ESSAY

Siblings in Law

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INTRODUCTION

> *Hardly a week goes by that I'm not presented with a proposed parenting plan that separates siblings.*
>
> —Judge Anne Kass[1]

Family law is tightly focused on two relationships: the bond between spouses and the bond between parent and child. The intense and rarely wavering spotlight on marriage and parenthood is so central to the law that it operates as a mostly unstated, yet canonical premise. Scholars note that "the traditional categories of domestic-relations law" are "matrimony and parenthood" without questioning this organizational structure or exploring its consequences.[2] The

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1. Anne Kass, *Splitting Siblings upon Divorce*, FAIRSHARE, Jan. 1998, at 13, 13.

2. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA, at x (1985); *see also infra* Part II.

assumption that family law should be riveted on marriage and parenthood is widely accepted as a matter of simple common sense.

Yet family relationships beyond marriage and parenthood are often crucial to family life. Family law's narrow concentration on marriage and parenthood comes at the expense of considering how the law should regulate and protect other family ties.

Reflexive focus on only two family relationships diverts legal scrutiny and support away from myriad family bonds and many kinds of relatives, such as siblings, grandparents, grandchildren, aunts, uncles, nieces, nephews, and cousins.[3] The effects are manifest throughout the law regulating the rights and responsibilities associated with family status. For instance, an undocumented immigrant living in the United States and raising citizen children may be able to avoid deportation if she is legally connected to the children through parenthood. But she will not be able to avoid deportation if she is legally connected to the children through any other family relationship, no matter how much hardship her deportation will inflict on the children.[4] Likewise, eligible employees have the right under federal law to take up to twelve weeks of unpaid leave a year to care for a seriously ill spouse, child, or parent, but federal law does not entitle workers to even one day of leave to care for any other ill family member.[5] Indeed, family law's focus on marriage and parenthood is so powerful that the law generally does not impose financial support obligations on family members other than spouses, parents, and adult children.[6] Whatever one thinks about this as a policy matter, the choice is notable in light of the state's strong fiscal incentives to compel family members to support their relatives so that

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3. *See, e.g.*, Rohmiller v. Hart, 799 N.W.2d 612, 618 (Minn. Ct. App. 2011) ("Like statutory law, Minnesota caselaw does not confer on courts the right to grant visitation to the sibling of a deceased parent . . . ."); *In re* Katrina E., 636 N.Y.S.2d 53, 53 (App. Div. 1996) ("Family Court correctly ruled that petitioners, the aunt and uncle of children whose care and custody has been transferred to the Commissioner of Social Services, have no standing to sue for visitation. Absent standing, the question of whether such visitation would be in the best interests of the children cannot be considered." (citations omitted)).

4. *See* 8 U.S.C. § 1229b(b)(1) (2006); Immigration & Naturalization Serv. v. Hector, 479 U.S. 85, 86, 88 (1986) (per curiam).

5. *See* Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 102, 107 Stat. 6, 9–11 (codified as amended at 29 U.S.C. § 2612(a)(1), (c) (2006 & Supp. II 2009)); Novak v. MetroHealth Med. Ctr., 503 F.3d 572, 581 (6th Cir. 2007); Krohn v. Forsting, 11 F. Supp. 2d 1082, 1092 (E.D. Mo. 1998).

6. A few states have enacted, although radically underenforced, laws requiring grandparents, grandchildren, or siblings to provide financial support if the recipient relative is needy and unable to support himself and the payer relative is able to provide support. *See* ALASKA STAT. § 47.25.230 (2010); LA. REV. STAT. ANN. § 13:4731 (2006); LA. CIV. CODE ANN. art. 229 (2007); MISS. CODE ANN. § 43-31-25 (2009); UTAH CODE ANN. § 17-14-2 (LexisNexis 2009); W. VA. CODE ANN. § 9-5-9 (LexisNexis 2007).

indigent people do not need to rely on government assistance. The absence of support obligations placed on other relatives, in turn, may help further reinforce family law's interest in marriage and parenthood, as the government often has less to gain economically from protecting and maintaining other family ties.

Family law's intense concentration on marriage and parenthood has left little room for legal attention directed at any other family relationship. The breadth of this exclusion from family law's canon is enormous. Examining the legal treatment of one noncanonical family relationship, whose marginalization in family law is particularly remarkable, can provide a foundation for better understanding the consequences of family law's narrowness.

The sibling relationship offers a striking illustration of a crucial, yet legally neglected, family tie. Siblings can give each other support, love, nurturing, and stability. But the law governing children's family relationships focuses almost exclusively on children's ties with their parents rather than children's ties with their siblings, making only modest, scattered, and unsystematic efforts to safeguard sibling relationships when they are in jeopardy. Siblings who have lived together for years are sometimes separated at adoption or parental divorce or death with no right to contact each other, communicate, or visit. Siblings who are separated early on may have no opportunity and no right even to learn of each other's existence. Nonetheless, sibling relationships have received amazingly little attention from courts, legislatures, and scholars. This Essay uses the example of sibling relationships to explore family law's treatment of noncanonical family ties and to consider some of the reform possibilities that emerge when we expand family law's focus beyond marriage and parenthood.

I. THE SIGNIFICANCE OF SIBLINGS

The sibling relationship is potentially one of life's most significant connections. Siblings can know and support each other from their earliest years through their final ones. The relationship between two siblings, which begins with the birth of the younger sibling and can continue until a sibling dies, is often the longest-lasting relationship that a person ever experiences.[7] Most people have

7. For an account of a particularly long-lasting and close sibling relationship, see SARAH DELANY & A. ELIZABETH DELANY WITH AMY HILL HEARTH, HAVING OUR SAY: THE DELANY SISTERS' FIRST 100 YEARS 5 (1993) ("Bessie is my little sister, only she's not so little. She is 101 years old, and I am 103. . . . Neither one of us ever married and we've lived together most all of our lives, and probably know each other better than any two human beings on this Earth.").

a living sibling until the end or nearly the end of their lives and remain in contact with their siblings throughout.[8] A sibling relationship can last for decades longer than the relationship between a parent and child, which typically ends with the parent's death when the child still has many years left, or the relationship between spouses, who usually do not meet until adulthood.

Strong bonds between siblings can develop remarkably early in life. Many children spend more time with their siblings than with anyone else, except (sometimes) a parent.[9] Moreover, siblings provide children with an opportunity to experience an intimate family relationship that tends to be much more egalitarian than that between parent and child,[10] and that operates to at least some extent outside of parental view.[11] The emotional importance of the sibling relationship can motivate even very small children to understand their siblings extremely well. Children as young as sixteen to eighteen months can comfort their siblings and empathize with them. Two- and three-year-olds can recognize and discuss their siblings' abilities, emotions, plans, and desires.[12]

Siblings who grow up together accumulate a store of shared memories and experiences that can shape each sibling individually and establish a foundation for their lifelong relationships with each other.[13] Indeed, sibling relationships can be so formative that they

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8. *See* JANE MERSKY LEDER, BROTHERS & SISTERS: HOW THEY SHAPE OUR LIVES, at xv, 102, 104 (1991); Victor G. Cicirelli, *Sibling Influence Throughout the Lifespan*, *in* SIBLING RELATIONSHIPS: THEIR NATURE AND SIGNIFICANCE ACROSS THE LIFESPAN 267, 281 (Michael E. Lamb & Brian Sutton-Smith eds., 1982) [hereinafter Cicirelli, *Sibling Influence*]; Victor G. Cicirelli, *Sibling Relationships in Middle and Old Age*, *in* SIBLING RELATIONSHIPS: THEIR CAUSES AND CONSEQUENCES 47, 50–51, 61 (Gene H. Brody ed., 1996) [hereinafter Cicirelli, *Sibling Relationships*].

9. *See* JUDY DUNN, SISTERS AND BROTHERS 4 (1985); LEDER, *supra* note 8, at xv; Don Meyer, *Foreword* to PEGGY GALLAGHER ET AL., BROTHERS & SISTERS: A SPECIAL PART OF EXCEPTIONAL FAMILIES, at ix, ix (3d ed. 2006).

10. *See* VICTOR G. CICIRELLI, SIBLING RELATIONSHIPS ACROSS THE LIFE SPAN 2 (1995); ELIZABETH FISHEL, SISTERS: LOVE AND RIVALRY INSIDE THE FAMILY AND BEYOND 110, 115 (1979); LEDER, *supra* note 8, at 3; Cicirelli, *Sibling Influence*, *supra* note 8, at 268; Michael E. Lamb, *Sibling Relationships Across the Lifespan: An Overview and Introduction*, *in* SIBLING RELATIONSHIPS: THEIR NATURE AND SIGNIFICANCE ACROSS THE LIFESPAN, *supra* note 8, at 1, 6; Laura M. Padilla-Walker et al., *Self-Regulation as a Mediator Between Sibling Relationship Quality and Early Adolescents' Positive and Negative Outcomes*, 24 J. FAM. PSYCHOL. 419, 426 (2010).

11. *See* LEDER, *supra* note 8, at 63.

12. *See* DUNN, *supra* note 9, at 169–70.

13. *See* STEPHEN P. BANK & MICHAEL D. KAHN, THE SIBLING BOND, at xv–xvii (2d ed. 1997); DUNN, *supra* note 9, at 162–63; FISHEL, *supra* note 10, at 113–15; GALLAGHER ET AL., *supra* note 9, at xi; LEDER, *supra* note 8, at xvi, 8, 104–05, 155; SUSAN SCARF MERRELL, THE ACCIDENTAL BOND: THE POWER OF SIBLING RELATIONSHIPS 7–8, 13, 15–16, 142 (1995); Cicirelli, *Sibling Influence*, *supra* note 8, at 268.

often create groundwork and patterns for other close relationships that siblings develop, such as with a romantic partner, spouse, or child.[14]

Sibling relationships can be especially important when other family relationships falter, weaken, change, or end. Children with absent, dysfunctional, or warring parents often forge extraordinarily close and intense sibling bonds that provide the children with solace, nurturing, caretaking, and secure emotional attachments.[15] Adult siblings commonly rely on each other for psychological and material support when a parent becomes ill or dies, when a marriage ends, or during other times of family crisis.[16] Elderly siblings frequently provide each other with comfort, security, companionship, belonging, connectedness, and sometimes material help and caregiving.[17] Many elderly people report that they feel closer to their siblings than to any other family members except their own children.[18] Sibling relationships can be particularly significant later in life when spouses have died and children have left or become preoccupied with other responsibilities.[19]

Elderly siblings who have not maintained affectionate relationships with their brothers and sisters often identify this absence as a source of tremendous regret and loss.[20] Siblings are most likely to develop and sustain strong bonds if they have early, close,

14. *See* CICIRELLI, *supra* note 10, at 114; LEDER, *supra* note 8, at xviii, 38, 62; THEODORE LIDZ, THE PERSON: HIS AND HER DEVELOPMENT THROUGHOUT THE LIFE CYCLE 558 (rev. ed. 1983); MERRELL, *supra* note 13, at 11–12, 14–15.

