decedent's next of kin as computed under the rules of civil law, and thus were entitled to take. *Id.* at 792.

Incidentally, the court noted that it was not necessary for it to determine whether the ancestral property statute could apply to personalty. *Id.* Quoting *City of Des Moines v. City of West Des Moines*, 30 N.W.2d 500, 507 (Iowa 1948), the court stated, "[t]here will be time enough to bid the Devil 'good morrow' when we meet him." *Id.*

A concurring justice in that case thought that the legislature had probably intended a result that favored the maternal relatives, but that the language of the statute did not accomplish that result. *Id. See* De Roin v. Whitetail, 312 P.2d 967, 975 (Okla. 1957) (Halley, Justice, dissenting) (opining that a maternal half-uncle (3d degree) should take over a paternal grandfather (2d degree) and a paternal half-brother when the property was maternal ancestral property).

distant degree?[156] What does "more distant degree" mean?[157] Does the

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In *Caffee v. Thompson*, 81 So. 2d 358, 359-60 (Ala. 1955), the intestate decedent had inherited land from his father and was survived by maternal uncles and aunts and paternal uncles and aunts. The paternal uncles and aunts claimed they should receive the "ancestral" property. *Id.* The court concluded that the estate must be divided into halves, because the ancestral property statute only excluded half bloods who fell within its meaning, and there were no half bloods in the instant case. *Id.* at 362. The statute stated that

> [t]here is no distinction made between the whole and the half-blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift, from or of some one of his ancestors; in which case all those who are not of the blood of such ancestor are excluded from the inheritance as against those of the same degree.

Id. at 360 (quoting ALA. CODE tit. 16, § 5 (1940)). Alabama no longer uses an ancestral property/half-blood statute. *See* ALA. CODE § 43-8-46 (1975) (making no distinction between half-blood and whole-blood relatives of the intestate decedent).

For an interesting twist involving ancestral property and an unusual intestacy statute, see *Cupp v. Frazier's Heirs*, 387 S.W.2d 328 (Ark. 1965). In that case, Clara inherited maternal ancestral property. *Id.* at 328-29. When she died intestate, she was survived only by paternal cousins. *Id.* at 329. The court concluded that ancestral property simply could not pass to the opposite side of the family, and therefore the paternal cousins were not capable of inheriting. *Id.* The court then applied Arkansas's intestacy provisions which permitted the estate to pass to the heirs of a predeceased spouse when no other relatives were capable of inheriting. *Id.* As a result, Clara's whole-blood cousins lost out to the heirs of her predeceased husband! *Id.* at 330.

156. The answer in most cases today is no; historically, however, the answers were mixed. In *In re Estate of Robbs*, 504 P.2d 1228 (Okla. 1972), the court construed Oklahoma's ancestral property statute. The decedent Lucinda died intestate. *Id.* at 1229. On her maternal side, Lucinda was survived by a half-brother (a second-degree relative) and some children of predeceased half-brothers and sisters (third-degree relatives). *Id.* On her paternal side, Lucinda was survived by some paternal cousins who were fourth-degree relatives. *Id.* The property was a paternal ancestral estate that Lucinda had received from her father's brother. *Id.* The issue was whether the decedent's half-blood maternal relatives should be excluded even though the paternal relatives were more remote in degree. *Id.* The court noted that in states with statutes similar to that in question, two divergent lines of authority existed. *Id.* Some cases indicate that the decedent's nearer half-blood relatives unrelated to the ancestor are excluded in favor of the more distant full-blood relatives who share the ancestor's blood. *Id.* at 1229-31 (citing *Kelly v. McGuire*, 15 Ark. 555, 586 (1854), and 141 A.L.R. 977, and referring to this approach as the "Arkansas rule"). Other cases hold that the statute applies to exclude the half-blood relatives *only* if there also exist whole-blood relatives of the same degree. *Id.* at 1230-31 (referring to this as the California rule and citing *In re Smith's Estate*, 63 P. 729 (Cal. 1901), and *In re Ryan's Estate*, 133 P.2d 626 (Cal. 1943)). Although prior Oklahoma cases had ruled in favor of the more distant whole-blood relatives, the court engaged in a rather tortured analysis to conclude that those cases had misconstrued the statute. *Id.* at 1231-32. Thus, the half-blood relatives could take. *Id.* Although the Oklahoma court had previously followed the Arkansas rule, the court in *Robbs* decided by a 5-4 decision that it had done so incorrectly. *Id.* Upon examining the California and Arkansas statutes, the Oklahoma court concluded that the Oklahoma statute was identical to the California statute and different from the Arkansas statute, and adopted the California interpretation. *Id.* at 1232.

The dissenting opinion concluded that Lucinda's personal property acquired by her own industry would pass to the half-blood relatives, but that the ancestral estate should have passed to the paternal relatives even though they were of more remote degree. *Id.* at 1233. The opinion noted that a commentator had suggested abolishing ancestral property. *Id.* (Jackson, J., dissenting) (citing Albert R. Matthews, *Descent and Distribution: De Roin and the Half-Blood Statute*, 13 OKLA. L. REV. 440 (1960)). The dissent suggested that the problem should be reviewed by the state legislature. *Id.*

Compare *Robbs* with an earlier Oklahoma decision, *De Roin v. Whitetail*, 312 P.2d 967 (Okla. 1957). In *De Roin*, the intestate decedent was survived by a paternal half-brother (second degree), a paternal grandfather (second degree), and a maternal half-uncle (third

statute exclude half-blood relatives if no whole-blood relatives exist?[158]

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degree). *Id.* at 968. The grandfather and half-uncle both agreed that the grandfather would be preferred to the half-brother because, although both were second-degree relatives, the grandfather was of the whole blood. *Id.* at 969. The maternal half-uncle argued that because the property involved was maternal ancestral property, he should take to the exclusion of the paternal grandfather. *Id.* at 969. The court disagreed. It stated that the proposition that the statute excludes whole-blood kindred who are not of the blood of the transmitting ancestor (the grandfather's situation here), had been presented to courts of other states as early as 1877 and as recently as 1955. *Id.* at 969. The court further stated that all such opinions held that the statute did not apply to exclude whole-bloods, but rather only half-bloods. *Id.* at 969-70 (citing Caffee v. Thompson, 81 So. 2d 358 (Ala. 1955)). The dissent in *De Roin* noted, however, that Oklahoma had previously followed the Arkansas approach exemplified in *Kelly's Heirs v. McGuire*, 15 Ark. 555 (1855). *Id.* at 973. The dissent stated that Oklahoma precedent "plainly holds that where there are kindred of the half blood, both those of the half blood and those of the whole blood of the deceased who were not of the blood of the ancestor from whom deceased received the property could not take." *Id.* at 974 (citing Thompson v. Smith, 227 P. 77 (Okla. 1923), *overruled in part by*, *In re* Estate of Robbs, 505 P.2d 1228 (Okla. 1972)).

