

Washington University Journal of Law & Policy

Volume 62 *Celebrating 150 Years of Women at WashULaw*

2020

Estate Planning with Shaq and Strom: Teaching Post-Mortem Intimacy Audits

Adrienne D. Davis
Washington University in St. Louis

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Estates and Trusts Commons](#), [Higher Education Commons](#), and the [Legal Education Commons](#)

Recommended Citation

Adrienne D. Davis, *Estate Planning with Shaq and Strom: Teaching Post-Mortem Intimacy Audits*, 62 WASH. U. J. L. & POL'Y 099 (2020), https://openscholarship.wustl.edu/law_journal_law_policy/vol62/iss1/14

This Article is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

ESTATE PLANNING WITH SHAQ AND STROM: TEACHING POST-MORTEM INTIMACY AUDITS

Adrienne D. Davis*

INTRODUCTION

I love teaching Trusts and Estates. I introduce the doctrine as a set of rules that, taken together, conducts what we might think of as post-mortem audits of the intimacy choices of the living. I approach the course, which I affectionately call Dead Law, as raising questions about which lifetime affective bonds the law recognizes after death.¹ As future lawyers, the class learns to search and account for intimacy vulnerabilities that can “knock out” the most thoughtful estate plans. We read case after case of intimates who sought post-mortem recognition of their relationships, whether those be kinship, sweetheart, or other sorts of affective bonds.² Which intimate bonds does the law economically ratify, through intestate succession or successfully probated wills, and which bonds are subject to the probate guillotine—rejected, condemned, and economically disavowed? Intensely

* Vice Provost, William M. Van Cleve Professor of Law, Washington University in St. Louis. Thanks to Susan Appleton, Goldburn Maynard, Rebecca Wanzo, and Stephanie Wildman, and to Emily Bartlett, Ariel Clarke, Faith Liveoak, and Lennox Mark for outstanding research assistance. I dedicate this essay to Beth Garrett, who encouraged and empowered me to teach my passion and to my dear colleagues, Al Brophy and Frances Foster, who inspired me in both my teaching and scholarship in this area. Most of all, I dedicate it to my students whose relentless efforts to get me to “change my notes” caused me to love and learn this course more every day.

1. I credit this term to my brilliant colleague and friend, Al Brophy, to whom this essay is dedicated. Al brought “Dead Law” to life for generations of students at the Universities of Alabama and North Carolina.

2. Inheritance by pets and charities also loom large in litigation. *See, e.g., In re Estate of Russell*, 444 P.2d 353, 363 (Cal. 1968) (“As a dog cannot be the beneficiary under a will, the attempted gift to [the testator's dog] is void.” (citation omitted)); *Unger v. Loewy*, 140 N.E. 201 (N.Y. 1923) (reversing the appellate court’s judgment that voided a testamentary gift to a university in favor of decedent's wife because the bequest constituted the majority of decedent's estate; holding that the university is entitled to half of the estate, with the decedent's wife entitled to the other half); *see also* Frances H. Foster, *Should Pets Inherit*, 63 FLA. L. REV. 801 (2011) (arguing American inheritance law must develop individualized approaches that will consider a decedent’s nonhuman companions); Allison Anna Tait, *The Secret Economy of Charitable Giving*, 95 B.U. L. REV. 1663 (2015) (discussing the development of charitable giving law and cy pres cases that has led to reform).

at the beginning of the course, and then intermittently throughout, we observe judges and juries reviewing the dead's kinship ties and principal affective bonds, assembling a sort of inventory of their pre-mortem intimate lives. Legal institutions—judges, juries, and even trustees—then subject these inventories to scrutiny for impermissible idiosyncrasies and deviations from prescribed intimacy.³ In this compilation and judgment, they essentially audit a life and its intimacies.

These post-mortem intimacy audits do more than cause vulnerability to individual estate plans. First, they also play a crucial role in generating political economies of normative intimacy that inevitably influence the affective choices of the living.⁴ In this sense, they function as a sort of social engineering of intimacy, defining and policing the bounds of normative, or “regular,” intimacy, while economically penalizing “irregular” relationships that deviate. Second, these rules help shape groups' relationship to wealth and ultimately to political equality. At times, Dead Law's intimacy audits affect donors not just as individual authors of idiosyncratic estate plans, but also as members of subordinated groups, for whom the claim of testamentary freedom may be part of a larger struggle for political equality. The equality compromising effects of some intimacy vulnerabilities are obvious. Most recently the marriage equality movement shone a bright light on how sexual orientation could undermine an otherwise ironclad estate plan.⁵ Other irregularities, like racial ones, are in need of

3. Inventories are conducted across disparate sectors of human life and endeavor—accounting, manufacturing, and psychotherapy, for instance. They share a common meaning of compilation in the service of evaluation. I bring this common meaning to Dead Law's intimacy inventories that similarly compile, evaluate, and often judge, or audit. Psychotherapy and adjacent fields also conduct “intimacy inventories,” although they serve an opposite function. In that context people are urged to conduct their own intimacy inventories towards goals of better understanding their relationships and self-empowerment.

4. Elsewhere, I have elaborated this as “sexual political economies.” See Adrienne Davis, “*Don't Let Nobody Bother Yo' Principle*”: The “*Sexual Economy*” of American Slavery, in *STILL BRAVE: THE EVOLUTION OF BLACK WOMEN'S STUDIES* 215 (Stanlie M. James, Frances S. Foster, & Beverly Guy-Sheftall eds., 2009) [hereinafter “*Sexual Economy*” of American Slavery]; Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT* 457 (Catharine MacKinnon & Reva B. Siegel eds., 2003); Adrienne D. Davis, *Regulating Sex Work: Assimilationism, Erotic Exceptionalism and the Challenge of Intimate Labor*, 103 CAL. L. REV. 1195 (2015); *BLACK SEXUAL ECONOMIES: RACE AND SEX IN A CULTURE OF CAPITAL* (Adrienne D. Davis & BSE Collective, 2019). See also Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010) [hereinafter *Regulating Polygamy*].

5. See *infra* notes 15, 103, 104, 112-114 and accompanying text.

deeper excavation. But I am getting ahead of myself. Let me start at the beginning.

I. DEAD LAW AND ME

I began teaching Trusts and Estates in 2002. It was a fluke and a lark, as I was visiting at a law school that did not permit visitors to teach first-year classes. As a result, my standard teaching package of Contracts and Property was ruled out. I had recently published an article on how U.S. slavery law managed controversies at the cusp of race and inheritance, *The Private Law of Race and Sex: An Antebellum Perspective*,⁶ hence, the school's associate dean suggested Trusts and Estates could be a good course.⁷ I welcomed an opportunity to teach the course and delve more deeply into my burgeoning interests in the economics of intimacy and how private law can encourage or defeat social justice. There was an immediate irony, however. I was invited to teach the class because of my article, which explored a series of nineteenth-century cases in which black families argued that the sexual relationships they formed under slavery ought to yield inheritance rights, or what one court called "inheritable blood."⁸ The article explored how southern courts managed three competing goals: maintaining slavery's racial hierarchies, reaffirming private property rights, and preserving the legitimacy of the legal system.⁹ Indeed, one of the reasons I had welcomed the opportunity to teach the new class as a visitor was my anticipation that it would enable me to broaden my focus on private law's role in socially engineering foundational human relationships. The irony

6. Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999) [hereinafter *Antebellum Perspective*].

7. This good-hearted soul was the inestimable Beth Garrett, then Associate Dean at the University of Chicago. I remain forever grateful to her for helping me stumble onto this marvelous course, which has since anchored my teaching.

8. "In a line of pre- and post-Emancipation cases in Alabama, black families argued that the sexual relationships they formed under slavery ought to yield succession rights to estates, or what one state supreme court justice called 'inheritable blood.'" *Antebellum Perspective*, *supra* note 6, at 224 (quoting *Malinda & Sarah v. Gardner*, 24 Ala. 719, 724 (1854)).

9. "Even under a simplistic and materialist analysis, their probate presents an obvious challenge to courts: to uphold property rights (in this case, testamentary freedom) without disrupting racial hierarchies. Southern antebellum culture is typically represented as strongly committed to both racial hierarchy and private property." *Antebellum Perspective*, *supra* note 6, at 226-27 (footnote omitted).

was that once I began teaching the course, I struggled to find ways to make my initial research in race and legal history relevant to it.

I also do research on the legal regulation of gender and sexuality, both of which are obviously intrinsic to Dead Law. Until relatively recently, law imposed explicit and formal disabilities on women's inheritance rights as donors, donees, and personal representatives of estates.¹⁰ Today's inheritance rules police gender more indirectly, via doctrines ranging from the "widow's share"¹¹ to partial restraints on remarriages¹² to QTIP trusts and the valuation of life estates.¹³ Sexuality, of course, is front and center, as inheritance law conducts its post-mortem audits of the dead's lifetime intimate choices.¹⁴ The role and significance of race, however, continued to elude me, as I found difficulty tying in subjects beyond my initial research on antebellum will contests.

The answer came, intriguingly enough, from my quest for pedagogical hypotheticals and case studies. Well-crafted hypotheticals play a crucial function in law school classrooms. Their fact patterns empower students to diagnose legal problems, articulate the applicable doctrine, and explore various solutions or "fixes." I learned early in teaching the course that nothing reinforced learning Dead Law's doctrinal intricacies like a good

10. In 1971, the United States Supreme Court declared unconstitutional laws that preferred men to women as administrators and executors of estates. *Reed v. Reed*, 404 U.S. 71, 76 (1971) (holding that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment . . .").

11. See, e.g., *Rowe v. Newman*, 276 So. 2d 412, 417 (Ala. 1972) (holding that the widow's share of the husband's estate had a prior right over all other legatees and devisees and that all of the other bequests and devises had to be exhausted for payment of any taxes and debts before the widow's bequest could be applied).

12. See, e.g., *Hall v. Eaton*, 631 N.E.2d 805, 808 (Ill. App. Ct. 1994) (stating that "[a]ttempts to prevent the remarriage of spouses are valid.>").

13. See, e.g., Joseph M. Dodge, *Feminist Perspective on the Qtip Trust and the Unlimited Marital Deduction*, 76 N.C. L. REV. 1729, 1734 (1998) ("There is no doubt that the QTIP device diminishes the autonomy of wives and widows, who statistically are the usual beneficiaries of QTIP trusts. . . . QTIP trusts implement the husband's dead-hand control."); Allison Tait, *Trusting Marriage*, 10 U.C. IRVINE L. REV. 199 (2019) (considering how to prevent QTIP and other trust forms "from disrupting the delicate ecology of the marital economy").