15. *See* BANK & KAHN, *supra* note 13, at xvii, 19, 64, 112–13; DUNN, *supra* note 9, at 159–60; FISHEL, *supra* note 10, at 109–10; GLORIA HOCHMAN ET AL., NAT'L ADOPTION INFO. CLEARINGHOUSE, THE SIBLING BOND: ITS IMPORTANCE IN FOSTER CARE AND ADOPTIVE PLACEMENT 3 (1992); LEDER, *supra* note 8, at 8, 213–15, 226–27; DOROTHY W. LE PERE ET AL., LARGE SIBLING GROUPS: ADOPTION EXPERIENCES 9 (1986); MERRELL, *supra* note 13, at 59–60, 273; Stephen Bank & Michael D. Kahn, *Intense Sibling Loyalties*, *in* SIBLING RELATIONSHIPS: THEIR NATURE AND SIGNIFICANCE ACROSS THE LIFESPAN, *supra* note 8, at 251, 251.

16. *See* CICIRELLI, *supra* note 10, at 109, 115; DUNN, *supra* note 9, at 159–60, 162–63; FISHEL, *supra* note 10, at 98–99; LEDER, *supra* note 8, at xvi–xvii; Cicirelli, *Sibling Relationships*, *supra* note 8, at 68.

17. *See* CICIRELLI, *supra* note 10, at 109, 115, 201; DUNN, *supra* note 9, at 162–63; LEDER, *supra* note 8, at 104–05; Cicirelli, *Sibling Relationships*, *supra* note 8, at 51, 55, 68.

18. *See* LEDER, *supra* note 8, at 104–05; Cicirelli, *Sibling Influence*, *supra* note 8, at 274.

19. *See* BANK & KAHN, *supra* note 13, at 13; GALLAGHER ET AL., *supra* note 9, at 16–17; Cicirelli, *Sibling Influence*, *supra* note 8, at 274.

20. *See* BANK & KAHN, *supra* note 13, at xxiii.

frequent, and extended contact in childhood.[21] Closeness in sibling relationships rarely originates in adulthood.[22]

II. SIBLINGS IGNORED

Despite the potential significance and value of sibling bonds, legal interest in sibling relationships is radically underdeveloped. This pattern of neglect began at common law and represents an important example of the common law's sustained influence on modern family law.

Common law courts and scholars endlessly discussed, debated, developed, and deployed the law of marriage and parenthood, while addressing siblings rarely. In fact, common law treatises on the family announced in their very titles that they covered "The Law of Baron and Femme" or "Husband and Wife" and the law of "Parent and Child" without mentioning sibling relationships or ties between other family members.[23] The common law recognized sibling relationships, but infrequently considered siblings beyond a few legal contexts, such as incest prohibitions barring siblings from sexual or marital relationships with each other,[24] or intestacy doctrine specifying the circumstances under which a sibling could inherit when a person died without a will.[25]

Legal consideration of siblings is still fragmentary. Family law scholars have written little about sibling relationships, and the law's protection for sibling ties remains unsystematic and incomplete.[26] To

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21. *See id.* at 10; DUNN, *supra* note 9, at 158–59; LEDER, *supra* note 8, at xvii, 81; Cicirelli, *Sibling Influence*, *supra* note 8, at 282–83.

22. *See* Helgola G. Ross & Joel I. Milgram, *Important Variables in Adult Sibling Relationships: A Qualitative Study*, *in* SIBLING RELATIONSHIPS: THEIR NATURE AND SIGNIFICANCE ACROSS THE LIFESPAN, *supra* note 8, at 225, 230.

23. TAPPING REEVE, THE LAW OF BARON AND FEMME; OF PARENT AND CHILD; OF GUARDIAN AND WARD; OF MASTER AND SERVANT (New Haven, Oliver Steele 1816); JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS; EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN AND WARD, INFANCY, AND MASTER AND SERVANT (Boston, Little, Brown, & Co. 1870).

24. *See* SCHOULER, *supra* note 23, at 26–27.

25. *See* 2 EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY 401–35 (Boston, Little, Brown & Co. 1862).

26. For some of the scant legal scholarship to date that has focused on sibling relationships, see Ellen Marrus, *"Where Have You Been, Fran?": The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 TENN. L. REV. 977, 977–78 (1999) ("[W]hen parents decide to separate siblings or half-siblings and deny them all contact or visitation with each other after divorce or the death of a common parent. . . . , I argue that siblings should have standing to sue or should be given other opportunities to voice their wishes in a court before they undergo a lasting separation."); William Wesley Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U. MIAMI L. REV. 745, 784–85 (1994) ("It is

the extent that legislatures have protected sibling relationships at all, they tend to treat that protection more as a legislative gift bestowed at the discretion of lawmakers than as a recognition of the legitimate claims of siblings.

The legal treatment of sibling relationships between minor children is particularly striking. Childhood is the crucial period for forming and solidifying sibling bonds. Moreover, children are systematically more vulnerable than adults to both government and private action that harms them or simply ignores their interests, which makes the availability of legal protection for children's relationships especially important. Yet family law envisions children almost entirely in terms of their relationships with adults—their parents—rather than in terms of their relationships with other children—their siblings.

Consider how family law deals with sibling relationships between children at moments when those relationships are most likely to be threatened, such as when siblings are facing adoption, parental divorce, or a parent's death.[27] Reviewing current law in some depth uncovers some of the places where legislatures and courts confront key choices about whether and how to protect sibling relationships, and illustrates some of the ways in which existing law largely fails to safeguard sibling bonds.

A. Adoption

Adoption can separate siblings and legally terminate their relationship. Siblings separated by adoption have written and spoken about the "pain,"[28] " 'sad[ness],' "[29] and "complete shock"[30] that such a

time for the Court to declare . . . that siblings have a fundamental liberty interest in associating, and that only after a procedurally fair due process hearing may the State separate siblings and only then because it is the least drastic alternative in the children's best interest."); Barbara Jones, Note, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1188 (1993) ("This Note argues that siblings possess a fundamental constitutional right to maintain relationships with each other. Additionally, this Note asserts that courts should recognize that the right of siblings to associate with each other is equal to the right of parents to rear their children. When the sibling's rights and the parent's rights collide, the constitutional arguments should cancel each other out. Courts should instead consider the best interests of the children to determine whether to permit visitation.").

27. Parents in an intact marriage can also impose obstacles on sibling relationships. *See In re* Interest of D.W., 542 N.W.2d 407, 409–10 (Neb. 1996); Weber v. Weber, 524 A.2d 498, 498 (Pa. Super. Ct. 1987).

28. Brenden Timpe, *Family Sorrow, Family Miracle*, GRAND FORKS HERALD, June 27, 2004, at 1A ("[Dovie] Rumbaugh recalled pain at being separated from her siblings as a child. When Herb was adopted, she said, she stood in a corner and cried all day. When Della left, she was told they were just taking a vacation. 'Two years later, I thought, 'That's an awful long vacation,' ' she said.").

separation can inflict. One sixteen-year-old, whose brother was adopted away in the early 1990s at the age of six,[31] wrote three years later that she thought of her brother "every day—so much that it hurts. It hurts the most when his birthday passes. He's getting older without me."[32] She had no right to contact her brother, to visit him, or to know where he lived. Her brother's adoptive parents had never responded to her request that they permit visits. Indeed, the adoptive parents had changed her brother's first and last name, and she did not know either.[33] Another woman, the oldest of four sisters separated for adoption in 1989 when they were thirteen, eight, four, and three, reported eleven years later that finding her sisters " 'was something I dreamed of and cried myself to sleep over many nights.' "[34] One of the woman's sisters said that after the separation " '[e]very night I would cry and pray; all I ever wanted was my sisters.' "[35]

Some people who were separated from their siblings by adoption have spent decades attempting to locate their siblings again. One man, unable to discover any information about his adopted away sister, checked the personal ads in his city's newspapers " '[e]very day for about 30 years' " in the hopes of discovering news of her.[36] One family " 'put ads to [their adopted away sister] in the newspaper, like 'Happy 32nd birthday. Wish we knew who you were,' ' " in the hope of attracting their sister's attention.[37] A woman who finally found her adopted away siblings after thirty-one years explained: " 'I was determined to find my sister and brother because I remembered them and I loved them. Because they're my sister and brother.' "[38] Another woman, who searched for her adopted away sister for more than forty

29. Tom Droege, *Putting the Pieces Together: East Tulsan Meets with Siblings for First Time in 13 Years*, TULSA WORLD, Sept. 13, 2000, at 4 East ("Her mother's funeral in 1987 was the last time East Tulsan Michelle Skelton, 28, saw her seven brothers and sisters. 'I have pictures of them waving from the car as they were leaving the funeral,' Skelton said. 'That was the saddest thing in the world.' ").

30. Wunika Hicks, *I Lost My Brother to Adoption*, *in* THE HEART KNOWS SOMETHING DIFFERENT: TEENAGE VOICES FROM THE FOSTER CARE SYSTEM 30, 31 (Al Desetta ed., 1996).

31. *See id.* at 31, 33.

32. *Id.* at 32.

33. *See id.* at 31–32.

34. Kim Horner, *Almost Complete: Three Sisters Reunite 11 Years After Separation—and Wonder About a Fourth*, DALL. MORNING NEWS, Aug. 28, 2000, at 17A (quoting Misty Hayner).

35. *Id.* (quoting April Hartline Norris).

36. Linnet Myers, *40 Years After Adoption, Sister Finds Her Family*, CHI. TRIB., May 25, 1990, § 2, at 3 (quoting William Wimmer).

37. Michele Lesie, *Seeking Their Past: Registry Helps Adoptees Find Origins*, PLAIN DEALER (Cleveland), Nov. 23, 1996, at 1-E (quoting Theresa Emerson).

38. Stephanie Simon, *Years Apart, 14 Find They're All in Family*, CHI. TRIB., July 6, 1990, § 2, at 1 (quoting Linda Jones).

years, recounted "that as the oldest sibling, she ha[d] always dreamed of finding her sister."[39] A man who looked for his two adopted away sisters for twenty years described life without his sisters as " 'like a circle that wasn't complete.' "[40] One of his sisters reported after the siblings were reunited that finding her brother " 'filled a hole in [her] heart.' "[41] The other sister explained " '[t]hat missing piece of the puzzle is gone now. Now, we've got our brother back.' "[42]

Even adopted children who do not know if they have biological siblings express a strong desire to discover whether they have such siblings, to meet their siblings, and to have an ongoing relationship with them.[43]

People who learn in adulthood that they have a biological sibling who was adopted by another family often begin extensive searches for their brother or sister. They can spend hours or years "searching the Internet and writing e-mails," employing lawyers,[44] "filling out forms and waivers,"[45] or seeking the help of newspaper publicity.[46] Some siblings who manage to find one another for the first time as adults develop close relationships, "exchang[ing] thousands of e-mails,"[47] "getting together about once a week,"[48] " 'talk[ing] every day,' "[49] or "talk[ing] twice a day."[50]

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39. Kevan Goff-Parker, *OKDHS Adoption Subsidy Employee Judy Ott Finds Long-Lost Sister After More than 40 Years*, OKLA. WOMAN, Sept. 2004, at 5, 5.