Although California no longer uses an ancestral property/half-blood statute, the California approach ultimately adopted by Oklahoma is exemplified in *In re Estate of Nidever*, 5 Cal. Rptr. 343 (Dist. Ct. App. 1960). In *Nidever*, the intestate decedent was survived by paternal half-brother and by children and grandchildren of a predeceased whole-blood sister. *Id.* at 345. The sister's descendants argued that the property the decedent received from his mother should pass entirely to them because the half-brother was not related to the ancestor who was the source of the property. *Id.* at 354. The statute provided that

> [k]indred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance came to the intestate by descent, devise, or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestor must be excluded in favor of those who are.

Id. at 355 (quoting CAL. PROB. CODE § 254 (West 1959)). The court concluded that the two sets of claimants were not of the same degree of kinship. *Id.* The half-brother was a second degree relative while the descendants of the predeceased sister were third and fourth degree relatives. *Id.* Thus, the half-brother was entitled to one-half of the estate. *Id.*

157. Courts have disagreed. *See, e.g.*, Stallworth v. Stallworth, 29 Ala. 76, 80 (1856) (holding that whole-blood siblings and children of half-blood siblings shared paternal ancestral property because children of half-blood siblings took by representation, and thus were of equal degree of kinship as full-blood siblings). *But cf. In re* Estate of Warnock, 97 P.2d 831, 833 (Cal. Ct. App. 1940) (preferring half-siblings as second-degree relatives over nieces and nephews of whole-blood, who were third-degree relatives); Lyon v. Crego, 154 N.W. 65, 66-67 (Mich. 1915) (preferring a maternal half-uncle over more distant paternal first cousins (and a maternal first cousin), even though the property was derived from the decedent's father).

158. *See, e.g.*, Univ. of N.C. v. Brown, 23 N.C. 387, 388 (1841) (concluding that where no whole-blood relatives survived, land did not escheat, but passed to half-siblings even though they were not blood of the ancestor). In *In re Estate of Edwards*, 273 N.W.2d 118, 119 (N.D. 1978), the decedent was born out of wedlock and was subsequently adopted. The decedent's birth mother later married and had three children. *Id.* The birth mother's three children survived at the decedent's death intestate. *Id.* The decedent was also survived by six nieces and nephews of his adoptive mother. *Id.* At the time of the decedent's death, North Dakota law provided that the only relationships affected by adoption were the parent/child relationships—thus the adoption did not terminate any relationship between the adopted child and his biological relatives other than the biological parents, and the adoption did not establish any relationship between the adopted child and members of the adoptive parents' families. *Id.* Since the nieces and nephews of the adoptive mother had no claim as relatives, the children of decedent's birth mother were his closest relatives. *Id.* at 120. The nieces and nephews could not successfully invoke the state ancestral property statute for two reasons—the half-siblings were of a closer degree of relationship, and, more importantly, the nieces and nephews of the adoptive mother simply were not potential heirs of the decedent. *Id.*

Does "ancestor" necessarily mean someone from a preceding generation?[159]

In *In re Estate of Little*, the decedent, Pearl, died intestate owning Washington realty worth more than $1 million.[160] Through her father's first marriage, Pearl was survived by half-blood relatives including a nephew, a grandniece, and a great-grandniece.[161] Through her mother, Pearl was survived by twenty or more second and third cousins of the whole-blood.[162] The court reviewed the different approaches in treating half-blood relations under the state ancestral property statute through the decades.[163] The version in question provided as follows:

> [k]indred of the half blood shall inherit the same share which they would have inherited if they had been of the whole blood, unless the inheritance comes to the intestate by descent, devise, or gift from one of his ancestors, or kindred of such ancestor's blood, in which case all those who are not of the blood of such ancestors shall be excluded from such inheritance . . . .[164]

Like most American courts, the court rejected the first purchaser approach of the common law.[165] Instead, it concluded that the ancestor whose blood is to be considered is the ancestor from whom the property immediately came to the intestate.[166] Because the property came to Pearl from her mother, Maggie, Maggie was the ancestor to be considered.[167] Thus, even if Pearl's father were the first ancestor to purchase the property, he could not be considered because Pearl had not received the property from him.[168]

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159. The answer is no. *See, e.g.*, *In re* Long's Estate, 67 P.2d 41, 44 (Okla. 1936).

160. 721 P.2d 950, 951 (Wash. 1986). Early in the opinion, the court noted that since only realty was in question, it would not address whether the statute also applied to personalty. *Id.*

161. *Id.*

162. *Id.*

163. *See id.* at 953-54 (noting that the first version treated half-bloods the same as whole bloods; the second version stated that kindred of the half-blood inherit equally with those of the whole-blood of the same degree, but it incorporated an ancestral property exception; the third version would have treated half-bloods the same as whole-bloods, but that version was never adopted; and the current version was like the second except that it eliminated the language "in the same degree").

164. *Id.* at 954 (citing WASH. REV. CODE § 11.04.035 (1967)).

165. *Id.* at 955-56.

166. *Id.*

167. *See id.* at 956 (finding it unnecessary to determine whether Charles was in fact the first purchaser).