14. See *supra* note 5 and accompanying text. See also *In re Kaufmann's Will*, 247 N.Y.S.2d 664, 682-86 (App. Div. 1964) (invalidating a will leaving the decedent's long-term, same-sex partner with the majority of the estate for claims on undue influence raised by decedent's family) *aff'd*, 205 N.E.2d 864 (N.Y. 1965); *In re Cooper*, 592 N.Y.S.2d 797, 801 (App. Div. 1993) (holding that the surviving, long-term same-sex partner of the decedent could not take under the elective share provision because their intimate relationship was not a legal marriage).

hypothetical or case study—and every year popular culture provides tantalizing examples. In particular, I look for popular cultural examples that build doctrinal and jurisprudential intricacy on familiar characters or on unfamiliar situations that provoke curiosity. Students’ eyes glazed and their brains drained over the vagaries of per capita by generation versus per capita by representation, the Uniform Testamentary Additions to Trusts Acts (I and II), and the impenetrability of dependent relative revocation.

Yet each year I find myself assisted by a surfeit of celebrity deaths, followed by dramatic estates debacles.¹⁵ These celebrity fact patterns often yield a simultaneous high-stakes complexity and laughable absurdity that makes compiling their intimacy inventories engaging. Supplementing these case studies are hypotheticals, often drawn from family sitcoms, which offer an ever-increasing array of conceptual examples about intimate family frameworks. They remind students how normative family intimacy can change from “irregular” to “regular” over a relatively short period of time.¹⁶

15. Indeed, here is a list of case studies warranting a thorough-going in-class dissection compiled from just this past summer: Former Missouri Governor Jay Nixon’s lawsuit on behalf of Hillsdale College against the University of Missouri for violating the terms of a gift to hire economists who follow the teachings of Ludwig von Mises illustrates freedom of testation and dead-hand control in a deliciously political context. See generally Joe Holleman, *Mizzou Being Sued by Former Governor and Alum Jay Nixon*, ST. LOUIS POST-DISPATCH (July 11, 2019), https://www.stltoday.com/news/local/columns/joe-holleman/mizzou-being-sued-by-former-governor-and-alum-jay-nixon/article_cad6b7e9-3f8e-5b07-bf7e-d29de3f066d9.html [<https://perma.cc/D4DF-QCWU>]. The speculation over the differential (and relatively modest) inheritances left to Anderson Cooper and his brother by their socialite/fashion designer/artist mother, Gloria Vanderbilt. See generally Katherine Lam, *Gloria Vanderbilt’s Son Anderson Cooper to Inherit Less than \$1.5M, Report Says*, FOX BUS. (July 8, 2019), <https://www.foxbusiness.com/business-leaders/gloria-vanderbilt-anderson-cooper-inheritance-report> [<https://perma.cc/USF5-5X2D>]. And a trifecta of “love children” cases, including new family contests regarding Arnold Schwarzenegger’s non-marital son; Belgium’s ex-King Albert II’s submission of his DNA in a paternity case; and a Spanish court’s decision upholding the claims of a forty-three-year-old man that Julio Iglesias is the biological father. See Luchina Fisher, David Wright & Kevin Dolak, *Mother of Arnold Schwarzenegger’s Love Child Revealed*, ABC NEWS (May 18, 2011), <https://abcnews.go.com/US/mother-arnold-schwarzeneggers-love-child-revealed/story?id=13626896> [<https://perma.cc/L379-MPV9>]; *Belgium’s Ex-King Albert II Submits DNA in Paternity Case*, BBC NEWS (May 29, 2019), <https://www.bbc.com/news/world-europe-48440845> [<https://perma.cc/VVT5-LY7G>]; Milena Veselinovic, *Spanish Court Rules that Julio Iglesias is the Father of a 43-Year-Old Man*, CNN (July 11, 2019, 9:26 AM), <https://www.cnn.com/2019/07/10/europe/julio-iglesias-paternity-claim-intl/index.html> [<https://perma.cc/Y9YD-9QAT>]. *The Atlantic* even proclaimed the “end of the age of paternity secrets”. Ashley Fetters, *The End of the Age of Paternity Secrets*, ATLANTIC (June 19, 2019) <https://www.theatlantic.com/family/archive/2019/06/dna-tests-and-end-paternity-secrets/592072> [<https://perma.cc/K6DU-HQCU>].

16. Sometimes I worry that my reliance on American popular culture excludes international students. However, I have found that international students can bring the most incisive dissection to these case studies and hypotheticals.

Heath Ledger's tragic early death taught the class both the complexity of establishing paternity for non-marital children and the pretermitted child doctrine.¹⁷ The Godfather of Soul, James Brown, offered insight into bigamy, common law marriage, and why you might not want to take out a full page ad showcasing your marital separation in Hollywood's *Variety* magazine.¹⁸ The ongoing saga subsequently revealed the limited ability of attorneys general to protect charitable trusts.¹⁹ Rock legend Mick Jagger's marital fraud against his long-time sweetie Jerry Hall lent an additional lesson on common law marriage, the putative spouse doctrine, and some of the technical complexities of community property rules.²⁰ We reviewed Whitney Houston's will and found it "solid."²¹ Mickey Rooney's dramatic congressional testimony demonstrated why we might bar inheritance by those who commit elder abuse.²² Brooke Astor's tragic twilight years reinforced the ongoing need for a healthy fraud doctrine and also professional malpractice rules.²³ NFL star Steve McNair is a case study on

17. See, e.g., James Barron, *Heath Ledger, Actor, Is Found Dead at 28*, N.Y. TIMES (Jan. 23, 2008) <https://www.nytimes.com/2008/01/23/movies/23ledger.html> [<https://perma.cc/ZH3T-HJV5>].

18. See, e.g., Andrew Smith, *James Brown's Estate Is Still In Turmoil 12 Years After His Death*, FORBES (Oct 15, 2018) <https://www.forbes.com/sites/legalentertainment/2018/10/15/james-brown-estate-twelve-years-after-his-death-controversy-remains/#1aec81af75d7> [<https://perma.cc/8RNE-FW8U>].

19. See, e.g., Matt Birkbeck, *Years After Death, Battle for James Brown's Estate Rages On*, ROLLING STONE (July 20, 2011, 2:00 PM.) <https://www.rollingstone.com/music/music-news/years-after-death-battle-for-james-browns-estate-rages-on-246712/> [<https://perma.cc/RS9W-BFK6>].

20. Simon Cooper, *We Were Never Married, Says Jagger as He Fights Jerry Hall Divorce Action*, GUARDIAN (Jan. 19, 1999, 6:08 AM) <https://www.theguardian.com/world/1999/jan/19/5> [<https://perma.cc/94X4-RTXV>].

21. Last Will and Testament of Whitney E. Houston, <https://abcnews.go.com/images/Entertainment/Whitney%20Houston%20Will.pdf> [<https://perma.cc/DQS6-NNCE>].

22. Justice for All: Ending Elder Abuse, Neglect, and Financial Exploitation: Hearing Before the S. Special Comm. On Aging, 112th Cong. 4-10 (2011).

23. Meryl Gordon, *MRS. ASTOR REGRETS: THE HIDDEN BETRAYALS OF A FAMILY BEYOND REPROACH* 152-198 (2008). For their roles in defrauding Astor, her son was one of the oldest men in the state of New York to serve prison time and her lawyer was not only disbarred but criminally prosecuted. Russ Buettner, *Son and Lawyer Lose Appeal in Looting of Astor Estate*, N.Y. TIMES (Mar. 26, 2013), https://www.nytimes.com/2013/03/27/nyregion/brooke-astors-son-loses-appeal.html?rref=collection%2Ftimestopic%2FMorrissey%2C%20Francis%20X.%20Jr.&action=click&contentCollection=timestopics®ion=stream&module=stream_unit&version=latest&contentPlace ment=5&pgtype=collection [<https://perma.cc/5KW6-8Z4K>] (maintaining that "Mr. Marshall and Mr. Morrissey were convicted on a series of charges that they had stolen tens of millions of dollars from Mrs. Astor, the longtime queen of Manhattan society and philanthropy, while she had Alzheimer's disease late in her life.").

See also Russ Buettner, *At 89, Astor's Son Wouldn't Be the Oldest in Prison*, N.Y. TIMES (June 16, 2003), <https://www.nytimes.com/2013/06/17/nyregion/at-89-astors-son-wouldnt->

why an estate might try to protect a surviving parent from the vindictiveness of a daughter-in-law.²⁴ *The Sopranos* star James Gandolfini's death brought planning for estate tax liability to life.²⁵ Three years ago, Prince's unexpected death showcased the vagaries of inheritance by half-blood relatives, the wisdom of the Uniform Probate Code (UPC) "laughing heirs" ban, and the challenges in persuading some clients to draft wills.²⁶

And, drawing from iconic sitcoms shifting norms of family intimacies, I used to teach representation, class gifts, and step-parent and adoption inheritance rules through *The Cosby Show*'s Huxtable family; at the time it was a case study in the UPC's efforts to normalize and recognize bonds that common law had spurned.²⁷ (And I loved the subtle racial didacticism of parsing the intricacies of intimate genealogical bonds through a loving black middle-class family.) When Cosby's confessions to and ultimate conviction of sexual predation led me to conclude that I could no longer lionize his sitcom world-making,²⁸ I turned to the network blockbuster *Modern Family* instead.²⁹ The UPC's efforts to police both strategic adoptions and strategic disclaimers appear more vivid and meaningful when visualized through manipulated reductions of the sitcom character Lily Pritchett's share of family patriarch Jay Pritchett's estate. These celebrity case studies and hypotheticals about "modern families" set the stage for a key aspect of what estates lawyers do—plan for successful post-mortem audits and judgments of their client's lives. This entails learning how to compile intimacy inventories, diagnose the vulnerabilities that make an estate plan fragile, and ideally craft "fixes."

be-the-oldest-in-prison.html [https://perma.cc/W9NA-BNL8] ("His age will accord him no special treatment; in fact, Mr. Marshall, 89, would only be the fourth-oldest inmate currently in the state prison system.").

24. Sabrina Winters, *Two Years Later And Steve McNair's Estate Drama Continues*, LEXISNEXIS: LEGAL NEWSROOM (Aug. 18, 2011) <https://www.lexisnexis.com/legalnewsroom/estate-elder/b/estate-elder-blog/posts/two-years-later-and-steve-mcnair-s-estate-drama-continues> [https://perma.cc/2HDQ-EURK].

25. Robert W. Wood, *6 Estate Planning Lessons From James Gandolfini's Will*, FORBES (Jul. 20, 2013, 9:50 PM), <https://www.forbes.com/sites/robertwood/2013/07/20/key-lessons-from-james-gandolfinis-will/#643e410c5e97> [https://perma.cc/UJ3Y-EUCJ].

26. Dennis M. Patrick & Beth T. Morrison, *The Prince Estate: How Intestacy Works, How It Could Work, and How It Fails as an Estate Plan*, 43 MITCHELL HAMLINE L. REV. 40 (2018).

27. *The Cosby Show* (NBC).