40. Elbert Starks III, *Search Mends Shattered Family: Siblings Are Reunited in Wadsworth Decades After Their Mother's Tragic Death Tore Them Apart*, AKRON BEACON J., Feb. 7, 2005, at B1 (quoting Rick Panther).

41. *Id.* (quoting Deborah Conway).

42. *Id.* (quoting Wendy Miracle).

43. *See* Jerica M. Berge et al., *Adolescent Sibling Narratives Regarding Contact in Adoption*, 9 ADOPTION Q. 81, 99 (2006).

44. Christopher Woytko, *Family Finds Long-Lost Brother*, READING EAGLE, Aug. 31, 2007, at C2.

45. Christine Show, *Finally, Reunited: Brother and Sister Separated as Children, Adopted by Different Families, Find Each Other After Long Search*, NEWSDAY (Long Island), July 29, 2006, at A5.

46. *See* Mick Walsh, *Ohio Couple Looking for a Long-Lost Brother: May Have Been Adopted by a Columbus Family More than 50 Years Ago*, COLUMBUS LEDGER-ENQUIRER, July 22, 2006, at A1.

47. ELYSE SCHEIN & PAULA BERNSTEIN, IDENTICAL STRANGERS: A MEMOIR OF TWINS SEPARATED AND REUNITED, at vii (2007).

48. Valerie Schremp Hahn, *3 Sisters Separated by Adoption Are Reunited and Sharing Lives*, ST. LOUIS POST-DISPATCH, Dec. 27, 2004, at N2.

49. Elizabeth Moore, *Sisters Get Together, 4 Decades Later: Separated by Adoption, 2 Are Reunited*, STAR-LEDGER (N.J.), Nov. 17, 2002, at 27 (quoting Fran Joans).

50. Show, *supra* note 45, at A5.

Adoption law historically did not create a "presumption" in favor of keeping siblings together,[51] much less impose an "affirmative duty" on states to do so.[52] If siblings were adopted into separate families, moreover, the law considered their relationship severed and made no provision for contact, visitation, or even the opportunity to learn of a sibling's existence. The operative premise was that biological siblings were legally connected through their relationship with a shared parent or parents. Once a child's legal relationship with her birth parents ended, siblings no longer had any legally recognized tie to each other.

Although there has been some reform in recent years, adoption law's attempts to protect sibling relationships remain relatively modest and sporadic. This Section starts with the law governing whether siblings available for adoption are placed in the same adoptive home and then turns to how the law treats siblings who are separated by adoption.

Federal law and the law of some states display some concern about placing siblings available for adoption together. For instance, federal law conditions some federal funding on a state's agreement to make "reasonable efforts" "to place siblings removed from their home in the same . . . adoptive placement, unless the State documents that such a joint placement would be contrary to the safety or well-being of any of the siblings." However, federal law neither elaborates on what "reasonable efforts" means nor specifies the documentation that states must produce to separate siblings.[53] Moreover, a United States District Court has held that this law creates no privately enforceable rights.[54]

The state statutes and regulations that have been promulgated thus far vary markedly in their commitment to placing siblings with the same adoptive parents. New York and Massachusetts are on the more protective end of the spectrum, at least according to the text of their rules. In New York, "[m]inor siblings or half-siblings who are free for adoption must be placed together in a prospective adoptive family home unless the [agency] determines" "after a careful assessment" according to specified criteria "that such placement would be detrimental to the best interests of one or more of the children."[55]

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51. Adoption of Hugo, 700 N.E.2d 516, 524 (Mass. 1998).

52. *In re* Gerald J., 2 Cal. Rptr. 2d 569, 574 (Ct. App. 1991).

53. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 206, 122 Stat. 3949, 3962 (codified at 42 U.S.C. § 671(a)(31)(A) (Supp. II 2009)).

54. *See* BK v. N.H. Dep't of Health & Human Servs., 814 F. Supp. 2d 59, 64–71 (D.N.H. 2011).

55. N.Y. COMP. CODES R. & REGS. tit. 18, §§ 421.2(e), 421.18(d)(3) (2008).

Massachusetts provides that "[s]iblings shall be placed in the same . . . adoptive home unless the [agency] documents a written explanation in the children's record as to why such placement is not in the best interest of the children."[56]

Some states are less rigorous in their attempts to place siblings together at adoption. Arizona provides that the state "shall make reasonable efforts to place" a child available for adoption "with the child's siblings," "unless a court determines that . . . the placement . . . would be contrary to the child's or a sibling's safety or well-being."[57] Missouri just provides that adoption agencies "shall make reasonable efforts to place siblings together."[58]

In addition, most state law on the placement of siblings for adoption focuses exclusively on siblings who are available for adoption at the same time. Few states address situations in which one or more siblings have already been adopted and another sibling subsequently becomes available for adoption. The statutes that do cover this situation range widely in the protection they offer to sibling relationships. Consider the law in West Virginia, Florida, and Illinois. West Virginia and Florida provide that the state must notify a parent who has adopted one sibling if another sibling becomes available for adoption,[59] while Illinois law provides that the state will "make a good faith effort to" provide such notification.[60] If the first sibling's adoptive parent would like to adopt the second sibling, West Virginia specifies that the state may keep the siblings apart only by presenting a court with "clear and convincing evidence" that the adoption would be contrary to the best interests of one or both siblings.[61] Somewhat less protectively, Florida provides that an adoption application from the first sibling's adoptive parent "will be given the same consideration as an application for adoption by a relative."[62] Less protectively still, Illinois law creates no preference in favor of the first sibling's adoptive parent, but instead instructs the state Department of Children and Family Services to consider at least eight factors in deciding who

56. 102 MASS. CODE REGS. 5.08(10) (1998).

57. ARIZ. REV. STAT. ANN. § 8-513(D) (Supp. 2010).

58. MO. CODE REGS. ANN. tit. 13, § 40-73.080(5)(C) (1998).

59. *See* FLA. ADMIN. CODE ANN. r. 65C-16.002(4)(e) (2007); W. VA. CODE ANN. § 49-2-14(d) (LexisNexis 2009).

60. 20 ILL. COMP. STAT. ANN. 505/7.4(a) (West 2008).

61. W. VA. CODE ANN. § 49-2-14(e). For a case enforcing this statute, see *In re* Carol B., 550 S.E.2d 636, 644–45 (W. Va. 2001).

62. FLA. ADMIN. CODE ANN. r. 65C-16.002(4)(e).

should adopt the second sibling, one of which is "the family ties between the child and the child's relatives, including siblings."[63]

When siblings are adopted into separate families, many states continue to treat the sibling relationship as terminated. The law's focus remains on the connection between parent and child. For instance, an Illinois appellate court has explained that "[o]nce an unrelated adoption takes place, the child's previous ties are completely severed. For all practical and legal purposes, the child's biological relationships end. The child becomes the legal child of the adoptive parents. Decisions and control over the adopted child's life are turned over to the adoptive parents. In an unrelated adoption, there simply is no authority for visitation with the child's biological family."[64] The West Virginia Supreme Court has reported that "[t]he right to sibling visitation does not apply in adoption cases."[65] Virginia law provides that except in adoptions by a new spouse of a birth or adoptive parent, siblings "shall, by final order of adoption, be divested of all legal rights and obligations in respect to the child including the right to petition any court for visitation with the child."[66]

With little apparent effect to date, federal law conditions some federal funding on a state's agreement to make "reasonable efforts"—a term again left undefined—"to provide for frequent visitation or other ongoing interaction between the siblings [separated by adoption], unless that State documents that frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings."[67]

Some state statutes mention visitation or communication between siblings separated by adoption, but most of these laws impose no requirements on adoptive parents and confer no rights on siblings. One common pattern is for state laws that discuss postadoption sibling contact to focus on advice and encouragement. For instance, Iowa requires adoption agencies to "[e]ncourage prospective adoptive parents to plan for facilitating postadoption contact between the child and the child's siblings." Iowa also requires adoption agencies to "[p]rovide prospective adoptive parents with information regarding the child's siblings" and "information regarding the importance of

63. 20 ILL. COMP. STAT. ANN. 505/7.4(b).

64. Harold K. v. Ryan B., 730 N.E.2d 88, 95 (Ill. App. Ct. 2000) (citation omitted); *see also In re* M.M., 619 N.E.2d 702, 713 (Ill. 1993); Donte A. v. Charlene T., 631 N.E.2d 257, 263 (Ill. App. Ct. 1994).

65. Lindsie D.L. v. Richard W.S., 591 S.E.2d 308, 312 n.3 (W. Va. 2003).

66. VA. CODE ANN. §§ 63.2-1215, 63.2-1241 (2007).

67. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, § 206, 122 Stat. 3949, 3962 (codified at 42 U.S.C. § 671(a)(31)(B) (Supp. II 2009)).

sibling relationships to an adopted child."[68] California law does the same,[69] and case law in California makes clear that neither adoption agencies nor courts in California have the authority to compel an adoptive parent to permit visitation between siblings separated by adoption.[70] Colorado law similarly limits itself. It instructs courts to "inquire as to whether the adoptive parents have received counseling regarding children in sibling groups maintaining or developing ties with each other" and states that "if the adoptive parents are willing, the court may encourage reasonable visitation among the siblings when visitation is in the best interests of the child or the children."[71] Maine law provides that the state "shall make reasonable efforts to establish agreements with prospective adoptive parents that provide for reasonable contact between an adoptive child and the child's siblings when the [state] believes that the contact will be in the children's best interests."[72] Washington instructs courts reviewing and approving agreements to adopt a child from foster care to "encourage the adoptive parents, birth parents, foster parents, kinship caregivers, and the department [of social and health services] or other supervising agency to seriously consider the long-term benefits to the child adoptee and siblings of the child adoptee of providing for and facilitating continuing postadoption contact between siblings."[73]

Other state laws permit courts to issue orders providing for postadoption sibling contact, but only if adoptive parents agree. For example, Indiana authorizes courts issuing adoption decrees to order "specific postadoption contact for an adopted child who is at least two (2) years of age with a pre-adoptive sibling," but only if "each adoptive parent consents to the court's order for postadoption contact privileges" and "the court determines that the postadoption contact would serve the best interests of the adopted child."[74] Louisiana law similarly provides that courts may approve agreements that adoptive parents have made for postadoption sibling contact if "[t]he child has an established, significant relationship with [the child's sibling] to the extent that its loss would cause substantial harm to the child" and "[t]he preservation of the relationship would otherwise be in the best

68. IOWA CODE ANN. § 232.108(6) (West Supp. 2010).

69. *See* CAL. WELF. & INST. CODE § 16002(e) (West Supp. 2010).