168. In fact, the court did not actually determine whether Charles would have been a purchaser had the common-law rule applied. *Id.* at 956. Pearl's maternal grandfather had obtained the land patent from United States President Chester Arthur. *Id.* at 951-52. Her grandfather left the property to his wife. *Id.* at 952. The wife left it to Pearl's mother, Maggie, and Maggie deeded part of the land to Pearl. *Id.* Pearl acquired the remaining part from Maggie through intestate succession. *Id.* At one point during the marriage of Maggie's parents, however, Maggie had deeded the property to her husband in return for his promise to pay a mortgage on the property. *Id.* Maggie received the outright title again when he died, however. *Id.* Nonetheless, this brief period of ownership by Maggie's husband allowed the paternal relatives of Pearl to argue that he was the last purchaser—

The court also concluded that the maternal relatives of the whole-blood would take ancestral property to the exclusion of the half-blood relatives even though the half-blood relatives were in the class of takers (as descendants from the decedent's *parent*) generally preferred to the class of whole-blood relatives (as descendants from the decedent's *grandparents*).[169]

Finally, the court concluded that the part of the realty *inherited* by Pearl was clearly ancestral property, but that the status of the part *deeded* to Pearl at Maggie's deathbed was ambiguous from the face of the deed.[170] To be ancestral property, the property had to be acquired by devise, descent, or gift.[171] While the circumstances surrounding the deed perhaps evidenced a gift, the deed itself contained a statement that the transfer was "[f]or and in consideration of Ten Dollars."[172] The deed also indicated, however, that the transfer was based on "Love and Affection."[173] The court noted that some courts had previously concluded that any statement of consideration in a deed barred treatment of the property as ancestral; however, other courts had ruled that a statement of nominal consideration would not affect its gift status and therefore its inclusion as ancestral property.[174] The court remanded the issue to the trial court, emphasizing that the essential issue was whether Pearl's mother had donative intent at the time the deed was executed and delivered to Pearl.[175]

A review of cases quickly reveals that courts often do not take a plain-language approach when interpreting ancestral property/half-blood statutes.[176] Courts could have interpreted such hybrid language to mean that ancestral property principles generally apply to *all survivors* and trump state policy that otherwise treats half-blood and whole-blood relations the same. Under this interpretation, probate courts would exclude half-bloods not because they are half-bloods, but because they don't share the blood of the ancestor; moreover, whole-blood relatives not sharing the

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his consideration was the promise to pay the mortgage—and that therefore he was the proper ancestor to be considered in applying the ancestral property statute. *Id.* at 955.

169. *Id.* at 958-59 (noting that the version of the statute in question did not require full-blood relatives to be of the same degree as the half-blood relatives in order to exclude the half-bloods).

170. *Id.* at 959.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 959-60.

175. *Id.* at 960 (also noting the importance of parol testimony to show "the circumstances under which the deed was made, to define technical terms, and to explain latent ambiguities"). A dissenting opinion found absurd the argument by the half-blood relatives that the transfer from Maggie to Pearl was not gratuitous, but rather was based on Pearl's years of service to her mother. *Id.* at 961. The opinion noted that there was no evidence of any form of agreement between Pearl and Maggie to indicate the deed was compensation to Pearl. *Id.* The dissenting justice disagreed with the majority's decision to remand on the gift issue, stating that "[t]o hold under the facts before us that this conveyance was anything but a gift . . . defies common sense." *Id.* (Dore, J., dissenting).

176. *See, e.g.*, Heirs v. McGuire, 15 Ark. 555 (1855) (opting to use legislative intent to aid in their interpretation).

blood of the ancestor would also be excluded. Instead, most courts conclude that these ancestral-property statutes apply *only to half-bloods*, leading to the anomalous result that a half-blood collateral not of the ancestor's blood is not an heir even when a whole-blood collateral equally unrelated to the ancestor is an heir.[177]

Such statutes are clearly not true ancestral property statutes. Rather, they are *half-blood* exclusion statutes that often render completely irrational results. They are an embarrassment to those states in which they still exist.[178]

E. Exclusion in Most Instances

Mississippi's half-blood statute—the stingiest in the United States—provides somewhat confusingly that "[t]here shall not be, in any case, a distinction between the kindred of the whole and half-blood, except that the kindred of the whole-blood, in equal degree, shall be preferred to the kindred of the half-blood in the same degree."[179] As stated earlier, excluding half-bloods in favor of whole-bloods has a historical basis.[180] The English common law treated half-blood relations the same as whole-blood relations for the inheritance of personalty;[181] however, it excluded half-blood relations completely as potential heirs to realty, which was historically the more important source of wealth.[182] In fact, the preference for whole-bloods was so strong that realty would escheat rather than pass to a half-blood relative.[183] England's Inheritance Act of 1833 altered the common-law approach to realty and provided that while whole-bloods were preferred, half-bloods could take in some instances.[184] The Administration of Estates Act of 1925 abolished the distinction between personalty and realty and all distinctions based on sex and age; however, the Act provided for half-blood siblings *only* in the absence of whole-blood siblings.[185] Similarly, uncles and aunts of the whole-blood were preferred to

177. *See generally* Bratt, *supra* note 127, at 81 (discussing applicability of half-blood statutes).

178. *Cf.* Simes & Basye, *supra* note 23, at 408 (commenting in 1928 on Ohio's then-existing ancestral property statute that "[i]f experience means anything, the ancestral distinction has been weighed in the balances and found wanting. It is time to remove it from our code. . . .").

179. Miss. Code Ann. § 91-1-5 (2002).

180. *See supra* notes 94-96 and accompanying text (discussing English common law).

181. *See supra* note 96 and accompanying text (discussing treatment of personalty).

182. For a brief discussion of the treatment of half-blood relations at early common law, see Atkinson, *supra* note 94, at 50-52 (citing Blackstone's Canon of Descent VI, noting that inclusion regarding personalty reflected the fact that a half-blood was of the same *degree* of relationship as a whole-blood and suggesting that civil-law inclusion affected the common-law decision to include half-bloods as potential takers of personalty).

183. *See supra* note 95 (quoting from Blackstone on Canon of Descent VI, which excluded half-bloods from the passing of realty); Atkinson, *supra* note 94, at 38-39, 51 & n.2 (discussing in historical context Blackstone's Canon of Descent VI).

184. Atkinson notes the changes as follows: "[under the Inheritance Act, 1833 half-bloods] were entitled to take next after relatives of the whole blood of the same degree when the common ancestor was a male and next after the common ancestor when the latter was a female." Atkinson, *supra* note 95, at 40.