28. Manuel Roig-Franzia, *Bill Cosby convicted on three counts of sexual assault*, WASH. POST (Apr. 26, 2018, 8:12 PM), https://www.washingtonpost.com/lifestyle/style/bill-cosby-convicted-on-three-counts-of-sexual-assault/2018/04/26/d740ef22-4885-11e8-827e-190efaf1f1ee_story.html.

29. *Modern Family* (ABC).

One ongoing challenge in Dead Law is how to make intestacy rules come to life. Students envisioning roles as potential estate planners are inclined to dismiss intestacy's intricate doctrinal rules as irrelevant to their practice, merely a set of defaults to easily navigate around by drafting wills, trusts, etc. In looking for hypotheticals to animate the broad set of rules that govern the will-less, I found two case studies—one based on a controversy that emerged following U.S. Senator Strom Thurmond's death in 2003³⁰ and the other derived from an *Ebony* magazine article I stumbled upon about NBA rock star Shaquille O'Neal's relationship with his father and stepfather.³¹ As I said above, the ideal Dead Law hypothetical or case study combines technical intricacies with lofty jurisprudential questions. My hope is that these do both.

II. CASE STUDIES IN IRREGULARITY: SHAQ AND STROM

At first glance, these two examples share little in common. One is about a deceased politician, famous—or infamous—for his racial complication; the other is about one of the greatest athletes and businesspeople living today. Yet, both case studies challenge the class to consider the manifold ways race functions in Dead Law's intimacy inventories and audits. Taken together, these two hypotheticals accomplish a couple of things. First, they offer students the opportunity to grapple with and test their understanding of the field's technical doctrinal intricacies. Importantly, this includes observing and learning how the law conducts its post-mortem intimacy audits. Equally importantly, they learn what triggers the audits—the sets of pre-mortem behavioral clues and codes—inventories, if you will—that predict post-mortem vulnerability and regulation. They learn to conduct their own intimacy inventories, searching for quirks and vulnerabilities, in order to protect future clients whose estate plans may be revealed as fragile. This leads to the second point. These case studies introduce inheritance law as a regulatory instrument with a reach far beyond settling the estates of the dead. Though the circumstances and nature of their respective intimacy inventories vary drastically, in each case study we find Dead Law relentlessly at work, affirming “regular” bonds and questioning and legally

30. See *infra* Section II.B.

31. Laura R. Lancaster, *Guydance*, EBONY, Sept. 2001, at 24; see *infra* Section II.A.

disavowing “irregular” ones. For instance, each entails multiple families and unrecognized families. Front and center in both are the racial irregularities for which I was searching, albeit in distinct ways. Looming large is how these post-mortem audits inevitably shape the intimate lives and choices of the living.

A. Hypothetical #1

Joe Toney is my biological father, but just because you bring a child into the world doesn't make you a father . . . Philip Harrison is the one who raised me . . . I love my father, and my father is Philip Harrison.

—Shaquille O’Neal, *Ebony Magazine*³²

Yo, Yo

I want to dedicated this song to Philip Arthur Harrison

Word up

'Cause he was the one who took me from a boy to a man

So as far as I'm concerned, he's my father cause my biological

Didn't bother

—Shaquille O’Neal, “Biological Didn’t Bother”³³

32. Lancaster, *supra* note 31, at 24. When he was twenty-one, O’Neal wrote:

When my mother needed someone 21 years ago, Philip Harrison was the man . . . My father joined the Army when I was two so he could make a better living and also so he could get us out of the ’hood. I was born two years before my parents were married.

One Stepfather’s Story: Sergeant Phillip Harrison, SUPPORT FOR STEPDADES (May 28, 2012), <https://supportforstepdads.com/2012/05/stepfathers-story-sergeant-philip-harrison/> [<https://perma.cc/J9M7-2A4T>]. O’Neal elaborated:

It's true. He (Toney) is my biological father, but he wasn't around for the first 21 years. He probably thinks that my mother (Lucille O'Neal) never told me, but she told me. . . . Just because you bring a child into the world, it doesn't make you a father. . . . He (Toney) wasn't around the first 21 years, and he won't be around the next 21.

Selena Roberts, *Who’s Shag’s Dad? It’s Harrison, in Spirit*, ORLANDO SENTINEL (Feb. 17, 1994), <https://www.orlandosentinel.com/news/os-xpm-1994-02-17-9402170484-story.html> [<https://perma.cc/5SZD-5BCA>]. When asked about his lack of relationship with his biological father, O’Neal stated: “No, it doesn't bother me at all. . . . Because the man doesn't even exist.” Bill Plaschke, *Unforgiven*, SOUTH FLA. SUN SENTINEL (June 12, 2002) [hereinafter *Unforgiven*], <https://www.sun-sentinel.com/news/fl-xpm-2002-06-12-0206120076-story.html> [<https://perma.cc/SS9S-G53E>].

33. SHAQUILLE O’NEAL, *Biological Didn’t Bother*, on SHAQ FU: DA RETURN (Jive Records 1994). The single was released on October 17, 1994 with production from the LG Experience and Warren G.

Shaquille O’Neal is a client with your law firm. You have been charged to review his estate plan and bring any concerns to the attention of the partner who works with O’Neal. Does the above statement by O’Neal give you any concerns? Do you anticipate a post-mortem audit?

1. Background Discussion

Shaquille O’Neal is athletic royalty. The fifteen-time NBA All-Star³⁴ and four-time NBA champion’s sports prowess has been matched only by his business acumen. An astute businessman with a wide-ranging investment and earning portfolio, O’Neal was ranked number seven on *Forbes*’ list of highest paid retired athletes this year.³⁵ His business interests range from movies, rap albums, and video games to a new deal with Krispy Kreme Doughnuts and a licensing and marketing agreement with Authentic Brands that *Forbes* predicted “should generate between \$230 million to \$270 million for the NBA Hall of Fame center, and has already boosted his net worth to over \$400 million.”³⁶

With O’Neal clearly being an invaluable firm client, our class discusses why many large law firms have estate planning departments. Not only does the planning itself generate revenue, but it is also strategic—law firms do not want transactional or litigation clients to take their estate planning needs elsewhere, thereby giving competitors the opportunity to gain a foothold. Hence, reviewing O’Neal’s estate plan is an opportunity to impress him with the firm’s legal acumen and reinforce the relationship. With this background, we then fill in some of the pieces underlying O’Neal’s

The single was a minor success, making it to 78 on the Billboard Hot 100. The song is dedicated to Shaq’s stepfather, Phillip A. Harrison and samples “They Reminisce Over You (T.R.O.Y.)” by Pete Rock & CL Smooth.

34. *Cavaliers Acquire 15-Time NBA All-Star and Four-Time NBA Champion Shaquille O’Neal*, NAT’L BASKETBALL ASS’N (June 25, 2009), https://www.nba.com/cavaliers/news/shaq_trade_090625.html [<https://perma.cc/5LM8-9C35>].

35. *The Highest-Paid Retired Athletes*, FORBES, <https://www.forbes.com/pictures/mli45ehlll/the-highest-paid-retired-athletes-2/#34a7480f4722> [<https://perma.cc/2UL6-LVBP>]. O’Neal earned almost \$300 million in salary, endorsements, and investments during his two decades in the NBA. Sergei Klebnikov, *Here’s Everything We Know About Shaq’s Business Empire, Including 150 Car Washes, 17 Auntie Anne’s, and—at One Point—155 Five Guys*, MONEY (Apr. 4, 2019), <https://money.com/shaq-business-empire/> [<https://perma.cc/34KD-2TMX>].

36. Mike Ozanian, *Shaquille O’Neal’s \$200 Million Deal*, FORBES (May 20, 2016, 3:27 PM), <https://www.forbes.com/sites/mikeozanian/2016/05/20/shaquille-oneals-200-million-deal/#6a654d24d6af> [<https://perma.cc/WU33-2FYR>].

“irregular” intimacy that may make his estate plan fragile and vulnerable to challenge. O’Neal has an ex-wife, Shaunie, with whom he has four children; he also has a child from a previous relationship.³⁷ However, our hypothetical focuses on the inheritance issues raised by O’Neal’s relationships with the two men who might be considered to be his father. This is yet another instance of multiple families and deciphering which ones Dead Law will decide to recognize and which to disregard.

O’Neal was famously close to his stepfather, Philip Harrison. O’Neal’s biological parents had not married, and his biological father left when O’Neal was six months old.³⁸ (O’Neal was Joe Toney’s second child.³⁹) When O’Neal was two, his mother married Philip Harrison; the couple subsequently had three children and remained together until divorcing after almost thirty years of marriage. As indicated in the above quotes, although his stepfather never formally adopted him, O’Neal considers Harrison his father. Even after Harrison’s divorce from O’Neal’s mother, the two men remained close until Harrison’s death in 2013. “The real story is that when my mother needed someone 21 years ago, Philip Harrison was the man,” O’Neal told the *Orlando Sentinel*, continuing, “He (Harrison) is my dad. He’s the one who raised me and made me what I am today.”⁴⁰ When being inducted into the NBA Hall of Fame in 2014, a year after Harrison’s death, O’Neal reflected on the support and confidence Harrison had expressed in him: “This was more his day than my day—this was his dream.”⁴¹ O’Neal keeps all of his trophies and awards, including his Hall of Fame ring, in his home in a room he calls The Philip Arthur Harrison Memorial Room.⁴²

37. Nicole Briese, *Shaquille O’Neal Talks Coparenting with Ex-Wife Shaunie O’Neal: “It’s a Man’s Job to Protect and Provide”*, US WEEKLY (Mar. 11, 2019), <https://www.usmagazine.com/celebrity-moms/news/shaquille-oneal-talks-coparenting-with-ex-wife-shaunie/> [<https://perma.cc/GA5Z-6RTE>]. The couple is worthy of a family law hypothetical, having generated marital drama aplenty—they separated after five years of marriage, reconciled, and finally divorced in 2009.

38. Bill Plaschke, ‘*Biological Didn’t Bother*,’ L.A. TIMES (June 11, 2002, 12:00 AM) [hereinafter *Biological Didn’t Bother*], <https://www.latimes.com/archives/la-xpm-2002-jun-11-spl-01-story.html> [<https://perma.cc/E3HQ-BS7Q>].

39. *Id.*

40. Roberts, *supra* note 32.

41. “When Harrison died on September 10, 2013, ‘I actually felt it,’ O’Neal said. ‘It hit me. I knew.’” Mike Wise, *Shaq to Biological Father: ‘I Don’t Hate You’*, UNDEFEATED (Sept. 9, 2016), <https://theundefeated.com/features/shaq-to-biological-father-i-dont-hate-you/> [<https://perma.cc/VYN9-AWQR>].