70. *See In re* Celine R., 71 P.3d 787, 794 (Cal. 2003); *In re* Daniel H., 121 Cal. Rptr. 2d 475, 481 (Ct. App. 2002).

71. COLO. REV. STAT. § 19-5-210(7) (2009).

72. ME. REV. STAT. ANN. tit. 22, § 4068(2) (Supp. 2009).

73. WASH. REV. CODE ANN. § 26.33.430 (West Supp. 2010); *see also id.* § 26.33.190(2)(c).

74. IND. CODE ANN. § 31-19-16.5-1 (LexisNexis 2007); *see also id.* § 31-19-16.5-4.

interest of the child."[75] Tennessee law explicitly states that "[t]he adoptive parents of a child shall not be required by any order of the adoption court to permit visitation by any other person." Adoptive parents in Tennessee may, "in their sole discretion," decide to allow sibling visitation or other sibling contact, but even if adoptive parents agree "to permit visitation or contact" their agreement does not give siblings "any enforceable rights."[76]

Only a few states permit courts to order postadoption sibling contact over an adoptive parent's objection. Florida law authorizes courts to order postadoption sibling communication or contact for a child adopted from the custody of the state "[i]f the court determines that the child's best interests will be served by postadoption communication or contact." "Statements of the prospective adoptive parents" are one factor courts must consider in deciding whether to order postadoption sibling communication or contact, but not the only factor.[77] However, an adoptive parent in Florida may petition at any time for review of a sibling communication or contact order, and a court may terminate or modify the order if the court determines that doing so is in the adopted child's best interests.[78] Nevada authorizes courts in adoption proceedings to grant siblings "a reasonable right to visit" the adopted child if a court previously gave the siblings "a reasonable right to visit the child" when her parent died, divorced, separated, or lost or relinquished parental rights.[79] Arkansas law provides that "[s]ibling visitation shall not terminate if the adopted child was in the custody of the Department of Human Services and had a sibling who was not adopted by the same family and before adoption the circuit court in the juvenile dependency-neglect or families-in-need-of-services case has determined that it is in the best interests of the siblings to visit and has ordered visitation between the siblings to occur after the adoption."[80]

In addition, a few states give siblings themselves the right to seek postadoption contact with each other. For example, Massachusetts permits "[a]ny child over 12 years of age [to] request visitation with siblings who . . . have been adopted in a foster or

75. LA. CHILD. CODE ANN. art. 1269.2(A) (Supp. 2010).

76. TENN. CODE ANN. § 36-1-121(f) (2005); *see also* N.M. STAT. ANN. § 32A-5-35(A) (West Supp. 2009); N.Y. DOM. REL. LAW § 112-b(2) (McKinney 2010); WASH. REV. CODE ANN. § 26.33.295(2) (West Supp. 2010).

77. FLA. STAT. ANN. § 63.0427(1) (West 2005).

78. *See id.* § 63.0427(2).

79. NEV. REV. STAT. ANN. § 127.171(1) (LexisNexis Supp. 2009); *id.* § 125C.050(1), (7) (2004).

80. ARK. CODE ANN. § 9-9-215(c) (Supp. 2011).

adoptive home other than where the child resides."[81] When a child is being adopted by a stepparent, Vermont permits the child's sibling to request postadoption visitation or communication. Vermont authorizes courts to grant the request if it is in the adopted child's best interests, taking into account "any objections to the requested order by the adoptive stepparent and the stepparent's spouse."[82] A sibling in New Jersey may petition for postadoption visitation and receive it if she can prove "by a preponderance of the evidence that visitation is necessary to avoid harm to the" brother or sister who has been adopted away from her.[83] Maryland law provides that "[a]ny siblings who are separated due to a[n] . . . adoptive placement may petition a court, including a juvenile court with jurisdiction over one or more of the siblings, for reasonable sibling visitation rights." Maryland instructs a court considering such a petition to "weigh the relative interests of each child and base its decision on the best interests of the children promoting the greatest welfare and least harm to the children."[84]

Even where they do exist, however, laws authorizing siblings to seek postadoption contact and laws empowering courts to order such contact over an adoptive parent's objection may be unconstitutional under the Supreme Court's plurality opinion in *Troxel v. Granville*.[85] The *Troxel* plurality held that a Washington state statute authorizing courts to " 'order visitation rights for any person when visitation may serve the best interest of the child' "[86] was unconstitutional as applied where a Washington Superior Court had granted a nonparent visitation petition under the statute without according "any material weight" to the mother's determination of her children's best interests.[87] The Superior Court had given two paternal grandparents the right to visit with their granddaughters for one weekend per month, one week in the summer, and four hours on each grandparent's birthday. This was less visitation than the grandparents had sought after their son's death, but more than the one short visit per month plus some holidays that the children's

81. MASS. ANN. LAWS ch. 119, § 26B(b) (LexisNexis 2009). For decisions implementing this provision, see Adoption of Pierce, 790 N.E.2d 680, 685 (Mass. App. Ct. 2003); Adoption of Galvin, 773 N.E.2d 1007, 1009 (Mass. App. Ct. 2002).

82. VT. STAT. ANN. tit. 15A, § 4-112(c)–(d) (2002).

83. *In re* D.C., 4 A.3d 1004, 1021 (N.J. 2010) (citation and internal quotation marks omitted).

84. MD. CODE ANN., FAM. LAW § 5-525.2(b) (LexisNexis 2006).

85. 530 U.S. 57 (2000) (plurality opinion).

86. *Id.* at 61 (citation omitted).

87. *Id.* at 72.

mother wanted to allow.[88] The *Troxel* plurality concluded that awarding the grandparents visitation based simply on the children's best interests "was an unconstitutional infringement on [the mother's] fundamental right to make decisions concerning the care, custody, and control of her two daughters."[89]

As *Troxel* illustrates, the Court's current constitutional jurisprudence on children's family ties focuses tightly on the parent-child relationship, exemplifying and helping to perpetuate family law's reflexive privileging of marriage and parenthood. This narrow focus, adopted with scant consideration of alternatives, is misguided in my view. The Court's constitutional decisionmaking could benefit enormously from a much more systematic exploration of the value of noncanonical family relationships.[90] But as the Court's case law is now organized, laws authorizing postadoption sibling contact without an adoptive parent's agreement may unconstitutionally infringe on the strong vision of parental autonomy that *Troxel* endorsed, unless perhaps courts interpret these laws to mean that judges deciding whether to authorize postadoption sibling contact over an adoptive parent's objection must give substantial weight to the parent's judgment about what is in his child's best interests.

B. Parental Divorce or Death

Let's turn to divorce. Siblings whose parents divorce are still legally recognized as siblings. But parental divorce can leave siblings in separate households and threaten the maintenance of functioning ties between siblings, at a time when children often have more need than ever for support and stability in their sibling relationships.[91]

Some siblings who were separated after their parents' divorce have described the hurt and loss that they experienced. One woman recounted her separation from her brother this way: " 'When I was little . . . my mom and dad had a divorce and my brother and I were split. The father took him and my mother took me. It's hard at 5 years old to be playing with your brother all this time and all of a sudden

88. *See id.* at 60–61, 71.

89. *Id.* at 72.

90. For a rare counterexample to the Court's narrow focus on marriage and parenthood, see Moore v. City of E. Cleveland, 431 U.S. 494, 504 (1977) (plurality opinion) ("Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household along with parents and children has roots equally venerable and equally deserving of constitutional recognition.").

91. *See* Lori Kaplan et al., *Splitting Custody of Children Between Parents: Impact on the Sibling System*, 74 FAMILIES SOC'Y: J. CONTEMP. HUM. SERVICES 131, 133 (1993).

he's gone and you can't see him and talk to him.' "[92] Another woman wrote that she "was left with a broken heart" after her divorcing parents separated their children, with the father getting custody of her and the mother getting custody of her sister and brother.[93] A third woman's parents separated when she was an infant. Her mother took her, and her father took her sister. When she learned of her sister's existence five years later, she "recall[ed] feeling a combination of anger, hurt, frustration, and powerlessness in being denied a sibling relationship for so long."[94]

Divorce courts in every state will sometimes split custody of siblings between parents so that some siblings live with one parent and other siblings live with the second parent. One study of contested custody cases found that courts awarded split custody 3.1% of the time when the mother requested sole physical custody and the father requested joint physical custody, that courts awarded split custody 7.5% of the time when each parent requested sole physical custody, and that courts awarded split custody 14.2% of the time when the mother requested joint physical custody and the father requested sole physical custody.[95] Another study of child custody awards found that "[s]plit custody was awarded in 13 percent of the disputed cases but in only 4 percent of the couples without a formal dispute."[96] The same study found that split custody "occurred in about 5 percent of the cases [overall] and this percentage did not change significantly from 1970 to 1993."[97]

Sometimes courts ordering split custody are attempting to resolve custody disputes between two parents who each want custody of all their children. Sometimes courts accept split custody plans that one parent has advocated or that both parents support and perhaps have already implemented upon separating. Split custody can appeal to a parent as a way of distributing the financial burdens and psychological benefits of childrearing. Alternatively or in addition, split custody can appeal to a parent who feels closer ties to some of his children rather than others. For instance, split custody often operates along sex-based lines, with mothers receiving custody of girls and

92. Larry Powell, *Long-Overdue Reunion Is a Good Reason To Give Thanks*, DALL. MORNING NEWS, Nov. 24, 1988, at 38A (quoting Janie Owens).

93. Debra Nisson, *Sisters Reunited After 23 Years*, HOUS. CHRON., June 26, 1994, at 1G.

94. Marrus, *supra* note 26, at 978.

95. *See* ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 104 tbl.5.4 (1992).

96. Stephen J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247, 257 (1994).

97. *Id.* at 259.

fathers receiving custody of boys.[98] A family court judge in Albuquerque, New Mexico, reported that "[h]ardly a week goes by that [she is] not presented with a proposed parenting plan that separates siblings." The judge recounted one case that "involved a dad who insisted on taking the younger of his two sons—the one who looked just like dad. The boys were 18 months apart in age. Within a year of separation, the older boy had become a 'failure-to-thrive' child."[99] In each of these scenarios, courts and/or parents sometimes envision split custody as a way of promoting strong relationships between parents and the children left in their custody, even as this arrangement may harm or disregard sibling ties.