185. *Id.* at 58.

those of the half-blood.[186]

In the United States, not even Mississippi completely precludes inheritance by a half-blood relative.[187] For example, in a 1939 case, the Mississippi Supreme Court concluded that a half-blood *first* cousin must take to the exclusion of a whole-blood *second* cousin.[188] Nonetheless, Mississippi's approach does completely exclude the half-blood relative when a whole-blood relative of the same degree exists.[189]

In *Jones v. Stubbs*, the decedent died intestate survived by a half-blood sister and by the children of predeceased whole-blood brothers.[190] The chancellor ruled in favor of the whole-blood relatives (decedent's nieces and nephews) to the complete exclusion of the half-blood sister.[191] On appeal, the half-blood sister admitted that an 1859 Mississippi case that was factually similar had also excluded the half-blood relative.[192] She argued, however, that the earlier case was incorrectly decided and "contrary to the overwhelming trend of modern authority with regard to half-bloods and inheritance rights."[193] The court examined Mississippi's general intestacy statute, its half-blood statute, and case law, and then concluded that the chancellor had reached the proper decision.[194] First, the chancellor had properly noted that a whole-blood sibling clearly takes to the exclusion of a half-blood sibling under Mississippi law.[195] Second,

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186. *Id.*

187. This was true at least as early as 1953, when the second edition of Atkinson's *Handbook* appeared. *Id.* at 74.

188. Toomey v. Turner, 186 So. 301, 301-02 (Miss. 1939); *cf. In re* Estate of Ford, 552 So. 2d 1065 (Miss. 1989). In *Ford*, Hattie was born out of wedlock in 1898. *Id.* at 1065. At her death intestate in her late eighties, she was survived by maternal whole-blood first cousins and paternal half-blood nieces and nephews. *Id.* The Mississippi Supreme Court noted that, as a general rule, half-nieces and half-nephews take to the exclusion of whole-blood cousins under Mississippi law. *Id.* at 1066. Because the claim of the nieces and nephews sprang from their relationship with Hattie's father and Hattie was a nonmarital child, the court was required to ascertain whether Hattie's father acknowledged her and did not refuse or neglect to support her. *Id.* at 1067. The court noted the difficulty of reconstructing the evidence for these events that had occurred decades before. *Id.* at 1068. The lower court had concluded that Hattie's father did not acknowledge her. *Id.* The nieces and nephews also provided no evidence to show that he had supported her. *Id.* Without that proof, the court concluded that the half-blood cousins could not take. *Id.*

189. Mississippi has not always been alone among the states in generally excluding half-bloods in favor of whole-bloods. *See, e.g.*, Holub v. King, 163 A.2d 800 (Conn. Super. Ct. 1960) (preferring whole-blood siblings to half-blood siblings under then-existing Connecticut law and discussing proof problems); Bynum v. Bynum, 113 S.E.2d 748, 753 (S.C. 1960) (interpreting then-existing South Carolina law to exclude half-blood siblings in favor of whole-blood sibling); Glanding v. Indus. Trust Co., 46 A.2d 881, 884 (Del. 1946) (noting preference for whole-blood over half-blood brothers or sisters). See generally *Kinard v. Moore*, 68 S.E.2d 321 (S.C. 1951), for a discussion of the early treatment of half-blood relatives under South Carolina inheritance law.

190. 434 So. 2d 1362, 1363 (Miss. 1983).

191. *Id.*

192. *Id.* at 1363-64 (citing Scott v. Terry, 37 Miss. 65 (1859)).

193. *Id.* at 1363. In *Scott*, the Mississippi Supreme Court held that children of predeceased whole-blood siblings inherit to the exclusion of half-blood siblings because the children represent their parents, who would clearly take to the exclusion of the half-siblings. *Id.* at 1364.

194. *Id.* at 1364-65.

195. *Id.* at 1364.

children of a predeceased sibling take by virtue of representation—taking the parent's share and not a share of their own.[196] Finally, since whole-blood nieces and nephews are taking their parents' share, and since their parents would take to the exclusion of a half-blood sister, then whole-blood nieces and nephews also take to the exclusion of a half-blood sister.[197]

How does one reconcile this holding with the language of the half-blood statute, which seemingly excludes the half-blood relative only when there are whole-blood relatives of *equal* degree? Aren't half-blood siblings second-degree relatives and whole-blood nieces and nephews third-degree relatives? Not necessarily. By treating the nieces and nephews as *representatives* of their parents, the court could engage in the fiction that the nieces and nephews were of the *same* degree of relationship as the half-blood sister. The court could thus reject the otherwise plausible argument that the half-blood sister was a second-degree relative, that the nieces and nephews were third-degree relatives, and that therefore the half-blood sister should not be excluded under the statute.[198] The ruling in *Jones* remains the law in Mississippi.[199]

The strength of Mississippi's preference for the whole-blood relative is demonstrated in *Davidson v. Brownlee*, a 1917 case that pitted two traditionally disfavored categories of relatives—whole-blood but "*illegitimate*" relatives and legitimate but *half-blood* relatives—against each other.[200] The decedent died and was survived by the nonmarital child of his whole-blood sister and by the marital children of his half-blood sister.[201] Inter-

196. *Id.* at 1364-65.

197. *See id.* at 1365 (affirming chancellor's decree).

198. Not all children take as representatives of their parents under Mississippi law. *See, e.g.*, Shepherd v. Townsend, 162 So. 2d 878 (Miss. 1964). In *Shepherd*, the testatrix's will left her personal estate to her next of kin under state intestacy laws. *Id.* at 879. The personalty was distributed to three maternal whole-blood first cousins of the decedent. *Id.* Later a maternal half-uncle came forward. *Id.* The chancellor determined that the maternal half-uncle should have received the personal estate, because the state intestacy laws specifically provided for uncles and aunts before authorizing distribution to the next of kin under the rules of civil law. *Id.*

199. In *Slaughter v. Gaines*, 71 So. 2d 760, 761 (Miss. 1954), C.H. Gaines died testate survived by one half-brother, one half-sister, two whole-blood brothers, one whole-blood sister, and issue of one predeceased full brother. The will left everything to his heirs at law without naming his siblings or their issue; however, the testator did specifically exclude the half-brother "who was already well provided for." *Id.* The will referred to the half-brother as "my brother." *Id.* The attorney who had prepared and witnessed the will indicated that the testator had never indicated that any of his siblings were half-siblings. *Id.* The half-sister clearly was not an heir-at-law under the laws of Mississippi. *Id.* The court concluded that the testator did not believe there was a distinction between his half-siblings and whole-siblings; rather, he believed his half-sister to be one of his heirs at law and therefore the court concluded that she was entitled to one-fifth of the estate. *Id.* at 763. Although the court was able to give effect to what it believed was the testator's intent in this case, it was able to do so only because of the additional language referring to the half-brother as "my brother." *Id.* at 763-64. The court noted that if the testator had merely stated "to my heirs-at-law" without further description, the court would have been bound under Mississippi law to exclude the half-siblings. *Id.* at 764.