42. He said, “Then I’ll walk out and close the door. And that’ll be it.” *Id.*

In contrast, O’Neal’s biological father, Joe Toney, was not involved in O’Neal’s life. Toney had struggled with drug addiction and was incarcerated when O’Neal was a baby. Upon his release, Toney did not seek a place in O’Neal’s life; indeed, he claims to have told O’Neal’s stepfather that he was relinquishing his parental rights (although he does not appear to have legally done so).⁴³ O’Neal was estranged from his biological father, refusing to speak or meet with Toney. Instead, he reiterated, “I love Philip Harrison. He’s the one who raised me.”⁴⁴ On his 1994 rap album, *Shaq Fu: The Return*, O’Neal voiced his feelings of disdain for Toney in the song “Biological Didn’t Bother,” dismissing Toney with the line, “Phil is my father.”⁴⁵ Finally, in response to a 1994 interview Toney did with the *National Enquirer*, publicly claiming to be O’Neal’s father, O’Neal said, “He (Toney) was just putting out information, and most of it was false. I’m not going to show any feeling. That’s what he wants me to do.”⁴⁶ However, Toney persisted in claiming a paternal bond: “Only one person can take a son away from you and that’s God.”⁴⁷ He explained,

I just want to sit with him 5 or 10 minutes and tell him I care for him. I want him to know about the other side of his family. I don’t want him to come see me or call me father. I think Philip and Lucille have done a wonderful job raising him. I love them for that.⁴⁸

Recently, I introduced a new, final fact into my hypothetical. After forty decades of estrangement, O’Neal’s feelings toward Toney finally

43. According to Toney, “When I came back home six years later, Lucille [Shaquille’s mother] had already married Phillip, and I was out of the picture.” Bill Plaschke, *In Newark, N.J., Lives the Biological Father of One of the Nation’s Most Dominant Athletes. The Man Calls Himself “Shaq,” yet He and His Famous Offspring—Shaquille O’Neal—Have Never Met*, CHI. TRIBUNE (June 12, 2002), <https://www.chicagotribune.com/news/ct-xpm-2002-06-12-0206120324-story.html> [<https://perma.cc/644E-FL5M>] [hereinafter Toney Article].

44. Roberts, *supra* note 32.

45. See O’NEAL, *supra* note 33.

46. Roberts, *supra* note 32. When a reporter asked O’Neal about Toney, “O’Neal’s smile turned to stone.” Toney Article, *supra* note 43.

47. Toney Article, *supra* note 43. “I’ve been trying for years to reach him,” said Toney on an interview he did for the *National Enquirer*. Oddly enough, one of O’Neal’s favorite restaurants was in the same building as Toney’s residence, but Toney never came to say hello when told his son was there. “I didn’t want for it to get this far, me going to the *Enquirer*. But I didn’t know any other way to tell him my side.” Roberts, *supra* note 33.

48. Roberts, *supra* note 33.

mellowed, and the two met for the first time in 2016.⁴⁹ We discuss whether this “rapprochement” might reinforce any of Toney’s potential claims and alter any of our analysis. (At the meeting O’Neal told Toney, “I don’t hate you. I had a good life. I had Phil.”⁵⁰). This raises one of the distinctive features of lawyering in the area. To be effective, estate planning lawyers have to develop deep, personal relationships with their clients that will engender trust. Clients must feel sufficiently comfortable that they will disclose their most intimate, and potentially “irregular,” intimate relationships. Without this information, estate planning lawyers cannot identify and guard against the vulnerabilities that irregularities can create. For example, O’Neal’s rapprochement with his father might change the analysis of whether he intended to exclude him from class and other gifts.

2. *The Intimacy Inventory: The Memo*

As the class assesses O’Neal’s estate, there is typically an immediate consensus that we should anticipate a post-mortem audit in the form of a will challenge. As we conduct our compilations and judgments, the class discussion elaborates the notion of a vulnerable estate plan, one that is fragile and susceptible to being overturned. Several features and irregularities make O’Neal’s estate vulnerable. First is the sheer size of the estate—\$400 million. Will contestants have much to gain and, given the typical lack of fee shifting requirements, very little to lose.

In addition to its sheer size, we find that O’Neal’s estate is vulnerable because of several “irregularities.” In the first entry in our inventory, we revisit the rule that anyone who stands to benefit from a will being overturned has standing to challenge it. In this case, that would include O’Neal’s intestate heirs, who would be determined not by his affective ties, but by his bloodline. In O’Neal’s case, the complications that often accompany blended families are intensified. He is estranged from his biological father and considers his stepfather to be his father. In fact, their relationship is so close that many, including Orlando Magic officials, believed Harrison was O’Neal’s biological father. Thus, his primary paternal bond departs from statutory rules that follow bloodline

49. Wise, *supra* note 41.

50. *Id.*

relationships, making legal parenthood coterminous with biological parenthood.⁵¹ This blood-bond definition means that Toney's legal paternity may give him standing to challenge the will. Although Toney publicly proclaimed that he didn't want anything from O'Neal, each year the class consensus is that \$400 million is incredibly tempting.⁵² An additional entry in the inventory stems from the complication that O'Neal's kinship ties include two sets of half-siblings, maternal and paternal, with whom he may have very different relationships. He grew up with his mother's children with his stepfather, but may not even be aware of Toney's other children.⁵³ Yet, the law gives them all the same status as heirs. Although jurisdictions have varying rules regarding inheritance by half-siblings,⁵⁴ because O'Neal has no "whole-blood" siblings, the class makes its way through the disparate rules to conclude that, universally, his half-siblings would be included as potential heirs and, under the right circumstances, could have standing to challenge his will.

51. The major exception to this rule is the marital presumption. According to this rule a child born to a mother is presumed to be the child of her husband, even when taken to absurd conclusions. *See, e.g., Michael H. v. Gerald D.*, 491 U.S. 110, 130-32 (1989) (holding a child did not have due process rights to maintain a filial relationship with her natural father, when the mother's husband was presumed to be the father of the child because he lived with the mother at the time of birth). *See also In re Marriage of Freeman*, 53 Cal. Rptr. 2d 439, 449 (Cal. Ct. App. 1996) ("However, as the estoppel cases demonstrate, although impotent or sterile men may not be subject to the presumption, they may still be required to support children they have treated as their own."); *Sheetz v. Sheetz*, 63 N.E.3d 1077, 1083 (Ind. Ct. App. 2016) (holding husband was equitably estopped from rebutting the presumption that he was a biological father of wife's child, even though husband was in prison at the time of child's conception). The strength of the presumption is also reflected in standing rules: in many jurisdictions, men claiming biological paternity do not have standing to challenge the presumption. *See Michael H.*, 491 U.S. at 129 ("Where . . . the child is born into an extant marital family, the natural father's unique opportunity conflicts with the similarly unique opportunity of the husband of the marriage . . . it is not unconstitutional for the State to give categorical preference to the latter."). I believe this is an infringement on men's reproductive autonomy, which is discounted in favor of husbands' rights to claim paternity over their wives' children and also "family privacy." *See, e.g., Preston D. Mitchum, Article, Male Reproductive Autonomy: Unplanned Fatherhood and the Victory of Child Support*, 7 MOD. AM. 10, 14-15 (2011). However, it can also backfire against husbands, who may find themselves paying child support for another man's child. *See, e.g., K.E.M. v. P.C.S.*, 38 A.3d 798, 810 (Pa. 2012) (adding "best interests of child" standard to "paternity by estoppel" in Pennsylvania).

52. Others agreed that Toney was not seeking anything from O'Neal. Although Toney says he doesn't want money, "Toney's people, including his Goodwill employers, say he is clean and sober and looking for nothing." Toney Article, *supra* note 43.

53. Bill Plaschke, *Tough Love*, L.A. TIMES (June 9, 2000) <https://www.latimes.com/archives/la-xpm-2000-jun-09-sp-39256-story.html> [<https://perma.cc/D2ZU-ZL6S>]. To understand how this complicates matters, see *Estate of Griswold*, 24 P.3d 1191 (Cal. 2001).

54. Ralph C. Brashier, *Half-bloods, Inheritance, and Family*, 37 U. MEM. L. REV. 215 (2007).

These same bio-legal dynamics may also generate a third vulnerability—challenges for class gifts O’Neal might make in his will or trusts. Most people focus their estates on their immediate family and perhaps make some charitable gifts. However, wealthy people are more likely to favor a broader set of bonds to relatives known as collateral heirs, i.e., descendants of their grandparents who are not their direct descendants or ancestors. O’Neal’s wealth would certainly put him in this category. Accordingly, in addition to gifts to his children and parents, his estate plan might include gifts to classes such as “my siblings” or “my nieces and nephews.” Yet, as was discussed above, we find that this is complicated by O’Neal’s two sets of half-siblings. On their face, such class gifts would include relatives from his paternal line, which generates the potential vulnerability. As was discussed above, because O’Neal was raised by his mother and Philip Harrison, the students mark in his inventory that he was very likely raised with his maternal half-siblings and may be close to them. On the other hand, given his lifelong estrangement from his biological father, he may not have meaningful relationships with—or even know—Toney’s other children and their descendants. We rehearse the rule that the donor’s intent is supposed to govern class gifts⁵⁵ and, find that, while Toney himself might be excluded from class gifts under this logic, gifts to “siblings” or “nieces or nephews” might pose a harder case, as O’Neal has not expressed animosity toward them. Thus, our inventory of vulnerabilities includes these class gifts, which are ripe for unintended claims and challenges.

A fourth entry into the inventory also follows from revisiting intestacy’s bio-legal bloodline rules. If a will challenge is successful and the estate falls into intestacy, following the above logic, statutory rules privileging bloodline relationships will define who O’Neal’s heirs are—potentially entitling his biological father and paternal half-siblings to an intestate share, while excluding Harrison’s relatives with whom he may share principal kinship bonds. (This empowers students to grapple with the uncertainty of Dead Law’s infamous refusals of uniformity. In most states, legal parents do not inherit in intestacy if the testator had children.⁵⁶ However a minority

55. RESTATEMENT (THIRD) OF PROPERTY div. v (AM. LAW INST. 2011).

56. Ronald J. Scalise, Jr., *Honor Thy Father and Mother?: How Intestacy Law Goes Too Far in Protecting Parents*, 37 SETON HALL L. REV. 171, 176-89 (2006).

of states still allow parents to inherit, even when there are grandchildren.⁵⁷ In addition, we must account for the unlikely possibility that O'Neal's children predecease him without leaving descendants of their own to inherit through representation.) Although O'Neal has no whole-blood siblings, as noted, he may have formed very different intimate bonds with his half-siblings. The very first estate planning "fix" the class learned was to include residuary clauses in every will they draft. Without such a clause disposing of any assets not specifically noted in the will, or in the event that any gifts fail, the estate could fall into partial intestacy, which again might enable Toney, and his descendants, to inherit as O'Neal's legal heirs.