Some courts appear to impose no presumptions against split custody at divorce. They split the custody of siblings when that is "desirable,"[100] "reasonable,"[101] or "best,"[102] or they treat the separation of siblings as just one factor among many for a court to take into account in determining custody.[103] Some state statutes similarly include a child's relationship with siblings as one factor for courts to consider in deciding custody.[104]

Other courts have announced varying presumptions against split custody, requiring what they deem to be "exceptional"

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98. For examples of cases upholding split custody along sex-based lines, see Hepburn v. Hepburn, 659 So. 2d 653, 654–55 (Ala. Civ. App. 1995); Matias v. Matias, 948 So. 2d 1021, 1022–23 (Fla. Dist. Ct. App. 2007); *In re* Marriage of Pundt, 547 N.W.2d 243, 244–46 (Iowa Ct. App. 1996); *In re* Marriage of Williams, 90 P.3d 365, 366–67 (Kan. Ct. App. 2004); Durbin v. Durbin, 226 S.W.3d 876, 880–81 (Mo. Ct. App. 2007) (per curiam); Replogle v. Replogle, 903 S.W.2d 551, 554–56 (Mo. Ct. App. 1995); Lightbody v. Lightbody, 840 N.Y.S.2d 131, 132–33 (App. Div. 2007); Harris v. Harris, 647 A.2d 309, 314 (Vt. 1994); Gooch v. Gooch, 575 S.E.2d 628, 632 (W. Va. 2002) (per curiam).

99. Kass, *supra* note 1, at 13.

100. BeauLac v. BeauLac, 649 N.W.2d 210, 216 (N.D. 2002).

101. *In re* Paternity of B.D.D., 779 N.E.2d 9, 14–15 (Ind. Ct. App. 2002).

102. Puddicombe v. Dreka, 167 P.3d 73, 78 (Alaska 2007) (citation and internal quotation marks omitted).

103. *See* A.B. v. J.B., 40 So. 3d 723, 729–30 (Ala. Civ. App. 2009) (per curiam); Foskett v. Foskett, 634 N.W.2d 363, 369 (Mich. Ct. App. 2001); Price v. McBeath, 989 So. 2d 444, 459 (Miss. Ct. App. 2008); Kay v. Ludwig, 686 N.W.2d 619, 630–31 (Neb. Ct. App. 2004); Gardner v. Gardner, 229 S.W.3d 747, 754 (Tex. Ct. App. 2007); *Harris*, 647 A.2d at 313–14; Hughes v. Gentry, 443 S.E.2d 448, 451–52 (Va. Ct. App. 1994); Blakely v. Blakely, 218 P.3d 253, 256 (Wyo. 2009).

104. *See* ARIZ. REV. STAT. ANN. § 25-403(A)(3) (Supp. 2011); COLO. REV. STAT. § 14-10-124(1.5)(a)(III) (2011); D.C. CODE § 16-914(a)(3)(C) (LexisNexis Supp. 2010); IDAHO CODE ANN. § 32-717(1)(c) (Supp. 2011); IND. CODE ANN. §§ 31-14-13-2(4)(B), 31-17-2-8(4)(B) (LexisNexis 2007); KY. REV. STAT. ANN. § 403.270(2)(c) (LexisNexis 2010); MINN. STAT. § 518.17(1)(a)(5) (2010); MO. ANN. STAT. § 452.375(2)(3) (West Supp. 2012); N.J. STAT. ANN. § 9:2-4 (West 2002); N.M. STAT. ANN. § 40-4-9(A)(3) (West 2003); VA. CODE ANN. § 20-124.3(4) (Supp. 2011).

circumstances,[105] "overwhelming"[106] or "strong need,"[107] or "compelling"[108] or "overriding reasons."[109] But courts apply these declared standards with virtually unfettered discretion, remarkable inconsistency, and frequently questionable logic.

A presumption against split custody that sounds strict in theory often means much less in practice. For instance, Kansas is a rare state with a statute addressing split custody. The law provides that "[i]n an exceptional case, the court may order a residential arrangement in which one or more children reside with each parent and have parenting time with the other."[110] However, the Kansas Court of Appeals has interpreted this statutory language in a manner that appears to eliminate any actual requirement of exceptional circumstances, holding that "when the district court makes a finding, supported by substantial competent evidence, that divided custody is in a child's best interests, the court has met the requirement of establishing an 'exceptional case.' "[111]

Similarly, the arguments that some parents advance for split custody arrangements along sex-based lines, and that some courts endorse, reflect deeply gendered understandings about what skills are important for children and even about which children are most valuable to parents. These arguments are typically presented and sometimes accepted with little scrutiny or reflection about the sex roles and sex-based hierarchy that they assume, enforce, and perpetuate. One Vermont family court ordering split custody on sex-based lines "suggested that [the son] had a natural affinity for his father, who teaches him 'things a young boy should know,' " including "fishing, hunting, and softball."[112] The Vermont Supreme Court affirmed the split custody order on appeal, insisting that the family court had not violated a Vermont statute prohibiting courts from

105. KAN. STAT. ANN. § 23-3207(b) (Supp. 2011); *In re* Marriage of Williams, 90 P.3d 365, 370 (Kan. Ct. App. 2004); Lloyd v. Butts, 37 S.W.3d 603, 607 (Ark. 2001); Sykes v. Warren, 258 S.W.3d 788, 793 (Ark. Ct. App. 2007); Durbin v. Durbin, 226 S.W.3d 876, 880 (Mo. Ct. App. 2007) (per curiam) (" 'exceptional or unusual circumstances' " (citation omitted)).

106. Valenti v. Valenti, 869 N.Y.S.2d 266, 269 (App. Div. 2008).

107. Sanders v. Sanders, 923 So. 2d 721, 725 (La. Ct. App. 2005).

108. *In re* Marriage of Williams, 105 Cal. Rptr. 2d 923, 924 (Ct. App. 2001); Matias v. Matias, 948 So. 2d 1021, 1022–23 (Fla. Dist. Ct. App. 2007); *In re* Marriage of Pundt, 547 N.W.2d 243, 245 (Iowa Ct. App. 1996); Brawley v. Brawley, 734 So. 2d 237, 241 (Miss. Ct. App. 1999); Saintz v. Rinker, 902 A.2d 509, 513 (Pa. Super. Ct. 2006); Hathaway v. Bergheim, 648 N.W.2d 349, 352 (S.D. 2002).

109. *In re* Marriage of Morales, 159 P.3d 1183, 1189 (Or. Ct. App. 2007).

110. KAN. STAT. ANN. § 23-3207(b).

111. *In re* Marriage of Williams, 90 P.3d 365, 370 (Kan. Ct. App. 2004).

112. Harris v. Harris, 647 A.2d 309, 314, 312 (Vt. 1994).

" 'apply[ing] a preference for one parent over the other because of the sex of the child [or] the sex of a parent.' "[113] An Iowa father who sought custody of his son, but not his two daughters, explained that he and his son "had similar interests, such as watching sports and playing basketball." The father singled out his son as "his best friend." The mother, who sought custody of all three children, testified that the father "was polarizing the family along gender lines" by "favor[ing]" their son and "not exhibit[ing] much interest in the girls. She felt that while in [the father's] care, [the son] began to exhibit more of a disparaging attitude towards the girls. She testified the girls missed [their brother], and she felt it would be better not to separate the children."[114] The Iowa Court of Appeals announced that "[g]ood and compelling reasons must exist" for splitting custody,[115] yet ordered split custody in this case nonetheless.[116]

Half-siblings are especially likely to be separated at divorce or when their shared parent dies.[117] Half-siblings who grow up together can develop extremely close relationships. They often do not distinguish between full and half-siblings, thinking about each other just as sisters and brothers. In contrast, half-siblings with little contact in childhood tend to have more distant relationships in adulthood and to think about each other in ways that emphasize their different histories rather than their shared ties.[118]

Custody law frequently adds obstacles to the development of close ties between half-siblings. While some courts considering split custody extend the same protections to full and half-sibling relationships,[119] many courts refuse to apply their presumptions against splitting custody of full siblings to cases involving half-siblings. These latter decisions treating half-siblings differently

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113. *Id.* at 314 (quoting VT. STAT. ANN. tit. 15, § 665(c)).

114. *In re* Marriage of Pundt, 547 N.W.2d 243, 244 (Iowa Ct. App. 1996).

115. *Id.* at 245.

116. *See id.* at 246.

117. For examples of half-siblings separated after the death of their shared parent, see J.M.W. v. C.C., 736 So. 2d 644, 645 (Ala. Civ. App. 1999); Lihs v. Lihs, 504 N.W.2d 890, 891 (Iowa 1993); Jones v. Willis, 996 So. 2d 364, 372 (La. Ct. App. 2008); Mills v. Hardy, 842 So. 2d 443, 444–45, 453 (La. Ct. App. 2003); Scruggs v. Saterfiel, 693 So. 2d 924, 925 (Miss. 1997); D.N. v. V.B., 814 A.2d 750, 751–52 (Pa. Super. Ct. 2002).

118. *See* LAWRENCE H. GANONG & MARILYN COLEMAN, REMARRIED FAMILY RELATIONSHIPS 104 (1994); Lawrence H. Ganong & Marilyn Coleman, *Do Mutual Children Cement Bonds in Stepfamilies?*, 50 J. MARRIAGE & FAM. 687, 696 (1988).

119. *See* A.B. v. J.B., 40 So. 3d 723, 729–30 (Ala. Civ. App. 2009) (per curiam); *In re* Marriage of Quirk-Edwards, 509 N.W.2d 476, 480 (Iowa 1993); *In re* Marriage of Swenka, 576 N.W.2d 615, 618 (Iowa Ct. App. 1998); Sumrall v. Sumrall, 970 So. 2d 254, 259 (Miss. Ct. App. 2007); Saintz v. Rinker, 902 A.2d 509, 513 (Pa. Super. Ct. 2006); Van Driel v. Van Driel, 525 N.W.2d 37, 40 (S.D. 1994); *In re* Guardianship of BJO, 165 P.3d 442, 446 (Wyo. 2007).

sometimes seem to assume that half-sibling relationships are necessarily less close or significant than full sibling relationships.[120] More explicitly, courts refusing to create presumptions against splitting half-siblings prioritize fairness between parents over the promotion of sibling relationships. These courts note that a presumption against separating half-siblings would favor the custody claims of the half-siblings' common parent, insist that this "ironclad advantage"[121] "would be blatantly unfair to"[122] the other parent or parents involved in a custody dispute, and swiftly assume that equity between parents disputing custody takes precedence over fostering relationships between half-siblings subject to such disputes.

When half-siblings are separated into the homes of different parents, the half-siblings often have no right to visit each other over a parent's objection. State visitation statutes frequently provide no help to siblings. By 2000, every state had enacted laws providing for some type of grandparent visitation.[123] But the passage of grandparent visitation statutes appears to have been driven less by a broad commitment to expanding family law's focus beyond marriage and parenthood, and more by the extraordinary lobbying efforts and political power of groups promoting the interests of older Americans, such as the AARP. Thomas Downey, a member of Congress who advocated for grandparent visitation rights, noted candidly in 1991 the "well-known fact that seniors are the most active lobby in this country, and when it comes to grandparents there is no one group more united in their purpose."[124] Congress designated 1995 "the 'Year of the Grandparent.' "[125] Siblings do not come close to garnering this level of political support. Many states limit their nonparent visitation laws to grandparents and do not permit other relatives, such as siblings, to seek visitation. Even within these nonparent visitation statutes, the premise that family law revolves around marriage and parenthood remains powerful.