200. 75 So. 140 (Miss. 1917).

201. *Id.*

preting the statute literally despite the historical disdain for nonmarital children, the court held that the "illegitimate" child succeeded to the estate because he was the only whole-blood relative among the group.[202]

For people in fractured families who do not consider half-blood relations to be family members, the Mississippi approach is attractive. Its lopsidedness, however, is evident and unforgiving. Automatic exclusion of half-bloods in favor of whole-blood relatives of the same degree ignores the probate wishes of people who—fractured families or not—make no distinction between their whole-blood and half-blood relatives. Like universal inclusion under the modern majority approach, Mississippi's exclusion rule simply fails to acknowledge the wishes of many intestate decedents.

All-or-nothing rules for half-blood relatives are easy to apply, but in the twenty-first century they provide egregiously simplistic, skewed solutions for complex American families.

F. Tomorrow's Alternatives

Each of the five approaches to half-blood inheritance currently used in the United States relies principally on objective criteria to determine inclusion and distributive amounts for the survivors.[203] Some scholars[204] now suggest that, in this world of rapidly changing relationships, probate law can no longer meet the needs of the individual and his or her loved ones by dogged adherence to objective rules that classify people as heirs based solely on marriage[205] or blood[206] without further investigation into

202. *Id.* at 141.

203. *See supra* notes 94-202 and accompanying text (discussing five existing approaches to the treatment of half-bloods in American intestacy laws).

204. *See, e.g.*, Waggoner, *supra* note 38, at 78-84 (discussing a groundbreaking proposal that would treat unmarried committed partners as heirs under a multi-factor test); Fellows et al., *Committed Partners*, *supra* note 32, at 24-31 (discussing Waggoner's proposal and results of a survey conducted in Minnesota); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 263 (2002) (setting forth a proposal that "asks the court to focus its inquiry on twenty-three enumerated factors"). Other scholars are also exploring the need for more judicial discretion in determining parent-child relationships under intestate succession laws. *See, e.g.*, Susan N. Gary, *The Parent-Child Relationship Under Intestacy Statutes*, 32 U. MEM. L. REV. 643, 670, 680-83 (2002) (proposing a multi-factor test for parent-child relationships that would expand existing intestate succession schemes); Gary, *supra* note 50, at 71-72 (proposing a functional approach to intestate succession laws); Margaret M. Mahoney, *Stepfamilies in the Law of Intestate Succession and Wills*, 22 U.C. DAVIS L. REV. 917, 919, 931-32 (1989) (proposing a stepfamily inheritance law that includes, among other things, an in loco parentis determination concerning the stepparent and stepchild relationship during the child's minority); Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 FAM. L.Q. 227, 242 (2002) (examining the ALI's definitions of "de facto parent" and "parent by estoppel" and their potential effect on intestacy law).

205. In a few states, the inheritance rights of a spouse are now extended to reciprocal beneficiaries or the partner of a civil union. So far, however, such inclusion is still based on objective criteria—registration papers or the civil union certificate. *See* BRASHIER, *supra* note 5, at 80-88 (discussing the treatment of surviving spouse-like partners under the laws of Hawaii, Vermont, and California); CAL. PROB. CODE § 6401(c) (West 2003) (treating a surviving domestic partner as a surviving spouse for inheritance purposes); HA. REV. STAT.

the decedent's life.[207]

Indeed, in recent years some state legislatures have developed new rules in their efforts to account for changing family structures.[208] These new rules typically provide more detailed classifications of family relationships—for example, distinguishing spouses and children in nuclear families from those in other forms of family—but still require courts to place the decedent and her survivors within fairly rigid groupings.[209] Unfortunately, objective default rules often ignore the desires of the modern intestate decedent even when they provide various groupings of family structures. These rules still assume that a *typical* decedent exists and that we can ascertain her wishes if we develop enough "boxes" to classify her and her survivors.[210] Considering the many different forms of family and intimate relationships that exist today, this assumption is increasingly unsound. True, objective rules are easy to administer and render predictable results, but of what value are simplicity and consistency if very often the "wrong" survivors wind up with the estate?[211] Perhaps the discrete

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ANN. § 560:2-102 (Michie 2003) (treating a reciprocal beneficiary as a surviving spouse for inheritance purposes); VT. STAT. ANN. tit. 15, § 1204(e) (2003) (extending inheritance rights to a surviving partner in a civil union).

206. Legislatures in all states have now extended "blood" relationships to include adopted relatives in most settings. *See* SCOLES ET AL., *supra* note 43, at 47-48 (noting the extension of inheritance rights to adopted children but observing that some questions remain). Inclusion is usually based on objective evidence (the adoption papers), not on subjective evaluations of the parent-child relationship. The virtual or equitable adoption, recognized in many states, is the one exception in which courts may engage in somewhat subjective evaluations of the parent-child relationship. The inheritance rights of the equitably adopted child are very limited, however. *See generally* BRASHIER, *supra* note 5, at 164 (discussing the limited rights of a child to inherit from the intestate estate of equitably adoptive parents).

207. In most instances, probate law refuses to inquire into the relationship between the decedent and claimants to his estate. Exceptions exist, however, under which probate courts do permit inquiry into that relationship. *See generally* BRASHIER, *supra* note 5, at 28-30 (discussing slayer's statutes, spousal disqualification statutes for adultery or abandonment, parental disqualification statutes for failure to acknowledge and support the decedent, and family allowance statutes).