As the fifth and final entry, the class agrees we should scrutinize the estate plan for any gifts made to O'Neal's "father." Because these legal rules fetishize bloodline relationships, Toney could make a compelling claim to such a gift. While it is likely that a gift to Philip Harrison would be specified as such, mistakes that failed to include his name could generate a challenge. In contract law, capacious intent-deferential rules of evidence admit external evidence to resolve ambiguities.⁵⁸ Despite much criticism, in most states, statutory rules exclude any external evidence in interpreting wills, instead continuing to favor the "plain meaning" rule.⁵⁹ Exceptions are made for latent ambiguities, that is, those that are not obvious on the face of a will.⁶⁰ Many students also recall that family law's "functional family" doctrines could empower recognition of Harrison as O'Neal's father. However, the class prediction is that, in Dead Law, courts would default back to the bio-legal definition of "father." Unlike its sibling doctrines of contracts and family law, Dead Law norms would neither

57. *Id.*

58. *See, e.g., Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co.*, 442 P.2d 641, 645 (Cal. 1968) ("The fact that the terms of an instrument appear clear to a judge does not preclude the possibility that the parties chose the language of the instrument to express different terms . . . Accordingly, rational interpretation requires at least a preliminary consideration of all credible evidence offered to prove the intention of the parties.").

59. *See, e.g., Mahoney v. Grainger*, 186 N.E. 86, 87 (Mass. 1933) ("It is only where testamentary language is not clear in its application to facts that evidence may be introduced as to the circumstances under which the testator used that language in order to throw light upon its meaning. Where no doubt exists as to the property bequeathed or the identity of the beneficiary there is no room for extrinsic evidence; the will must stand as written.").

60. *See, e.g., Moseley v. Goodman*, 195 S.W. 590, 594 (Tenn. 1917) (holding that extrinsic evidence was admissible to resolve the latent ambiguity regarding the testator's intended beneficiary of a will).

permit the introduction of evidence to prove an ambiguity nor recognize Harrison as a “functional father.”

Once the class identifies these vulnerabilities, the next step is to secure the estate plan. The fixes we craft included ensuring that we, O’Neal’s lawyers, have established which bonds he intends to honor and clarify that the will reflects that intent, mobilizing intent-deferential doctrines wherever possible. This can be especially important in blended families where ties and relations have not been legally formalized and also families in which there is ongoing estrangement. Both of these depart from intimacy norms and are considered legally “irregular”; hence, they can produce unanticipated vulnerabilities in estate plans.

There is another element to the vulnerabilities revealed by our inventory of O’Neal’s intimacies. The fragility of O’Neal’s estate plan is fascinating because, on the one hand, he embodies the All-African-American Dream of success—celebrity and wealth based on talent, hard work, and fiscal responsibility. On the other hand, O’Neal’s intimate life followed a pattern prevalent in many African-American communities, in which biological consanguinity does not always dictate the order and priority of kinship bonds.⁶¹ Many black Americans consider a grandparent, an aunt, or other non-parent kin their primary caregiver. In these instances, biological parents may not play a principal affective role, or if they do, still may not follow the order assigned by law’s intestacy defaults. While the UPC justifies much of its defaults as majoritarian ones, as rules that reflect empirical studies of most people’s preferences, it is worth considering whether these defaults function in some instances as racialized penalty defaults, i.e., rules that render some estates fragile and in need of additional effort to safeguard in the face of non-normative behavior.⁶²

61. See, e.g., CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* (1983).

62. I appreciate that this is not the conventional definition, which defines penalty defaults as designed to re-engineer opportunistic behavior. However, if understood more broadly as requiring additional effort in the face of non-normative behavior, these inheritance rules might be viewed as penalty defaults. For a detailed discussion on inheritance rules and penalty defaults, see Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 *FORDHAM L. REV.* 1031, 1042-61 (2004). For earlier use of majoritarian and penalty defaults in the intimacy context, see *Regulating Polygamy*, *supra* note 6, at 2017-20 (“The primary goal of [penalty default] rules is to show that commercial partnership defaults provide guidelines and norms for regulating polygamous unions, consistent with contemporary norms of fairness and egalitarianism in family law. These defaults do implement some key changes from

Hence, O’Neal’s hypothetical offered the class many layers and footholds to conduct intimacy inventories, identify irregularities, and explore how law undermines testamentary intent, even among the highly resourced and socially powerful. Importantly, these are not only questions of enforcing quirky people’s quirky estate plans, as one of my students put it. Rather, we observe how Dead Law’s constant policing of irregular intimacy can also reinforce social subordination by punishing intimacy choices common in some cultures, thereby undermining these groups’ economic personality and ability to direct and distribute their wealth. The racial dynamics that function implicitly in O’Neal’s inventory operate explicitly in Strom Thurmond’s estate, in which we encounter different kinds of racial audits of irregular intimacy.

B. Hypothetical #2

When United States Senator Strom Thurmond died in 2003, the nation learned that he was survived not only by his marital family, i.e., his widow and their three children together, but also by a non-marital, mixed-race daughter, Essie Mae Washington-Williams.⁶³ When Senator Thurmond was twenty-two years old, he fathered Essie Mae with his family’s sixteen-year-old African-American maid.⁶⁴ While the media made much of this revelation, many commentators concluded that because Ms. Washington-Williams stated that she did not intend to make any claims on Senator Thurmond’s estate, there were no inheritance issues.⁶⁵ You are called for comment. Do you agree?

the way polygamy is currently practiced in many communities, and also from the ideals its adherents might desire.”).

63. Thurmond’s first wife had died in 1960; that marriage did not produce any children. ALBERTA MOREL LACHICOTTE, *REBEL SENATOR: STROM THURMOND OF SOUTH CAROLINA* 155 (1966). Thurmond and his second wife had four children, although the oldest had been killed in 1993 by a drunk driver. *ESSIE MAE WASHINGTON-WILLIAMS & WILLIAM STADIEM, DEAR SENATOR: A MEMOIR BY THE DAUGHTER OF STROM THURMOND* 205 (2005). Thurmond’s marital relationship was also complex; he and his wife had separated in 1991, but never divorced. *Id.*

64. Jeffrey Gettleman, *The Nation: Strom Thurmond's Child; Old Times There Are Not Forgotten*, N.Y. TIMES (Dec. 21, 2003), <http://www.nytimes.com/2003/12/21/weekinreview/the-nation-strom-thurmond-s-child-old-times-there-are-not-forgotten.html> [https://perma.cc/4LBC-NAYC].

65. See Marilyn W. Thompson, *Woman Claims Thurmond As Father*, WASH. POST (Dec. 14, 2003), <https://www.washingtonpost.com/archive/politics/2003/12/14/woman-claims-thurmond-as-father/b0f1772e-259d-4954-8801-c773de3cff5d/> [https://perma.cc/LR7A-NK6M].

1. Background Discussion

In order to compile this inventory of intimacy vulnerability, which demonstrates the inextricability of inheritance and broader questions of political equality, I ask the students what they know about Senator Thurmond, or “Ol’ Strom” as he was known by colleagues and constituents.⁶⁶ What results is insight into the nation’s history of racial segregation, the sexual exceptions regularly made for elite white men, and the legal norms that managed those exceptions, including inheritance law. If race was background and subtle in O’Neal’s case study, in Thurmond’s it is front and center. And appalling.

When Strom Thurmond retired from the Senate at the age of one hundred, he was at that time the longest-serving senator in U.S. history, having represented South Carolina for eight terms.⁶⁷ Thurmond’s death sparked a national debate over the long arc of his political career and whether he had been personally and politically transformed. Through the 1970s and 1980s, Thurmond became known for supporting his African-American constituents, including voting for some key federal civil rights legislation.⁶⁸ Thurmond’s advocacy and support for African-American

66. JACK BASS & MARILYN W. THOMPSON, *OL’ STROM: AN UNAUTHORIZED BIOGRAPHY OF STROM THURMOND* (1998).

67. S. HISTORICAL OFFICE, *LONGEST SERVING SENATORS* (2019), https://www.senate.gov/senators/longest_serving_senators.htm [<https://perma.cc/4NDK-JFQP>].

68. In 1971, he had become the first member of Congress from South Carolina to include an African-American on his staff. JACK BASS & MARILYN W. THOMPSON, *STROM: THE COMPLICATED PERSONAL AND POLITICAL LIFE OF STROM THURMOND* 239-40 (2005). Thurmond collaborated with Thomas Moss, a former director of a voter registration project, for a quarter of a century to bring federal resources to support African-American colleges, businesses, and towns in the state. *Id.* In the 1980s, Thurmond also voted to extend the Voting Rights Act, to strengthen the Fair Housing Act, and in favor of recognizing Dr. Martin Luther King, Jr.’s birthday as a federal holiday. See Steven V. Roberts, *Voting Rights Act Renewed in Senate by Margin of 85-8*, N.Y. TIMES (June 19, 1982), <https://www.nytimes.com/1982/06/19/us/voting-rights-act-renewed-in-senate-by-margin-of-85-8.html> [<https://perma.cc/2H6H-2HKB>]; William J. Eaton, *Senate OKs Tough Housing Bias Ban: Sponsors Call Bill to Enforce Fairness Biggest Civil Rights Gain in 20 Years*, L.A. TIMES (Aug. 3, 1988), <https://www.latimes.com/archives/la-xpm-1988-08-03-mn-6744-story.html> [<https://perma.cc/9MB2-MNDL>]; Don Wolfensberger, *The Martin Luther King, Jr. Holiday: The Long Struggle in Congress An Introductory Essay*, WOODROW WILSON INT’L CTR. FOR SCHOLARS (Jan. 14, 2008), <https://web.archive.org/web/20110303194404/http://www.wilsoncenter.org/events/docs/King%20Holiday-essay-drw.pdf> [<https://perma.cc/Z2GC-6AFX>]. Although recognized in South Carolina, until 2000 Martin Luther King, Jr. Day was optional; people could instead opt to substitute a Confederate holiday. *The Controversial History of Martin Luther King Day*, NAT’L GEOGRAPHIC (Jan. 13, 2017),

interests were reciprocated: when he ran for re-election in 1978, he was endorsed by South Carolina's caucus of black mayors and the head of the NAACP said, "We don't care what the senator did in the 40's and 50's but how he is representing us in 1978."⁶⁹ This would not be particularly noteworthy for a Senator from a state with a large African-American population, were it not for Thurmond's prior political history.

From the 1940s through the 1960s, Senator Thurmond had been one of the nation's staunchest defenders of Jim Crow and racial segregation, including, importantly, sexual Jim Crow.⁷⁰ Between 1956 and 1962, Thurmond authored the Southern Manifesto, which urged southern defiance of the Supreme Court's mandate to end school segregation;⁷¹ attempted to block the Civil Rights Act of 1957 by executing Congress's longest solo filibuster;⁷² and was the first Democrat to shatter the "solid South" by switching parties to support Barry Goldwater in 1964.⁷³ Of relevance to the

<https://www.nationalgeographic.com/news/2017/01/martin-luther-king-jr-day-robert-e-lee-birthday-holiday/#close> [<https://perma.cc/Y9MU-GV76>].