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120. *See* Middleton v. Middleton, 113 S.W.3d 625, 630 (Ark. Ct. App. 2003); Miers v. Miers, 53 S.W.3d 592, 598 (Mo. Ct. App. 2001); Chant v. Filippelli, 716 N.Y.S.2d 158, 159–60 (App. Div. 2000); Stoppler v. Stoppler, 633 N.W.2d 142, 147 (N.D. 2001); *In re* K.L.R., 162 S.W.3d 291, 306 (Tex. Ct. App. 2005).

121. Viamonte v. Viamonte, 748 A.2d 493, 498 (Md. Ct. Spec. App. 2000).

122. Johns v. Cioci, 865 A.2d 931, 943 (Pa. Super. Ct. 2004).

123. *See* Troxel v. Granville, 530 U.S. 57, 73 n.* (2000) (plurality opinion) (citing statutes).

124. *Grandparents Rights: Preserving Generational Bonds: Hearing Before the Subcomm. on Human Servs. of the H. Select Comm. on Aging*, 102d Cong. 2 (1991) (statement of Rep. Thomas Downey).

125. Joint Resolution Designating 1995 the "Year of the Grandparent," Pub. L. No. 103-368, 108 Stat. 3475, 3475 (1994).

Several suits seeking visitation with a half-sibling in another parent's home have failed because the state provided no sibling visitation statute. Court decisions rejecting these suits discount sibling relationships to prioritize "parental authority,"[126] "[a] parent's right to associate with and make decisions concerning the care, custody and control of his or her children,"[127] "the right of parents to raise their children as they see fit."[128] The courts start from the premise that parents have a right to exclude nonparents, including siblings, from visitation with a child and refuse to disturb that premise without statutory authorization.[129]

Some half-siblings have been unable to secure rights to visit each other even in states with sibling visitation statutes.[130] Legislatures often strictly limit these laws in the interest of minimizing any infringement on "parental authority."[131] One half-sibling lost a visitation suit because the state statute (since repealed entirely) authorized sibling visitation over a parent's objection only if at least one of the siblings at issue had a deceased parent.[132] Another half-sibling lost a visitation suit because the state statute authorized sibling visitation over a parent's objection only in cases where the sibling whose visitation was sought either had a deceased parent or had parents who were divorced or living separately.[133] A third half-sibling lost a visitation suit because the state statute authorized sibling visitation over a parent's objection only if both siblings were

126. Lihs v. Lihs, 504 N.W.2d 890, 892 (Iowa 1993).

127. MBB v. ERW, 100 P.3d 415, 420 (Wyo. 2004).

128. Ken R. *ex rel.* C.R. v. Arthur Z., 682 A.2d 1267, 1271 (Pa. 1996).

129. *See* Sandor v. Sandor, 444 So. 2d 1029, 1030 (Fla. Dist. Ct. App. 1984) (per curiam); *Lihs*, 504 N.W.2d at 892–93; Scruggs v. Saterfiel, 693 So. 2d 924, 926 (Miss. 1997); *Ken R. ex rel. C.R.*, 682 A.2d at 1271; D.N. v. V.B., 814 A.2d 750, 753–54 (Pa. Super. Ct. 2002); *MBB*, 100 P.3d at 420.

130. For examples of sibling visitation statutes, see ALASKA STAT. § 25.20.060(a) (2010); ARK. CODE ANN. § 9-13-102 (2009); HAW. REV. STAT. § 571-46(a)(7) (Supp. 2011); 750 ILL. COMP. STAT. ANN. 5/607 (West Supp. 2011); LA. REV. STAT. ANN. § 9:344(C)–(D) (2008); NEV. REV. STAT. ANN. § 125C.050(1) (LexisNexis 2010); N.H. REV. STAT. ANN. § 169-C:19-d (LexisNexis 2010); N.Y. DOM. REL. LAW § 71 (McKinney 2010); OR. REV. STAT. ANN. § 109.119 (West Supp. 2010); R.I. GEN. LAWS §§ 15-5-24.3(b), 15-5-24.4 (2003); S.C. CODE ANN. § 63-3-530(A)(44) (2010).

131. Pullman v. Pullman, 560 A.2d 1276, 1278 (N.J. Super. Ct. Ch. Div. 1988).

132. *See* Barger *ex rel.* E.B. v. Brown, 134 P.3d 905, 907 & n.1, 910 (Okla. Civ. App. 2006).

133. *See Pullman*, 560 A.2d at 1277–79 (citing N.J. STAT. ANN. § 9:2-7.1, *found unconstitutional as applied in* Wilde v. Wilde, 775 A.2d 535, 538 (N.J. Super. Ct. App. Div. 2001)). Before New Jersey enacted a sibling visitation statute, an earlier decision from the New Jersey Superior Court, Chancery Division, had held in a case involving full siblings separated by a parent's death because of subsequent conflict with the father's new wife "that siblings possess the natural, inherent and inalienable right to visit with each other," "subject to the requirement that such visitation be in the best interest of a minor child." L. v. G., 497 A.2d 215, 216, 222 (N.J. Super. Ct. Ch. Div. 1985).

dependent children already under the jurisdiction of the juvenile court.[134]

Moreover, even siblings who fall within a state visitation statute may face constitutional obstacles in a legal regime that is fixated on parent-child relationships and devotes little concern to siblings. One half-sibling visitation suit failed because the court held that it would be unconstitutional under the *Troxel* plurality's vision of "the fundamental liberty interest of a parent" to enforce the state's sibling visitation law against a parent who objected to visitation between her child and the child's half-sibling.[135]

In sum, the legal vulnerability of sibling relationships has attracted insufficient attention from courts, legislators, and commentators narrowly focused on marriage and parenthood. Yet sibling relationships can be as significant as the parental and marital bonds that are canonical in family law. A legal regime that fails to safeguard sibling relationships can impose tremendous costs on people who lose opportunities to develop and maintain bonds with their siblings.

III. EXPANDING FAMILY LAW'S FOCUS BEYOND MARRIAGE AND PARENTHOOD

Questioning family law's reflexive focus on marriage and parenthood helps direct our attention to the legal treatment of noncanonical family members like siblings and encourages us to think systematically about how best to reform the law's regulation and protection of sibling relationships. Lawmakers, judges, scholars, advocates, and citizens should all participate in this process of reexamining family law from the perspective of family ties beyond marriage and parenthood. Thinking about how to protect and promote noncanonical family relationships is as complicated and multifaceted, and involves as many choices, tradeoffs, and decisions, as thinking about how to protect and promote marital or parental relationships. Even if everyone were to agree that noncanonical family ties merit more legal support and safeguarding, difficult, complex, and potentially divisive questions would still remain about how best to accomplish this goal, in what ways, under what circumstances, and at what costs. In the interest of sparking dialogue and debate, this Essay concludes by exploring some potential policy reforms that come into

134. *See In re* Dependency of M.J.L., 96 P.3d 996, 1000 (Wash. Ct. App. 2004).

135. Herbst v. Swan, 125 Cal. Rptr. 2d 836, 837, 841 (Ct. App. 2002).

view when considering family law through the lens of sibling relationships.

Let's return to adoption, starting again with the issue of whether siblings who are available for adoption at the same time are placed in the same adoptive home. As this Essay has observed, current law on sibling placement at adoption, where it exists, ranges widely with little evidence of systematic deliberation or discussion. Less protective states require adoption agencies to make "reasonable efforts" to place siblings together. More protective states instruct adoption agencies that they must place siblings together unless the agency determines that a joint adoptive placement would be contrary to at least one child's best interests. Freed from the blinders of a tight focus on marriage and parenthood, states can consider both of these policies in more depth and with more care than they have shown to date, and can also examine alternative policy choices.

For instance, states exploring or enacting a policy that would require reasonable efforts from adoption agencies to place siblings together could think more systematically about what constitutes reasonable efforts. The appeal of a reasonable efforts standard is that it seems designed to encourage joint placement of siblings, while avoiding the imposition of too many costs on adoption agencies or the addition of too much delay on adoptive placements. But the danger of requiring only "reasonable efforts" is that such a requirement will mean little in practice and will simply validate adoption agency operations as they are, rather than pushing agencies to do more to place siblings together. States seeking to capture the benefits of a reasonable efforts standard, while minimizing the standard's pitfalls, might think about how to give greater guidance to adoption agencies as the agencies look for "reasonable" ways to keep siblings together. For example, statutes might provide that agency recruitment materials publicizing children's availability for adoption must picture sibling groups together, stress that the agency is seeking joint adoptive placements for siblings, and discuss the value of maintaining sibling ties. This form of publicity should cost no more than publicity that features children individually, and advertisements that depict siblings together may themselves help facilitate joint adoptive placements. The executive director of an adoption organization that successfully employed this strategy has reported that " '[m]ost people are distressed when they hear there is a chance siblings will have to be separated. It is against the natural order of things—and their visceral reaction is that brothers and sisters should stay together. Even a family considering the adoption of only one child will almost always want to adopt his siblings once they are made aware of their

existence.' "[136] Another reform that states might implement without imposing additional expense or delay would be to specify that adoption agencies cannot (as they sometimes have)[137] overlook or exclude a fit prospective adoptive parent interested in adopting a sibling group simply because the prospective parent is unmarried, gay, or already has other children in his household. More aggressively, states might also consider defining "reasonable efforts" to require adoption agencies to conduct out-of-state searches for potential adoptive parents if necessary to find a shared adoptive placement for a sibling group. This strategy would impose costs on agencies and possibly delay some adoptions, but it would have the considerable advantage of reaching a much larger pool of potential adoptive parents.

Similarly, states instructing adoption agencies that they must place siblings together unless the agency determines that a joint adoptive placement would be contrary to at least one child's best interests could think more systematically about how to elaborate their policies in ways that would promote and protect sibling relationships. For instance, state law might seek to structure agency decisionmaking about whether a joint adoptive placement would be against a sibling's best interests in an effort to ensure that agency practice reflects a real commitment to keeping siblings together. State law might provide that an adoption agency cannot conclude that a joint adoptive placement would be against a sibling's best interests without documenting in writing all of the reasons for and against separating the siblings. In addition, state law might provide that an agency cannot decide against seeking a joint sibling placement unless at least two different experts who have had sustained interaction with the siblings agree with this assessment.