208. *See, e.g.*, Gary, *supra* note 204, at 670 (noting recent changes in intestacy statutes to account for changing family structures). Even the basic intestacy provisions of the 1990 UPC now take into account some permutations of the evolving family. *See* E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1077-80 (1999). Professor Spitko states, "[UPC] Article II's intestacy provisions do not purport to reflect the presumed intent of one typical intestate decedent. Rather, the provisions purport to reflect the presumed intents of many, indeed thirteen, typical intestate decedents who died in a variety of family circumstances." *Id.* at 1078.

209. *See, e.g.*, UNIF. PROBATE CODE § 2-102 (amended 1993), 8 U.L.A. 81 (1998) (distinguishing the traditional nuclear family from families with stepchildren in establishing the share to a surviving spouse).

210. *See* Waggoner, *supra* note 38, at 28-29, 78-80 (discussing "common intention" and proposing default intestate rules for de facto surviving partners).

211. *See* Gaubatz, *supra* note 32, at 534-35 (discussing the insufficient coverage of American probate statutes for our changing families). In this thoughtful early article on the topic, Professor Gaubatz questioned whether ease of administration and reduction of potential litigation were adequate justifications for the existing system of inheritance laws. *Id.* at 535. He further suggested that the societal interest in fostering respect for the law, in promoting the welfare of individuals, and in strengthening family units might not be furthered by the traditional approach of American probate law. *Id.*

but important area of half-blood relations is ripe for the development of a new approach.

1. Discretionary Determinations

Why not look for the intent of the *particular* intestate decedent whose estate is before the probate court?[212] Why not reward those survivors who did the most for her?[213] Why not deny an inheritance to those who ignored her?[214] Courts have long evaluated marital conduct and parent-child relationships in divorce and custody proceedings, so why can't probate courts evaluate the decedent's relationships with others?[215] In the context of half-blood relationships, why can't probate courts inquire whether the decedent would want the half-bloods to take none, part, or all of her estate?[216]

State legislatures could authorize probate courts to make such inquiries.[217] Yet many observers believe that the costs of individualized probate inquiries would outweigh the potential benefits they might produce for a particular decedent.[218] Moreover, no assurance exists that probate judges invested with broad judicial discretion would reach results superior to those reached under current distributive schemes.[219] Abandoning the simplicity and consistency associated with objective rules is a scary proposition for American probate law. It would be foolish to abandon objective rules without good reason to believe that their replacement could render substantially better results.

Fights among survivors claiming a decedent's property are far different from property fights between divorcing spouses.[220] Unlike the two par-

212. *See* Foster, *supra* note 36, at 257 (discussing possibility of a "decedent intent" approach to inheritance that would "transcend the family paradigm by containing no 'family' limitation whatsoever").

213. *See id.* at 268-71 (discussing the possibility of an inheritance scheme based on the actual relationship between the decedent and those who claim part of his estate).

214. *See id.* at 268-69.

215. *See* Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 127-29 (1994) (discussing problems that would arise in transferring equitable distribution principles of divorce to the probate setting).

216. In a fascinating article on inheritance under Chinese law, Professor Frances Foster discusses alternatives that give some dependents and caregivers equal status with family, that advance some survivors to "first order" heir status, and that allow courts to make "appropriate" awards to survivors based on their needs or contributions. *See* Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, 1999 WIS. L. REV. 1199, 1202 n.11, 1229-45; *see also* Foster, *supra* note 36, at 251 (noting scholarly arguments against investing probate courts with an increased responsibility to administer discretionary inheritance regimes); Spitko, *supra* note 204, at 285 (discussing the importance of certainty and ease of administration as "prized features" of American probate law).

217. *Cf.* BRASHIER, *supra* note 5, at 122-36 (discussing the widespread availability of judicial discretion under modern English inheritance law and noting its limited availability in American inheritance law); Spitko, *supra* note 204, at 281-89 (discussing English law and drawbacks as perceived by some American observers).

218. *See* BRASHIER, *supra* note 5, at 130-33 (discussing English law and judicial discretion); DUKEMINIER & JOHANSON, *supra* note 36, at 478 (noting American opposition to the English inheritance system that vests great judicial discretion in judges).

219. *See* BRASHIER, *supra* note 5, at 132-33.

220. *Id.* at 129.

ties to the divorce proceeding, the number of potential claimants in probate is unlimited.[221] Further, divorce courts divide marital property between two parties whose relationship has ended unsuccessfully, while probate courts should facilitate the orderly transfer of the decedent's property to those he wished to have it.[222] Moreover, unlike the divorce litigant, the decedent is not in the courtroom to argue her position.[223] Probing the mind of a dead person is an awesome responsibility—one that many probate judges probably would not want.[224]

For now, there is little reason to believe that American state legislatures will invest probate courts with substantial investigative or discretionary power concerning half-bloods and inheritance. Yet while we remain reluctant to enter the murky waters of the intestate decedent's wishes, we might find other means of accomplishing the probable desires of decedents without abruptly departing from the objective rules upon which probate has so long relied.

2. *Limited Objective Determinations*

When weighing the relative merits of objective and subjective probate decisions, we should remember that a legislative solution does not necessarily have to employ an either/or approach. Inheritance law could maintain much of its fixed-rule simplicity and yet incorporate an element of inclusiveness and flexibility by permitting probate courts to use extrinsic but objective evidence concerning the decedent's family relationships. For example, regarding the inheritance rights of the surviving unmarried partner of the intestate decedent, Professors Lawrence Waggoner, Mary Louise Fellows, and Gary Spitko have discussed creative approaches for inclusion by reference to objective evidence of the couple's relationship.[225]

What kinds of objective evidence would indicate that a decedent considered his half-blood sibling to be a member of his family who should inherit from his intestate estate? Some of the considerations that scholars have proposed for evaluating committed unmarried partner relationships could be instructive in the sibling context.[226] Cohabitation of adult siblings at the time one dies is objective evidence that the two considered themselves family.[227] If they pooled their financial resources in bank accounts, real estate, or other investments, this too is some evidence of the

221. *See id.* at 129-33.
222. *See id.* at 131-32.
223. *Id.* at 129.
224. BRASHIER, *supra* note 5, at 24-25 (discussing potential problems in applying a discretionary approach to spousal distributive provisions in probate).
225. *See supra* note 204 (discussing proposals by leading probate scholars).
226. *See, e.g.*, LAWRENCE W. WAGGONER, INTESTATE SHARE OF COMMITTED PARTNER (working draft) (providing an individualized inquiry under a multifactor test), *in* WAGGONER ET AL., *supra* note 1, at 108-09.
227. *Cf.* WAGGONER, *supra* note 1, at 108-09 (reprinting a proposal that includes an intestate share for a surviving committed partner who shared a "common household" with the decedent in a marriage-like relationship).

survivor's status as a "true" sibling.[228] On the other hand, clear evidence that the decedent was unaware of a half-blood sibling's existence certainly indicates that no close family relationship existed between the two. Of course, drawing conclusions from these examples is simple, because they lie at the extremes.