69. JOSEPH CRESPINO, STROM THURMOND'S AMERICA 284, 283 (2012); *Thurmond's Black Hope*, WASH. POST (Mar. 17, 1978), <https://www.washingtonpost.com/archive/politics/1978/03/17/thurmonds-black-hope/49fe22d8-a223-4e9a-aa07-7d8b452fe395/> [<https://perma.cc/4HVX-UWWZ>].

70. As *The New York Times* reported at his death: "His opposition to integration, which he often attributed to Communism, was the hallmark of his career in Washington until the 1970's." Adam Clymer, *Strom Thurmond, Foe of Integration, Dies at 100*, N.Y. TIMES (Jun. 27, 2003), <http://www.nytimes.com/2003/06/27/us/strom-thurmond-foe-of-integration-dies-at-100.html> [<https://perma.cc/95LP-6H23>]. The article notes Thurmond "continued to connect Communism and civil rights, calling the Freedom Riders of 1961, who sought integrated bus travel, 'red pawns and publicity seekers.'" *Id.*

71. In 1956, along with Senator Harry F. Byrd of Virginia, he proposed a Southern manifesto, which, after various drafts, argued that the Supreme Court justices, "with no legal basis for such action, undertook to exercise their naked judicial power and substituted their personal, political and social ideas for the established law of the land." Nineteen of the twenty-two Southern senators signed — those who did not were Lyndon B. Johnson of Texas and Albert Gore and Estes Kefauver of Tennessee. The manifesto gave major encouragement for Southern delay and defiance of the court's verdict to end segregation. 102 CONG. REC. 4459-62 (daily ed. Mar. 12, 1956) (statements of Sens. George & Thurmond).

72. Thurmond's record-setting filibuster against the Civil Rights Act of 1957 lasted twenty-four hours and eighteen minutes. STAFF OF S. COMM. ON RULES AND ADMINISTRATION, 112TH CONG., SENATE CLOTURE RULE 48 (Comm. Print 2011). See also Osagie K. Obasogie, *Anything but a Hypocrite: Interactional Musings on Race, Colorblindness, and the Redemption of Strom Thurmond*, 14 YALE J.L. & FEMINISM 451, 454-55 (2006).

73. "The first major Southern pol to cross the aisle during the civil rights era, the South Carolina Senator marked the beginning of the GOP's appeal to white, Southern conservatives, and helped turn a former blue state red." *The Crist Switch: Top 10 Political Defections*, TIME (Apr. 29, 2009), http://content.time.com/time/specials/packages/article/0,28804,1894529_1894528_1894521,00.html

Dead Law hypothetical, though, was Thurmond's earlier political claim to fame, his 1948 presidential run on the newly formed "Dixiecrat" party ticket, which was when he "first came to national attention . . . as the States' Rights candidate after Southerners walked out of the Democratic convention to protest the party's new commitment to civil rights."⁷⁴ In his speech accepting the States' Rights Democratic Party nomination, Thurmond ardently defended laws criminalizing sex and marriage between blacks and whites: "All the laws of Washington and all the bayonets of the Army cannot force the negro into our homes"⁷⁵ He reiterated, "on the question of social intermingling of the races, our people draw the line."⁷⁶

To many, the post-mortem revelation about Thurmond's mixed-race child was ironic. "Everybody knew this was going on," commented Jack Bass, co-author of *Ol' Strom: An Unauthorized Biography of Strom Thurmond*. "But what was talked about was the number of mulatto children on the next plantation, not those on your own."⁷⁷ In fact, this seeming contradiction between public politics and private intimacy practices is emblematic of the nation's racial history. Like many powerful southern white men, Thurmond called for sexual racial apartheid while violating the

[<https://perma.cc/3DHB-6FYM>]. Bruce H. Kalk, *Wormley's Hotel Revisited: Richard Nixon's Southern Strategy and the End of the Second Reconstruction*, 71 N.C. HIST. REV. 85, 88-89 ("What did it mean for Strom Thurmond to take the lead in swinging southern support for Nixon? Thurmond was the most powerful force within the 'Dixiecrat' segregationist wing of the party and one of the most influential political leaders in the South.")

74. The Dixiecrats hoped to "capture the Democratic Party and its electoral votes in the South—a first step in a strategy of trying to deadlock the electoral college and force the election into the House of Representatives, where the South had power to bargain for its positions." Clymer, *supra* note 70. Thurmond won only 2.4% of the popular vote and thirty-nine electoral votes. Alonzo L. Hamby, *Harry S. Truman: Campaigns and Elections*, U. VA. MILLER CTR., <https://millercenter.org/president/truman/campaigns-and-elections> [<https://perma.cc/2QPZ-TYAH>]. "Mr. Thurmond finished a distant third to President Harry S. Truman that year, but his million votes cracked the once-solid Democratic South and helped set the stage for political realignment." Clymer, *supra* note 70. The Dixiecrat legacy reared its head at Thurmond's centennial birthday party, costing Senator Trent Lott his leadership of the Senate. *Id.*

At [Thurmond's] 100th birthday party Senator Trent Lott of Mississippi, the Republican leader, paid tribute to Mr. Thurmond, saying the nation 'wouldn't have had all these problems over all these years' had he won the presidency in 1948. The racially charged political firestorm over the next two weeks forced Mr. Lott to resign his leadership post.

Id.

75. *Id.*

76. *Id.*

77. Gettleman, *supra* note 66.

very rules he endorsed. Sexual Jim Crow was an insidious twist on slavery's regulation of sexual interactions between the races.⁷⁸ Under slavery, criminal and property laws gave white men close to unfettered sexual access to enslaved black women.⁷⁹ Inheritance law stepped in to ensure there would be no economic consequences—mixed race children of white slaveholders were deemed “illegitimate” and hence unable to inherit from their often wealthy white fathers. Thus inheritance law collaborated with other foundational rules to ensure that white men's affective ties or intimacy bonds across caste lines would not alter the racial descent of wealth.⁸⁰ Of course, the political economy of interracial intimacy eventually shifted from slavery to Jim Crow—black women gained some formal rights and white men lost some. Most obviously, white men could no longer lay formal legal claim to black women's sexuality.⁸¹ And, importantly, the explicit sexual access that many elite white southern white men had defended was now replaced with the nominal sexual racial apartheid endorsed by presidential candidate Strom Thurmond.⁸² Yet, the regular breach of the nominal norm continued as did the regulatory effects. Criminal law still would not prosecute rapes of black women by white men. For consensual relationships, Jim Crow laws prohibited whites from marrying non-whites; thus any child born of an interracial relationship could only be illegitimate and barred from any standing as a legal heir.⁸³

78. See, e.g., *Pace v. Alabama*, 106 U.S. 583 (1883) (prohibiting a black and white person from living together in adultery and fornication is not in conflict with the Constitution, even where the penalties of two people of the same race and color living together would be less severe).

79. See “*Sexual Economy*” of *American Slavery*, *supra* note 4; see also *Antebellum Perspective*, *supra* note 6.

80. See “*Sexual Economy*” of *American Slavery*, *supra* note 4 (children could be result of rape, coercion, or relations that occurred without explicit force, although one cannot untangle consent from slavery and Jim Crow's intrinsically coercive power structures, which were not merely private, but backed by the state).

81. People sometimes speak, naively, about rights as “a zero-sum game.” This may be untrue with regard to political rights, i.e., my right to due process does not undermine another citizen's rights to due process. But with regard to private law and related rights, they are a zero-sum game. When black women gained criminal protection from sexual assault, men lost the “right” to rape them. Although legal scholars typically use Wesley Hohfeld's framework of correlative rights in the context of private and common law, it also offers a map of the nation's racial subordination. See Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913).

82. See *Antebellum Perspective*, *supra* note 6.

83. As noted above, in some instances marriage is definitive in establishing legal heirship, trumping biology in rules such as the marital presumption of paternity. Bans on interracial marriage, however, ensured that black women's children with white men would never be entitled to the marital presumption. *Id.*

Much changed between slavery and Jim Crow, but inheritance law remained a constant. Against a backdrop of shifting regulation of interracial intimacy, inheritance law played a starring role in managing the economic effects and possibilities. It ensured that intimate bonds between the races would never ripen into legal rights, thereby conserving white wealth and political power. This continued until the Warren Court overturned, first, state bans on interracial marriage in 1968⁸⁴ and, second, a decade later, bans on inheritance by non-marital children.⁸⁵ And, of course, the effects on racial wealth continue to be felt to this day.⁸⁶

Hence, like many other powerful white men over the centuries, Thurmond exploited his power and privilege to breach sexual segregation without apparent fear that his actions might have significant consequences, including on his or his family's inheritance expectations.⁸⁷ His avowal that not even military might could "force the negro into our homes," was a rhetorical erasure of the fact that African-Americans *were* "in white homes" and had been since they were forcibly brought to colonial America for indenture and enslavement in the seventeenth century. Indeed, throughout much of the nation's history, the presence of black "help" defined white homes like Thurmond's, which refused to function without it. The vagaries of "into our homes" functions as a complex code of racial relationships—of a black presence both needed and spurned, insisted upon and erased, of intimacies forced into irregularity precisely because of this combination of public disavowals and private coercions.⁸⁸ The question raised by the Dead

84. *Loving v. Virginia*, 388 U.S. 1, 12 (1968) ("There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause.").

85. *Trimble v. Gordon*, 430 U.S. 762 (1977) (holding that an Illinois statute barring a nonmarital child from their paternal inheritance rights is an unconstitutional violation of the Equal Protection Clause).

86. Wealth is notoriously difficult to change, and these laws helped to crystallize wealth inequality. See, e.g., Goldburn P. Maynard, *Addressing Wealth Disparities: Reimagining Wealth Taxation as a Tool for Building Wealth*, 2 *DENV. U. L. REV.* 145, 170-71 (2014) (arguing that the current tax system reinforces tax disparities). See also *Antebellum Perspective*, *supra* note 6 (describing how inheritance rules affected racial distribution of wealth during the antebellum period).

87. See *Antebellum Perspective*, *supra* note 6 (reviewing cases that protected racial wealth from any propensity of wealthy white men to distribute it to their mixed race, or "shadow" families); see also Obasogie, *supra* note 74, at 456-466, 475 ("Sex with Black women, who had little capacity to 'say no,' was both a script and path of early twentieth century White masculinity.").

88. See, e.g., Hortense Spillers, *Mama's Baby, Papa's Maybe: An American Grammar Book*, 17 *DIACRITICS* 64 (1987).

Law hypothetical is, do those expectations continue to hold *today*? What would Thurmond's intimacy inventory look like today?

2. *The Intimacy Inventory: The "Press Conference"*

The hypothetical posed to the class was whether the media was correct in concluding that, because Senator Thurmond's newly revealed daughter did not intend to make any legal claims on his estate, there were no inheritance issues. What might a member of our Dead Law class say, if called to comment by the media?