States committed to safeguarding sibling relationships in adoption could also consider policies that would be more protective of sibling ties than any of the laws enacted to date. For example, state statutes could require adoption agencies to place siblings in the same adoptive home when siblings are available for adoption at the same time, unless the agency can present a court with a preponderance of evidence (or even with clear and convincing evidence) that placing siblings together would be contrary to at least one sibling's best interests. Such a standard would be more protective of sibling ties and would give courts considerable leverage in monitoring agency

136. HOCHMAN ET AL., *supra* note 15, at 7–8 (quoting Carolyn Johnson, National Adoption Center).

137. *See id.* at 7; *see also* MISS. CODE ANN. § 93-17-3(5) (Supp. 2009) ("Adoption by couples of the same gender is prohibited.").

behavior. At the same time, subjecting adoption agencies to judicial oversight in the interest of safeguarding sibling relationships would likely demand important trade-offs by imposing additional expenses on agencies and delaying the adoptive placement of some children.

States can additionally explore whether to apply the same protective rules and standards to sibling adoptions regardless of whether the siblings at issue have ever lived together.[138] The reasons to keep siblings together are most compelling when siblings have already developed functioning relationships with each other. But whether children have had the opportunity to live together is almost always the product of adult decisions rather than children's own choices. States focused on protecting sibling relationships might conclude that, even if siblings have not been able to live together to date, the fact of their biological connection creates a unique foundation for the development of lifelong intimacy and everyday functional ties that the law should not surrender lightly. Indeed, we have seen that adopted children report that they want these connections with their biological siblings. Siblings separated by adoption often make great efforts to find each other and develop ongoing relationships, even when they have never lived together.[139]

Let's turn to the situation of siblings who become available for adoption after another sibling has already been adopted. Few states have any statutes on this topic, but it is an important one that all states should address. There are three basic issues for states to consider: how to inform the adoptive parents of one sibling that another sibling is available for adoption, how to encourage the first sibling's adoptive parents to seek adoption of the second sibling, and how to treat the first sibling's adoptive parents when they decide that they would like to adopt the second sibling.

First, consider the notification of the first sibling's adoptive parents. States might explore strategies both to make notification more effective in leading to the placement of siblings together and to mitigate the costs associated with notification. For instance, one way to make notification more effective might be to require state adoption officials to contact the first sibling's adoptive parents not only when a second sibling becomes available for adoption, but also when a second sibling enters the foster care system or experiences other changes making it reasonably likely that the second sibling will become

138. For cases denying postadoption sibling visitation because the siblings never had the opportunity to develop a relationship, see Sherman v. Hughes, 821 N.Y.S.2d 628, 629 (App. Div. 2006); *In re* Justin H., 626 N.Y.S.2d 479, 480 (App. Div. 1995); Hatch *ex rel.* Angela J v. Cortland Cnty. Dep't of Soc. Servs., 605 N.Y.S.2d 428, 429 (App. Div. 1993).

139. *See supra* text accompanying notes 43–50.

available for adoption. This practice would facilitate the prompt placement of the second sibling in foster care with the parents who have already adopted the first sibling. One way to make notification less costly from the state's perspective, while imposing only minimal costs on adoptive parents, would be to require adoptive parents to keep the contact information they provided to the state updated over time. If the state cannot reach the first sibling's adoptive parents with the contact information that the parents provided, state law might permit state adoption officials to access preexisting state databases on driver's licenses, voter registration, and the like, to facilitate finding updated contact information.

Second, consider the provision of encouragement. A relatively simple possibility for states to consider would be to require state adoption officials to provide the first sibling's adoptive parents with information about the importance of sibling ties and to encourage these parents to consider adopting the second sibling. States could do even more to promote joint adoptive placements, albeit at significantly greater expense, by establishing that any subsidies that are available to an adoptive parent who adopts a sibling group all at once are also available to an adoptive parent who has already adopted one sibling and adopts another sibling later.[140]

Third, consider what happens when the first sibling's adoptive parents decide that they would like to adopt the second sibling as well. The sparse state law on this subject currently ranges widely, from a requirement that the state must place siblings together unless the state can present a court with clear and convincing evidence that joint adoption would be contrary to at least one sibling's best interests, to a policy providing that the sibling tie is just one of many factors that state adoption officials will consider in placing the second sibling. States need to focus on this issue, and to weigh the costs and benefits of various alternatives. The advantages of placing siblings together seem clear. Joint placement provides siblings with the best opportunity to enhance or develop their connection with each other, and to enjoy the potential lifelong significance and value of sibling bonds. The costs of placing siblings together, in a situation where there is a fit adoptive parent eager to raise the sibling group, are more obscure and could usefully be elaborated before states decide against adopting a standard that prioritizes joint sibling placement.

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140. For an example of an adoption subsidy where "the child is the sibling or half-sibling of a child already adopted and it is considered necessary that such children be placed together," see N.Y. COMP. CODES R. & REGS. tit. 18, § 421.24(a)(3)(iii)(b) (2008).

The next issue that states need to explore is how to treat siblings who are separated by adoption. Here again, a range of options emerges when family law focuses on sibling relationships. At the more modest end of the spectrum, states could mandate that adoption agencies educate adoptive parents about the importance of sibling ties and encourage adoptive parents to permit and facilitate contact, communication, and visitation between siblings. State law could direct adoption agencies to work individually with adoptive parents to help parents establish a schedule and routine of sibling visitation, phone calls, e-mails, and the like. Adoption agencies could also help parents anticipate and respond to logistical difficulties, such as those created when siblings live a considerable distance apart.

A significantly more demanding approach to protecting sibling relationships would be to give siblings separated by adoption an enforceable right to contact, communication, and visitation even over a parent's objection, unless a court determines that such contact would be contrary to the best interests of one or more siblings. The argument in favor of such a policy is that enforceable postadoption sibling rights are worth their intrusion on parental autonomy because sibling relationships are potentially as important and valuable as parent-child relationships. However, legislatures may be unwilling to limit parental prerogatives in this way and courts may be even less willing to uphold such a limit. Surviving a constitutional challenge under *Troxel* may require postadoption sibling visitation statutes to specify that courts must give "material weight" (or perhaps something more than that) to a parent's assessment of her child's best interests.[141] This is a large limitation, but perhaps an unavoidable one absent substantial reform of the Supreme Court's constitutional regime prioritizing parental autonomy.

Another policy possibility for states to consider in more detail concerns whether and how to use sibling registries to enable siblings separated by adoption to contact each other when they reach the age of majority. These registries are not a substitute for contact in childhood, the most crucial period for forming sibling ties. But they represent a much smaller infringement on the autonomy of adoptive parents and thus may be more politically and judicially acceptable.

At least thirty-six states currently have some form of sibling registry for adopted children and their siblings.[142] However, states could think about a variety of potential reforms in the interest of protecting sibling ties. First, many states collect information about a

141. Troxel v. Granville, 530 U.S. 57, 72 (2000) (plurality opinion).

142. *See* statutes cited *infra* notes 144, 147.

child's biological family, including siblings, as the biological family exists at the moment of the child's adoption, but devote little, if any, attention to keeping that information current.[143] States could explore whether and how to implement procedures for updating an adopted child's biographical information when another biological sibling is born or identified. States could also consider requiring adoptive parents to keep the contact information for their adopted children current at least until the children turn eighteen.

Second, states could think about revising their procedures for distributing the information they collect. For instance, more states could enact "confidential intermediary" sibling registries that help willing brothers and sisters find each other, even if one sibling is unaware of the registry. Some state sibling registries now operate just as passive "mutual consent" registries that connect two siblings separated by adoption only if both have discovered the registry and requested contact information for each other.[144] These passive registries tend to be ineffectual, with very low matching rates. For example, approximately 8,500 adoptees, birth parents, and siblings registered in Texas by 2008, but the Texas registry made just one or two matches of any family members each month.[145] Almost 24,000 adoptees, 5,700 birth parents, and 1,100 siblings registered in New York by 2009, but the New York registry made just 100 to 200 matches of any family members a year.[146]

Confidential intermediary registries, which at least twenty states have enacted in some form, allow one sibling to initiate the connection process. When a person joins one of these registries seeking contact information about a sibling, the registry uses a confidential intermediary to search for the sibling, ask her if she would like to

143. *See, e.g.*, ALA. CODE § 26-10A-31(d)(9) (LexisNexis 2009); CONN. GEN. STAT. ANN. § 45a-746(a)(6) (West 2004); MICH. COMP. LAWS ANN. § 710.27(3)(d) (West 2002).

144. *See* ARK. CODE ANN. §§ 9-9-503 to 9-9-504 (2009); FLA. STAT. ANN. § 63.165 (West 2005); IDAHO CODE ANN. § 39-259A (2011); IOWA CODE ANN. § 144.43A (West 2005); KY. REV. STAT. ANN. § 199.575 (LexisNexis 2007); LA. CHILD. CODE ANN. art. 1270 (Supp. 2012); ME. REV. STAT. ANN. tit. 22, § 2706-A (2004); MO. ANN. STAT. § 453.121(9) (West Supp. 2012); NEV. REV. STAT. ANN. § 127.007 (LexisNexis 2010); N.Y. PUB. HEALTH LAW §§ 4138-c to 4138-d (McKinney Supp. 2012); OHIO REV. CODE ANN. §§ 3107.40 to 3107.41, 3107.48 to 3107.49 (LexisNexis 2008); R.I. GEN. LAWS §§ 15-7.2-6 to 15-7.2-10 (2003); S.C. CODE ANN. § 63-9-780(E) (2010); TEX. FAM. CODE ANN. §§ 162.414, 162.416 (West 2008); UTAH CODE ANN. § 78B-6-144 (LexisNexis Supp. 2011); VT. STAT. ANN. tit. 15A, § 6-105 (2010).

145. *See* Wendy Koch, *As Adoptees Seek Roots, States Unsealing Records: Maine Lawmakers' Story Shows 2 Sides of Debate*, USA TODAY, Feb. 13, 2008, at 1A.

146. *See* Akiko Matsuda, *Woman Seeking Adopted Half-Sister: Teacher Hopes Registry Inquiry Leads to Long-Sought Reunion*, J. NEWS (Lower Hudson Valley), Jan. 25, 2009, at 1B.

connect, and distribute contact information if the sibling agrees.[147] Unsurprisingly, these more active registries appear to be more effective in matching willing siblings than registries that wait passively for mutual consent. A study of the Georgia Adoption Reunion Registry for adoptees, birth parents, and siblings tracked the eighty searches that the registry both initiated and concluded during the one-year period from October 1, 1998, to September 30, 1999. Seventy-six percent of these searches led to a reunion, fifteen percent led to the discovery that the searched-for family member had died, and five percent ended with the searched-for family member denying consent to be contacted. Only three searches ended with the registry unable to locate the searched-for family member.[148]

Beyond sibling registries, legislators could think about establishing default rules that promote the distribution of information rather than relying on siblings to know to ask for it. For example, states could create a default rule providing that when a group of siblings separated by adoption all reach the age of majority, the state will send each sibling basic, nonidentifying information about the other siblings. Siblings could contact the state in advance if they wanted to opt out of receiving any information and of having their information distributed. When siblings did not opt out, the notification would alert siblings to each other's existence and ask them if they are interested in sharing their identifying information and in receiving their siblings' identifying information. Such a regime would represent more active state intervention to foster sibling relationships among adults without any initial prompting by one of the siblings. But it would enable siblings whose information the state has collected at the time of an adoption to find one another in adulthood even if no sibling is aware of the sibling registry or knows that he has biological brothers or sisters.