The harder cases are those in the middle, in which the decedent knew his half-blood siblings but failed to leave unequivocal evidence of his ties to them. One objective inquiry that a probate court might consider in determining whether the decedent would want such half-blood siblings (or their issue) as heirs is whether the decedent had a "shared upbringing" with the half-blood siblings during a significant part of her childhood.[229] The "shared upbringing" inquiry would often exclude the half-blood sibling if a wide age gap exists between the decedent and him, because either the decedent or he will be grown and out of the household before the other is born. Yet if shared upbringing fosters sibling relationships, then perhaps the typical decedent would not want the much younger or much older half-blood sibling to share his estate.[230]

Legislatures would have to define "shared upbringing" carefully to use that criterion as an objective standard.[231] Presumably two half-blood siblings who shared a principal residence with the common parent would have a shared upbringing.[232] To further refine the determination by objective parameters, the legislature could place time considerations in the definition.[233] For example, "shared upbringing" could provide that the half-blood sibling is to be treated as a whole-blood sibling if the decedent and the half-blood sibling are reared in the same household for at least forty-five days of the year in at least three years of the decedent's childhood.[234] Thus if two half-blood siblings spent at least three school years together in the home of their mother, they would have a shared upbringing. If one of the children also spent most of a summer, several long holidays, or numerous weekends with his father and paternal half-blood siblings, that child could also have a shared upbringing with his paternal half-blood siblings. Nonetheless, strict adherence to these requirements could unfairly exclude some half-blood siblings whom the decedent considered family. To account for such problems, state legislatures could in-

228. *Cf. id.* (reprinting a proposal that includes an intestate share for a surviving committed partner and that lists intermingling of finances as a factor in determining the survivor's inheritance rights).

229. *See supra* notes 61-63 and accompanying text (discussing the relevance of a "shared upbringing" in ascertaining whether one is likely to consider a half-sibling to be a family member).

230. The age gap problem probably occurs more often when the common parent is the father, since men generally have a much longer period of fertility than women.

231. *See infra* note 236 (defining "shared upbringing" in a draft statute).

232. Although I focus here on half-siblings, this shared upbringing would also permit the half-sibling's issue to take from the decedent if the half-sibling predeceased the decedent. *See infra* note 236 (providing a draft proposal of a half-blood statute).

233. *See infra* note 236 (providing a draft statute).

234. *See infra* note 236 (providing a draft statute that defines "shared upbringing" to mean at least forty-five days of cohabitation).

clude limited judicial discretion in the statutory scheme as a safety valve.[235] For example, the statute could afford those half-blood siblings who cannot satisfy the shared upbringing test the alternative of proving "significant family interaction" with the decedent.[236]

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235. *See infra* note 236 (providing a draft statute with a safety valve for half-blood survivors who cannot satisfy the "shared upbringing" test).

236. For example, a half-blood statute relying in part on both fixed rules and judicial discretion might be as follows:

> (1) A relative of the half-blood does not inherit from the decedent unless the relative
> proves,
> (a) by a preplonderance of the evidence, the existence of a shared upbringing
> (i) between the half-blood relative and the decedent; or
> (ii) between a predeceased ancestor of the half-blood relative and the decedent; or
> (iii) between a predeceased ancestor of the half-blood relative and a predeceased ancestor of the decedent;
> or,
> (b) by clear and convincing evidence, the existence of significant interaction between the half-blood relative and the decedent demonstrating that the decedent considered the half-blood relative to be a member of the decedent's family.
> (2) "Shared upbringing" means cohabitation with the decedent or the decedent's predeceased ancestor for at least forty-five days in each of three years during the minority of the decedent or the decedent's predeceased ancestor. The forty-five days of cohabitation may be satisfied by continuous cohabitation or by combining multiple shorter periods of cohabitation including holidays, weekends, and overnight stays.
> (3) "Significant interaction" means acts or events sufficient to indicate that the decedent acknowledged and considered the half-blood claimant as family.
> (4) "Ancestor of the half-blood relative" means lineal ancestors of the claimant whose relationship with the decedent or the decedent's predeceased ancestors was also of the half-blood.
> (5) "Ancestor of the decedent" means lineal ancestors of the decedent whose relationship with the claimant or the predeceased ancestors of the claimant was also of the half-blood.
> (6) A relative of the half-blood who satisfies the requirements of paragraph (1) inherits as though he or she were a relative of the whole-blood.
>
> Comment
>
> The current majority approach to half-bloods and inheritance includes half-blood relatives without inquiry. This draft statute includes half-blood relatives who satisfy either (a) the minimal requirements for "shared upbringing" or (b) the more demanding requirements for establishing a family connection directly with the decedent by "significant interaction." The statute would exclude the claims of previously unknown half-blood survivors such as those in *In re Griswold*, 24 P.3d 1191, 1192 (Cal. 2001) (recognizing a right of half-siblings to inherit from an intestate decedent and thus reducing the inheritance of his wife, even though the decedent had never met half-blood siblings, was apparently unaware of their existence, and the half-siblings were unaware of the decedent until after his death).
>
> To further limit the probate determination to objective facts, a state legislature may specify acts or events that indicate "significant interaction." These might include, for example, cohabitation, intermingling of finances, frequent visits and phone calls, the regular exchange of holiday or birthday cards and gifts, and so forth. Alternatively, a legislature troubled by this prong of the statute may simply limit the inheritance rights of half-bloods to scenarios involving a shared upbringing.
>
> Paragraph (1)(a) applies primarily to the claimant who is a half-sibling of the decedent. It is not limited to that scenario, however, and thus other half-blood relatives who had a shared upbringing with the decedent could be entitled to inherit under this paragraph.