Thurmond's potential estate issues are simultaneously simpler and more complex than O'Neal's. First, the press too easily dismissed the potential Dead Law significance of Thurmond's non-marital, African-American daughter. As we discussed extensively in the previous hypothetical, anyone who would inherit in intestacy has standing to challenge a will. In Thurmond's case, his potential heirs now include not only Washington-Williams herself, but also her children and grandchildren. She and her descendants are now a permanent, inalterable part of the Thurmond bloodline. Ms. Washington-Williams's declaration that she is not making claims on Thurmond's estate does not bind her children, or other descendants, who might also stand to inherit as legal heirs. Moreover, the discovery of Thurmond's oldest daughter altered more than his own intestacy family tree. Hence, the first entry in Thurmond's inventory of intimacy vulnerability is that Washington-Williams and her descendants are now part of the heirship tables of many of Thurmond's relatives, should any die intestate, including the marital children he acknowledged, and, in some states, his widow.⁸⁹ (Washington-Williams is his widow's stepdaughter, and the UPC and some states authorize intestate inheritance by stepchildren⁹⁰). This includes direct inheritance, as well as inheriting by representation, or through "ancestors," i.e., a parent or grandparent, who predecease a decedent.

Following this same doctrinal logic, Washington-Williams and her descendants may now be entitled to inherit from class gifts in Thurmond family wills and trusts. Any gifts to children, grandchildren, issue, or

89. UNIF. PROBATE CODE § 2-103 (UNIF. LAW COMM'N).

90. *Id.*

descendants now may include this new branch of Thurmond's genealogical tree, his non-marital daughter. This is the case not only with any class gifts in Thurmond's own estate plan, but also in the estate plans of some of his relatives, e.g., parents or siblings, who may have left gifts to "grandchildren" or "nieces or nephews." If the donors are deceased and cannot amend the instruments, Washington-Williams's branch of the tree may be able to join in such gifts. Importantly, as noted in the O'Neal hypothetical, in some jurisdictions, class gift distributions ultimately rest on donor's intent. In these jurisdictions, the inclusion of Washington-Williams and her descendants may turn on this determination. For Thurmond himself, a court might focus on the fact that he attempted to keep Washington-Williams's existence a secret his whole life. On the other hand, the fact that he gave her consistent financial support, including paying for her college education, and met with her regularly could support a finding that she be included in the denomination of his "children."⁹¹ It is ambiguous at best.

The assessment of intent from Thurmond's relatives could be complex and potentially embarrassing. It is unlikely that they intended his non-marital African-American family to be included in the distribution of their wealth. However, given the South's legendary racial and sexual subordination, family members might hesitate to make such arguments publicly, and a court might be reluctant to enforce structural racism and sexism through an intent standard.

Arguably as important as material inheritances are the cultural and symbolic inheritances that can follow ancestry, especially when the dead are as iconic as Senator Strom Thurmond. Within six months of Thurmond's death, his marital family confirmed the Senator's paternity of Ms. Washington-Williams, which paved the way for claims to cultural legacies.⁹² For instance, Washington-Williams' name was engraved on the base of a South Carolina state capitol memorial to Thurmond, alongside his

91. See Michael Janofsky, *Thurmond Kin Acknowledge Black Daughter*, N.Y. TIMES (Dec. 16, 2003), <https://www.nytimes.com/2003/12/16/us/thurmond-kin-acknowledge-black-daughter.html> [<https://perma.cc/NJ8D-ZAPV>]

92. The family attorney read the following statement: "As J. Strom Thurmond has passed away and cannot speak for himself, the Thurmond family acknowledges Ms. Essie Mae Washington-Williams' claim to her heritage. We hope this acknowledgment will bring closure for Ms. Williams." *Id.*; see also David Mattingly, *Strom Thurmond's Family Confirms Paternity Claim*, CNN (Dec. 16, 2003), <http://www.cnn.com/2003/US/12/15/thurmond.paternity/> [<https://perma.cc/JVJ4-GA5W>].

other children, and the language was changed to state that Thurmond was the father of five, not four, children.⁹³ It was an African-American state legislator, Robert Ford, who introduced the bill to have the monument altered, suggesting the *political* significance of Washington-Williams's cultural inheritance.⁹⁴ Washington-Williams herself stated that she planned to claim a different legacy, exercising her right as a Thurmond descendant to join the highly exclusive, heritage based societies, Daughters of the American Revolution and the United Daughters of the Confederacy.⁹⁵ Her mere presence, not as “the help” but claiming a heritage as “the daughter” was changing history, challenging falsified family lineages, and forcing a complete reassessment of everything that had been assumed.⁹⁶ Finally, if scholarships or other legacies have been set up for Thurmond heirs, e.g., at the University of South Carolina, Thurmond's alma mater, Washington-Williams's family may now be eligible to participate. Cultural inheritances are slightly tangential to formal Dead Law. But memorialization and other memory acts are still a potentially important and valuable part of post-mortem legacy and something that estates carefully negotiate.⁹⁷ This is the final entry, then, in Thurmond's inventory of intimacy vulnerability.

93. “There was no room at the beginning of the list to add “Essie Mae” in her pride of place as the oldest, so her name was inscribed at the bottom, in a typeface that roughly matches that used on the rest of the monument.” Joseph Crespino, *The Scarred Stone: The Strom Thurmond Monument*, SOUTHERN SPACES (Apr. 29, 2010), <https://southernspaces.org/2010/scarred-stone-strom-thurmond-monument> [https://perma.cc/SL47-KS2M].

94. *Id.*

95. Washington-Williams applied for these heritage-based societies, but died before being admitted. Shaila Dewan & Ariel Hart, *Thurmond's Biracial Daughter Seeks to Join Confederacy Group*, N.Y. TIMES (Jul. 2, 2004), <https://www.nytimes.com/2004/07/02/us/thurmond-s-biracial-daughter-seeks-to-join-confederacy-group.html> [https://perma.cc/NM96-H9Q7]. See also Shaun Assael, *The Secret Fight To Save Confederate Monuments*, GLAMOUR (Aug. 16, 2019), <https://www.glamour.com/story/the-secret-fight-to-save-confederate-monuments> [https://perma.cc/6NHA-CYXJ] (“To be accepted as members [in the UDC], applicants are required to prove they are blood descendants of ‘men and women who served honorably’ for the South or gave ‘material aid to the cause.’”).

96. In a television debate with white conservative James Kilpatrick, James Baldwin answered the racial dog-whistle “Would you want your daughter to marry” a black man with the now famous retort: “You’re not worried about me marrying your daughter—you’re worried about me marrying your wife’s daughter. I’ve been marrying your daughter since the days of slavery.” TIMOTHY B. TYSON, BLOOD DONE SIGN MY NAME 39 (2004).

97. This has been increasingly the case as colleges and municipalities navigate calls to rename buildings and/or remove monuments. What my colleagues Geoff Ward and David Cunningham call “the memory landscape” is under increasing contestation, which brings significant challenge to long-standing memorializations and legacies. See generally *Faculty Project Uses GIS to Explore History of Racial Violence*, WASH. U. LIBR. (Nov. 11, 2019), <https://library.wustl.edu/faculty-project-uses-gis-to-explore-history-of-racial-violence/> [https://perma.cc/89AS-8B2T].

As with O’Neal, in addition to the technical level, the case study has implications at a more conceptual level as well, or what I call “economic personality.” By “economic personality,” I mean the effects of these laws beyond the individual, i.e., on groups’ legal abilities to accumulate, control, and transfer property and wealth, including after death.⁹⁸ Thurmond’s case study reinforces how definitions of intimate bonds as normative and regular, or “deviant” and irregular, can mediate and shape racial economic personality in the United States. In the instance of sexual Jim Crow, criminal, family, and inheritance law all converged to ensure that “regular” bloodline inheritance would never cross racial lines. Sex between white men and black women could be socially regular, normative even, while remaining legally irregular and invisible. Inheritance and other laws denied black women and their children economic personality; they would never be able to inherit through intestacy, participate in class gifts, or have standing to challenge the wills that excluded them. At the same time, these laws shored up white men’s economic personality; they could choose to include their mixed race families in their wills, but remain impervious to any claims based on legal rights. For centuries, inheritance law policed this irregular intimacy to deny black economic personality and conserve white racial wealth. In the end, the case study is a chilling reminder of how inheritance law has been used in the service of social, political, and economic subordination.

III. THREE LESSONS

What do my students take away from these hypotheticals, these audits of the intimate lives of the dead? A few things, I hope.

First, from a lawyering perspective, these two case studies focus students’ attention on how various accidents of affective life and decisions about intentional intimacy can converge to create a fragile estate plan. The first hypothetical takes as a client an extraordinarily wealthy and business-savvy celebrity, but one whose nontraditional family structure amounts to non-normative intimacy that yields a potentially vulnerable estate plan. As we inventory O’Neal’s intimate bonds, we discover the vulnerability—his

98. *Antebellum Perspective*, *supra* note 6; Adrienne D. Davis, *Corrective Justice and Reparations for Black Slavery*, *CAN. J.L. & JURIS.* (forthcoming 2020) (on file with author).

self-understood paternal ties do not align with the biological ones recognized and mandated by intestacy law. His biological father did not parent him, and the man who did raise him, and who he viewed as his father, did not legally adopt him. The biological insistence of state intestacy law extends to potentially include in O'Neal's estate distribution collateral relatives who he may not know or view as part of his family.

The case study showcases an ongoing theme in the course, the normativity of intimacy rules in Dead Law. Intestate statutes of descent and distribution reinforce the primacy of biological bonds and bloodline inheritance.⁹⁹ Although intestacy is nominally a default rule, one that can be overcome by making a will, in Dead Law we come to understand the "stickiness" of the default¹⁰⁰ and its punishing rejection of non-normative, irregular intimacy.¹⁰¹ These same defaults also fill gaps in interpretation in wills and drive two of the most litigated challenges to wills, undue influence and mental incapacity, which are measured explicitly and implicitly against deviations from "regular" inheritance through intestacy. Through collateral rules such as refusing to authorize negative disinheritance and the finally fading no-residue-of-a-residue doctrine, Dead Law reiterates and regularizes the primacy of bloodline inheritance.

At the same time, the main engine of Dead Law reform in defining intimacy bonds, the UPC, may similarly presuppose family dynamics that are in fact highly variant and unpredictable.¹⁰² In this case study, O'Neal's estate is made vulnerable by the UPC intestacy rules that recommend treating whole and half-siblings the same. Underlying this doctrine is the UPC's assumption that half-siblings grow up in a context of divorce and

99. Another departure from conventional biological reproduction within nuclear families is children born with assistance from reproductive technologies. Again, family law has embraced those born in this way as legal children while Dead Law has struggled to treat them as universally legal heirs. *See, e.g.*, Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091 (1997).

100. *See, e.g.*, Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. L. REV. 651 (2006).