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147. *See* ARIZ. REV. STAT. ANN. § 8-134(A)(7) (Supp. 2011); CAL. FAM. CODE § 9205(g) (West Supp. 2012); COLO. REV. STAT. § 19-5-304(1)(b)(I)(C) (2011); CONN. GEN. STAT. ANN. §§ 45a-743(3)(C), 45a-751(a) (West 2004); DEL. CODE ANN. tit. 13, § 962(a)(3) (2009); GA. CODE ANN. § 19-8-23(f)(5) (Supp. 2011); 750 ILL. COMP. STAT. ANN. 50/18.3a(a)–(b), (i) (West Supp. 2011); IND. CODE ANN. § 31-19-24-2 (LexisNexis Supp. 2011); MD. CODE ANN., FAM. LAW § 5-4B-05 (LexisNexis Supp. 2011); MICH. COMP. LAWS ANN. § 710.68b (West 2002); MINN. STAT. § 259.83(1) (2010); MONT. CODE ANN. §§ 42-1-103(11), 42-6-103 to 42-6-104 (2011); N.M. STAT. ANN. § 32A-5-41 (West 2003); N.C. GEN. STAT. § 48-9-104 (2011); N.D. CENT. CODE § 14-15-16 (2009); OKLA. STAT. ANN. tit. 10, § 7508-1.3 (West 2009); OR. REV. STAT. ANN. §§ 109.502 to 109.504 (West 2003); TENN. CODE ANN. §§ 36-1-128 to 36-1-131 (2010); WASH. REV. CODE ANN. § 26.33.343 (West 2005); WYO. STAT. ANN. § 1-22-203 (2011).

148. *See* Robert L. Fischer, *The Emerging Role of Adoption Reunion Registries: Adoptee and Birthparent Views*, 81 CHILD WELFARE 445, 453–54 (2002).

States systematically focused on sibling relationships could also think about whether their registries will be open to siblings separated by adoption regardless of whether the siblings' biological parents agree. Some state sibling registries currently give biological parents substantial control over the access that siblings have to each other. Minnesota's confidential intermediary system specifies that the state "shall provide services to adult genetic siblings" only "if there is no known violation of the confidentiality of a birth parent or if the birth parent gives written consent."[149] Oregon law states that "[a]n adult adoptee or the adoptive parent of a minor or deceased adoptee may not request a search for a genetic sibling of the adoptee if there was a previous search for a birth parent of the adoptee and the birth parent did not want to make contact with the adult adoptee or adoptive parent."[150] Nevada's passive mutual consent registry provides that if two siblings separated by adoption join the registry and consent to share contact information with each other, the state may distribute the information only if "written consent for the release of such information is given by the natural parent."[151]

With little apparent discussion or debate, such laws prioritize continued parental prerogatives over biological children, including adopted away children, and represent another example of how family law views children through the lens of their relationships with their parents. However, this focus on parental prerogatives comes at the cost of denying some siblings separated by adoption the opportunity to connect when each sibling would like to do so. Siblings rarely have any role in the decision to separate them through adoption, and laws granting parents significant power over sibling registries make it more difficult for siblings to exercise control over whether they reunite after adoption.

Third, the federal government could enact legislation that would coordinate all state sibling registries into a combined database in order to help people who do not know which state's registry might have information about them and/or their siblings. The Senate passed a bill in 1997 to create "a National Voluntary Mutual Reunion Registry,"[152] but the bill died in the House of Representatives after a subcommittee of the House Ways and Means Committee held a

149. MINN. STAT. § 259.83(1).

150. OR. REV. STAT. ANN. § 109.504(1).

151. NEV. REV. STAT. ANN. § 127.007(3) (LexisNexis 2010); *see also* ARIZ. REV. STAT. ANN. § 8-134(F); CONN. GEN. STAT. ANN. § 45a-751b(e) (West Supp. 2011); OKLA. STAT. ANN. tit. 10, § 7508-1.3(D).

152. S. 1487, 105th Cong. (1997).

hearing on the measure.[153] Some congresspeople objected to the proposed federal registry on the ground that "family law is best left to the States."[154] However, evaluating the proposed federal registry on its own merits, without canonical assumptions that family law should or must be local,[155] reveals a strong case for federal participation. A federal database combining state registries would provide crucial coordination to enable states to better effectuate their preexisting policies, coordination that states have been unable to arrange on their own. Some congresspeople criticizing the proposed federal registry also cited privacy concerns.[156] But both passive and confidential intermediary state registries appear to have dealt successfully with privacy concerns by requiring mutual consent before a registry shares contact information, suggesting that a federal registry combining state registries would be able to respect privacy as well.[157]

Let's turn to siblings separated by divorce, the end of their parent's nonmarital relationship, or a common parent's death. State legislators and courts have canonically understood these events as transformative moments in marital and parental relationships. Yet as we have seen, these events may also profoundly transform sibling relationships.

The appropriate legal treatment of split custody requires much more sustained discussion and debate. At present, the law on split custody varies widely and haphazardly between states and from case to case. Some states have no presumption at all against split custody, while other states impose at least nominally exacting standards disfavoring the separation of siblings. Some judicial decisions rigorously oppose split custody, while other decisions interpret seemingly strict presumptions against separating siblings much more loosely. Split custody can give parents an additional way to share the benefits and burdens of childrearing, but this custody arrangement can come at a tremendous cost to sibling relationships. States need to

153. For the hearing, see *Adoption Reunion Registries and Screening of Adults Working with Children: Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways and Means*, 105th Cong. (1998).

154. *Id.* at 36 (statement of Rep. Tom Bliley); *see also id.* at 40–41 (statement of Sen. Robert Bennett).

155. For criticism of such localist assumptions, see Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 870–92 (2004); Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998).

156. *See Adoption Reunion Registries and Screening of Adults Working with Children: Hearing Before the Subcomm. on Human Res. of the H. Comm. on Ways and Means*, *supra* note 153, at 36 (statement of Rep. Tom Bliley); *id.* at 40–41, 43 (statement of Sen. Robert Bennett); *id.* at 45 (statement of Rep. Jim McCrery).

157. *See id.* at 30, 41–42, 48–49 (statement of Sen. Carl Levin).

think more rigorously about how to regulate split custody, considering both the range of alternatives that states have already adopted and additional possibilities that would be more protective of sibling ties. For instance, a significantly more protective possibility would be for state legislation to require a parent seeking to split custody of siblings at divorce or the end of a nonmarital relationship to present a court with clear and convincing evidence that placing siblings together would be contrary to the best interests of at least one of the children. Similarly, state law could require courts ordering split custody over a parent's objection to explain why there is clear and convincing evidence that placing siblings together would be contrary to at least one child's best interests. Even if states decide that such a standard is unduly hostile to split custody and adopt a less strict presumption against split custody, or no presumption at all, state legislatures and courts could focus much more systematically on how to assess and safeguard a child's interests when split custody is at issue. For instance, states could usefully focus on how much, if any, weight courts should give to a child's own views about splitting the custody of siblings. Similarly, state legislators could think about instructing judges to be particularly wary of splitting custody along sex-based lines because of the danger that such splits may reinforce gendered understandings about children's interests and about which children are most valuable to whom.

Another issue that states can explore in focusing on split custody concerns whether to apply the same presumptions against separation to full siblings and half-siblings. A strict presumption against separating half-siblings favors the custody claims of the half-siblings' common parent and disfavors custody claims from a parent related to only one half-sibling. Some lawmakers and commentators concerned about fairness between parents may accordingly be unwilling to implement a presumption against separating half-siblings. However, others may conclude that it is reasonable to subordinate fairness between parents to the promotion of sibling relationships by applying the same presumptions against split custody to half-siblings. The argument in favor of this latter view is that half-sibling relationships can be as close and valuable as relationships between full siblings, especially if half-siblings have the opportunity to grow up together. Family law typically prioritizes parental relationships over sibling ties with little deliberation. Yet children are systematically more vulnerable than adults, and they commonly have fewer material and psychological resources available to them in maintaining relationships with family members living in other households.

A subsidiary issue for states to consider involves splitting custody of half-siblings when that is necessary to keep each half-sibling with at least one parent. For instance, suppose a man and woman, both with children from previous marriages, marry each other, have children together, and then divorce. Unless the children from this most recent marriage can evenly rotate between their parents' custody, which may be impossible for children attending school, at least some half-siblings will need to live apart if every child is to reside with one parent. Or suppose half-siblings are living with their common parent and their common parent dies. Some might argue that the law should keep half-siblings together in this situation, even though that means some children will be living separately from any parent. The contrary view, however, is that such a policy would inappropriately discount the parent-child relationship.

Lastly, states should consider whether full or half-siblings separated by divorce, the end of a nonmarital relationship, or a parent's death will have an enforceable right to contact, communication, and visitation, unless a court determines that such connection would be contrary to the best interests of one or more siblings. Such a right would protect and promote sibling relationships, albeit at the cost of some infringement on parental prerogatives. In light of the constitutional constraints that *Troxel* appears to impose, states that decide to create such an enforceable right to sibling visitation might specify that courts will give "material weight" or more to a parent's assessment of her child's best interests.[158]

CONCLUSION

Family law's tight focus on marriage and parenthood has directed legal decisionmakers and commentators away from exploring how the law should safeguard and promote other familial ties. Yet marriage and parenthood are not the only family connections that can be central to family life and to the flourishing of family members, providing care, love, support, and nurture. Examining the law's treatment of noncanonical family relationships brings a wealth of potential reforms into view.

The reform possibilities that this Essay has considered suggest just some of the myriad policy choices that emerge when we free ourselves from the reflexive assumption that family law should be

158. Troxel v. Granville, 530 U.S. 57, 72 (2000) (plurality opinion). For an example of a post-*Troxel* opinion along these lines, see Lindsie D.L. v. Richard W.S., 591 S.E.2d 308, 314 (W. Va. 2003).

systematically concerned with only two family ties. These possibilities, and many others involving both siblings and other noncanonical relatives, need to be discussed and debated by legislators, regulators, judges, scholars, advocates, and citizens who have so far given only sporadic and uneven attention to family relationships beyond marriage and parenthood. Family law's narrow focus on marriage and parenthood, inherited from the common law and then endlessly replicated without normative scrutiny, has constrained critical thinking in family law for too long.