Although a limited objective approach to half-blood relationships might provide better results than existing pure objective probate schemes, convincing state legislatures to take this path would probably be difficult. To date, even when states have extended probate's default rules to acknowledge society's broadening view of family, they have continued to rely primarily on cut-and-dried rules. For example, states that have extended the default rules of intestate succession to unmarried surviving partners have generally placed severe restrictions on eligibility, requiring a public filing or registration to verify the existence of the relationship.[237] In light of states' dogged adherence to fixed, box-like rules, perhaps our best hope concerning half-bloods and inheritance rules is that more states will begin to provide pure objective solutions that reflect the need for compromise.

V. CONCLUSION

Recent inquiries into the default rules of American intestacy law have explored ways to expand those rules to family members who fall outside the norms upon which traditional probate laws are based. Concentrating particularly on spouse-like relationships and parent-child relationships, we have neglected the changing relationships among other family members. Moreover, by focusing on the ways in which traditional default rules are *too narrow* to encompass evolving spouse-like and parent-child relationships, we have ignored an important corollary concern: the ways in which the traditional rules have become *too expansive* in their continued assumption that consanguinity is a reliable gauge for ascertaining family membership. The half-blood relationship is a unique and important area in which most modern probate laws use an overbroad, unduly optimistic default rule to define membership in the modern family.

Paragraph (1)(b) applies primarily when the claimant's predeceased ancestor was the half-sibling of the decedent. Paragraph (1)(c) permits inheritance by distant half-blood relations when the family half-blood division began before the generation in which the decedent was born. For example, if the decedent's predeceased mother and the claimant's predeceased grandmother were half-sisters who had a shared upbringing, the claimant could satisfy the statute. Legislatures troubled by the potential tracing problems presented when the half-blood relationship originated with an ancestor of the decedent may simply limit the inheritance rights of surviving half-bloods to those in which the claimants or their ancestors had a shared upbringing with the decedent.

Although the term "lineal" before "ancestor" in the definition of ancestors in paragraphs (4) and (5) may seem obvious or even redundant, its placement prevents a claimant from asserting the occasionally-encountered usage in which an ancestor refers to *collaterals* of preceding generations. *See, e.g.*, BLACK'S LAW DICTIONARY 84 (6th ed. 1990). The seventh edition of Black's makes it perfectly clear that using the term ascendant (or ancestor) to refer to collateral forbears is "loose" usage. BLACK'S LAW DICTIONARY 108 (7th ed. 1999).

"Ancestor of the half-blood relative" and "ancestor of the decedent" are further defined to indicate that tracing the relationship in question cannot go beyond the generation in which the half-blood family division first occurred. Since all half-blood relationships begin at the sibling level, tracing back to the source of the half-blood split must end there.

237. *See* BRASHIER, *supra* note 5, at 80-88 (discussing inheritance rules for unmarried partners in Hawaii, Vermont, and California).

Today, adults commonly parent children by or with different partners, increasing the numbers of half-blood relationships in society. Many half-blood relatives play no role in each other's lives and may die unaware of their common bond. This is so even among half-blood siblings—the closest biologically of any half-blood relations. Now more than ever, a consanguineous connection through one ancestor alone is an inadequate criterion for determining whether a half-blood survivor is an object of the decedent's bounty. Yet in most states the DNA shared through only one parent or ancestor can make the survivor a laughing heir even when no semblance of a true family relationship exists between the decedent and the survivor.

Now that the strength of family ties among half-blood relatives increasingly runs the gamut, how should state legislatures fashion default rules for half-blood survivors? If there is no *typical* half-blood relationship today, is it time to abandon the rigidity of a one-size-fits-all approach?

A flexible solution could provide probate courts with generous discretion in distributing the intestate estate to or among half-blood survivors. The universe of half-blood relations is a potentially fertile area in which to test discretionary distributive rules that American jurisdictions traditionally consider anathema. Intestacy cases involving half-blood relations would provide a *discrete* testing ground because, even as families change, most intestate estates will not wind up in the hands of collateral relatives since the decedent will be survived by a spouse or issue. Moreover, if the test were successful, states would have more confidence in expanding the discretionary distributive powers of probate courts in other ways to meet the needs of our changing families.

Alternatively, states could base inclusion primarily on objective factors concerning the relationship between the intestate decedent and his half-blood survivors. States could adopt statutes that limit inclusion to scenarios in which the half-blood siblings had a "shared upbringing" or engaged in "significant interaction." These terms and others could be statutorily defined generally or in detail, depending upon how much discretion a legislature wished to introduce into the system. A limited objective approach, of course, is not without flaws. It could still leave the door open for the airing of a family's dirty linen, emotional free-for-alls, and groundless litigation. Moreover, some half-blood survivors whose distant ancestors were the half-blood siblings in question could face a difficult evidentiary hurdle in reconstructing the required evidence of a shared upbringing.

For now, states appear unlikely to adopt either of the preceding approaches. States will continue to assert that laws to effectuate the decedent's intent must be tempered by the economic benefits that result from pure objective rules that are simple to apply and that render predictable results. Among such existing approaches, the majority's inclusive approach and Mississippi's exclusive approach go too far. Universal inclusion ignores the wishes of many decedents to exclude unknown or

unloved half-blood relations; universal exclusion ignores the wishes of many decedents to provide for half-bloods whom they consider family. The ancestral property approach takes a compromise position but has little-or-nothing to do with the probable desires of the decedent. It is largely irrational. The remaining compromise approaches currently in use—the half-as-much and the representative-of-the-parent approaches—strike a meaningful if imperfect bargain between the competing claims of half-blood and whole-blood relatives. Of the pure objective approaches, they are plausible ways to deal with modern families in which a decedent is survived by half-blood relatives.

Evolving family structures have caused states to reassess their default inheritance rules for spouses, children, and unmarried partners. The same evolution in family structure that led to these reassessments has also created an explosion in half-blood relationships, yet states have ignored the unjustifiable results of half-blood statutes designed decades ago. In today's world of half-blood relationships, there is no *typical* decedent for whom states can derive a completely satisfactory, purely objective default inheritance rule. If they dared, states could invest courts with limited distributive discretion and perhaps begin revolutionizing American probate law to meet the needs and desires of individuals in our ever-changing families.