101. Of course, the rejection of non-normative, irregular intimacy extends far beyond the ability to form families. For a discussion *see, e.g.*, Sarah Mervosh, *Gay U.S. Couple Sues State Dept. for Denying Their Baby Citizenship*, N.Y. TIMES (Jul. 23, 2019), <https://www.nytimes.com/2019/07/23/us/state-department-assisted-reproductive-citizenship.html> [<https://perma.cc/726V-S4B9>].

102. For a discussion of the Uniform Probate Code's "conspicuous omission of committed, unmarried partners from its default succession scheme," *see* Jennifer Seidman, *Functional Families and Dysfunctional Laws: Committed Partners and Intestate Succession*, 75 U. COLO. L. REV. 211, 212 (2004).

remarriage that produces Brady Bunch-esque “blended families.” This may or may not be the case in genealogies in which a parent’s children are raised in different families and do not know each other; in these instances children’s primary intimate allegiances may be to whole siblings, or to the half-siblings with whom they were raised. (In Minnesota, which has adopted the UPC rule, the ongoing battle over Prince’s estate, involving dozens of half-siblings, reinforces these concerns.¹⁰³) Thus, individuals whose affective bonds do not follow prescriptions for normative intimacy may find themselves with vulnerable estate plans that may be overturned to privilege intestacy’s preferred intimacy defaults.¹⁰⁴ For O’Neal, his perception of “family” is irregular under both “bloodline” rules and UPC reforms. Unlike contract law’s intent-deferential “slippery” default regimes, Dead Law’s regularizing sticky defaults are relentlessly intent-defeating, socially engineering its own vision of intimate life.¹⁰⁵

The hypothetical about Strom Thurmond’s estate surfaces a distinct set of issues about the normativity of intimate practices and resulting bloodlines. The hypothetical raises doctrinal questions akin to those raised by O’Neal’s—it reveals how bloodline inheritance can subvert testators’ preferences to privilege some intimacy bonds and choices over others. However, in contrast to O’Neal’s, the social engineering at work in the Thurmond case study reveals how in some instances inheritance rules actually *repressed* bloodline inheritance in the service of other social and political goals.¹⁰⁶

103. See Patrick & Morrison, *supra* note 26, and accompanying text.

104. See, e.g., Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611 (1988) (arguing both substantive rules of lapse and rules of construction impute to decedents traditional forms of family intimacy); Mary Louise Fellows & Gregory S. Alexander, *Forty Years of Codification of Estates and Trusts Law: Lessons for the Next Generation*, 40 GA. L. REV. 1049, 1065-66 (2006) (“[The UPC] presumptively imposes a survivorship requirement on all future interests held in trust and creates substitute gifts in the predeceased beneficiary’s descendants who survive to the time of distribution.”).

105. See, e.g., KY. REV. STAT. ANN. § 391.010. I thank Goldburn Maynard for this insight into Kentucky’s intimacy norms, which preference intestate decedents’ children, parents, and siblings to a surviving spouse, despite the fact that surveys show most people would prefer the spouse to inherit first and principally.

106. In response to developments in in-vitro fertilization, the Supreme Court has found that the social interest in protecting a person’s ability to consent to reproduction outweighs genetics for inheritance purposes. *Woodward v. Comm’r*, 760 N.E.2d 257 (Mass. 2002) (holding that, where the decedent’s wife artificially conceived their children after his death, a genetic bloodline connection between the descendants and the decedent was insufficient to establish inheritance rights, absent a finding that the decedent consented to reproduce posthumously and to support any posthumously borne child). In instances of adoption, the Uniform Probate Code severs the inheritance relationship between the

This leads to the second take-away: how these post-mortem inventories and audits of intimacy spill over the boundaries of individual estates to shape groups' relationship to both wealth and political equality.¹⁰⁷ Some of these effects are obvious. As noted above, historically Dead Law denied women full economic personality, limiting their ability to inherit, transfer, or even administer post-mortem property distribution.¹⁰⁸ As was thoroughly documented in the decade-long run up to the *Obergefell v. Hodges*¹⁰⁹ decision, bars on same-sex marriage converged with inheritance rules to deny same-sex loving people the ability to command property in the same ways that heterosexuals could, i.e., to guarantee post-mortem transfers to their sweeties.¹¹⁰ (In fact, the first Supreme Court chip at state same-sex marriage bans was a challenge based on the estate tax.¹¹¹) Even now, post-*Obergefell*, we continue to see these denials at work—most recently last fall, in a contested Brooklyn townhouse inheritance.¹¹²

The Thurmond hypothetical brings into stark relief the effects of historical inheritance rules and racial audits on African-American wealth

biological parent and biological child, replacing it with an inheritance relationship between the adopting parent and adoptee child. Unif. Prob. Code § 2-119(a) (Unif. Law Comm'n 2010). See generally Anne-Marie Rhodes, *On Inheritance and Disinheritance*, 43 REAL PROP. TR. & EST. L.J. 433 (2008).

107. See also *Antebellum Perspective*, supra note 6.

108. For "inherit," see, e.g., *Brummet v. Weaver*, 2 Or. 168 (1866) (overturning previous rules that a married woman could not hold inherited property as her separate property). For "administer," see *Reed v. Reed*, 404 U.S. 71 (1971) (holding unconstitutional that rules favoring men over women as estate executors). For "transfer," see, e.g., *Urquhart v. Oliver*, 56 Ga. 345 (1876) (overturning rules that a married woman could not execute will disposing of her separate property without obtaining prior consent of her husband).

109. See, e.g., E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063 (1999); T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55 (2004).

110. See, e.g., Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 326-27 (2018) (discussing the same-sex partner of a decedent who could not inherit under decedent's will due to a minor technicality, despite the couple's fifty year romantic union); Gwendolyn L. Snodgrass, *Creating Family Without Marriage: The Advantages and Disadvantages of Adult Adoption Among Gay and Lesbian Partners*, 36 BRANDEIS J. FAM. L. 75, 75 (1997) (discussing the use of adult partner adoption by same-sex partners to reinforce their testamentary devices and circumvent unwanted intestacy defaults).

111. *United States v. Windsor*, 570 U.S. 744, 771 (2013) ("The particular case at hand concerns the estate tax, but DOMA is more than a simple determination of what should or should not be allowed as an estate tax refund.") (ruling that the federal Defense of Marriage Act is an unconstitutional violation of the Equal Protection Clause and ordering a tax refund with interest to decedent's spouse).

112. Sarah Maslin Nir, *A Brownstone and the Bitter Fight to Inherit It*, N.Y. TIMES (Oct. 23, 2016), <https://www.nytimes.com/2016/10/24/nyregion/a-brownstone-and-the-bitter-fight-to-inherit-it.html> [<https://perma.cc/4V6T-3MBV>].

and economic personality. In order to inventory the baroque drama of Senator Thurmond's estate, the class has to engage the web of rules that maintained racial subordination, including inheritance law. Thurmond, of course, is a perfect example because he personally supported Jim Crow and its explicit design to keep black Americans politically, socially, and economically inferior. Thurmond's actions reveal how southern elite white men constructed criminal rules that publicly prohibited and punished interracial intimacy but then turned to private law rules, including inheritance law, to minimize the potential disruptive consequences of their regular breach of their own sexual prohibitions. Importantly, this irregular intimacy often involved members of some of the wealthiest families in the country. What we see, in the end, is how inheritance law—which is seemingly about autonomous individuals and their rights to the post-mortem transmission of wealth—also, until the 1970s, played a key role in regulating racial access to wealth and, in the process, shaped the racial economic personality of black Americans.

While Thurmond's case study reveals Dead Law conducting overtly racial audits and regulation, its policing of irregularity sounds in a different racial register in O'Neal's case study. As discussed above, the fragility of O'Neal's estate plan stems from the combination of his American Dream wealth and the fact that his family relationships follow patterns of intimacy common in black communities but that are considered non-normative. In these instances, biological parents may not play a principal affective role, or if they do, still may not follow the order assigned by law's intestacy defaults.

The UPC justifies many of its defaults as majoritarian ones, as rules that reflect empirical studies of most people's preferences. However, it is worth considering whether these defaults function in some instances as racialized penalty defaults, i.e., rules that render some estates fragile and in need of additional effort to safe-guard in the face of non-normative behavior.¹¹³ In

113. See *supra* note 64 and accompanying text. I appreciate this is not the conventional definition, which defines penalty defaults as designed to re-engineer opportunistic behavior. However, if understood more broadly as requiring additional effort in the face of non-normative behavior, these inheritance rules might be viewed as penalty defaults. See, e.g., Ian Ayres & Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 STAN. L. REV. 1591, 1591 (1999). See also Scott Baker & Kimberly D. Krawiec, *The Penalty Default Canon*, 72 GEO. WASH. L. REV. 663 (2004) (discussing penalty defaults in context of statutory incompleteness). For my earlier use of majoritarian and penalty defaults in the intimacy context, see *Regulating Polygamy*, *supra* note 5. See also Boni-Saenz, *supra*

this sense, Dead Law's efforts to regularize intimacy encompass both the explicit racial audits we witness in Thurmond's case study and the more subtle racial effects we observe in O'Neal's.

Finally, these hypotheticals reinforce a primary principle of critical legal studies and critical race theory—the role of private law in distributing legal rights and political equality.¹¹⁴ Often students internalize conventional understandings of law that focus on criminal law, constitutional law, and regulatory administrative law as the primary engines of equality and liberty. In this view, social justice advocates should focus their energies on quintessential public law. However, these case studies demonstrate that private law plays at least as significant a role as public law in shaping the legal rights that define individuals' and groups' social standing. This includes rights to enforce agreements, negotiate duties of care, and command property, including its transfer during one's life and after one's death, as inheritance. My former colleague, and fellow trusts and estates teacher, Laura Rosenbury used to call this regulation of quotidian transactions and negotiations “the law of everyday life.”¹¹⁵ Far from being banal, the law of everyday life helps shape the infrastructure within which people—individuals and groups—navigate their intimate lives and loves. These racial audits are both fantastical and material, ordering our collective imaginary about normative intimacy while aligning economic entitlements and wealth to these judgments. By auditing the dead, by subjecting their ante-mortem intimate lives to an accounting in the service of regularized intimacy, Dead Law determines whether to recognize, reinforce, undermine, or deny the relationships that undergird the meaning of what it is to be human. In this sense, Dead Law determines whether to recognize, reinforce, undermine, or deny the relationships that undergird the meaning of what it is to be human.

note 112 (using same-sex couples as an example to argue “[f]ormalistic wills doctrines should be reformed because they create unjustified inequalities in the distribution of donative errors.”); Hirsch, *supra* note 64 (discussing how to reform default rules in inheritance law).

114. See, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); *Antebellum Perspective*, *supra* note 6.

115. See generally Laura A. Rosenbury, *Between Home and School*, 155 U. PA. L. REV. 833, 842 (2007); Laura A. Rosenbury, *Working Relationships*, 35 WASH. U. J.L. & POL'Y 117, 137 (2011).