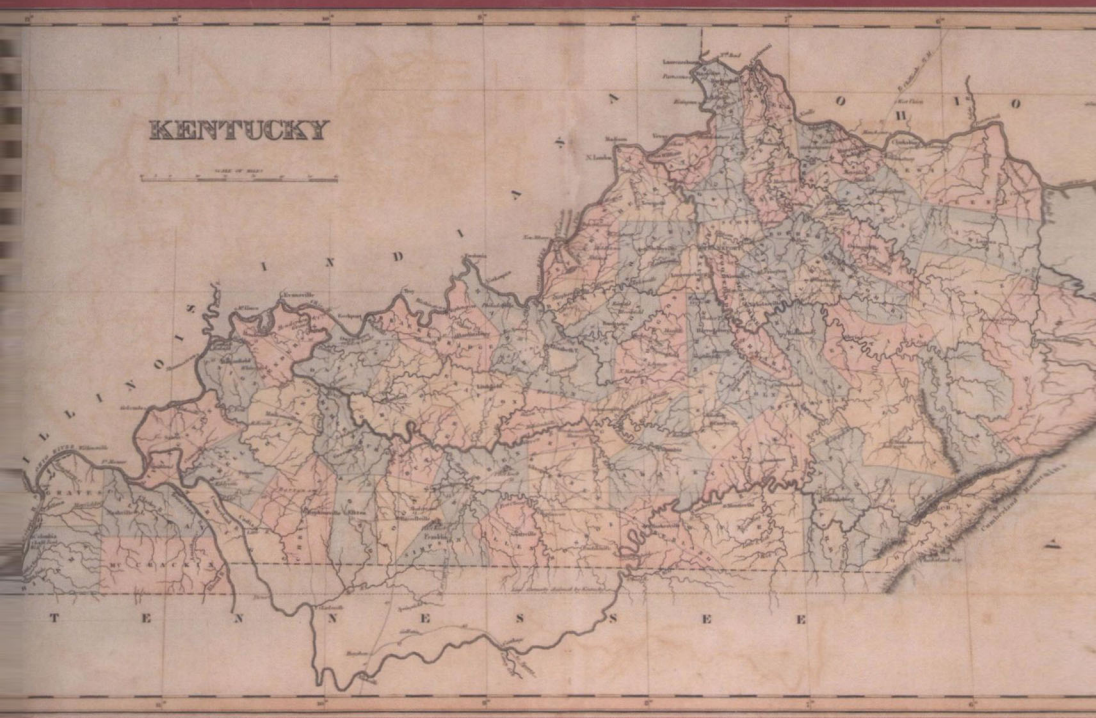
Family, Law, and Inheritance in America



A Social and Legal History of Nineteenth-Century Kentucky

YVONNE PITTS

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Purdue University

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Family, Law, and Inheritance in America

Yvonne Pitts explores inheritance practices by focusing on nineteenth-century testamentary capacity trials in Kentucky in which disinherited family members challenged relatives' wills. These disappointed heirs claimed that their departed relatives lacked the capacity required to write a valid will. These inheritance disputes crisscrossed a variety of legal and cultural terrains, including ordinary people's understandings of what constituted insanity and justice, medical experts' attempts to infuse law with science, and women's claims to independence. Pitts uncovers the contradictions in the body of law that explicitly protected free will while simultaneously reinforcing the primacy of blood in mediating claims to inherited property. By anchoring the study in local communities and the texts of elite jurists, Pitts demonstrates that the term *capacity* was laden with legal meaning and competing communal values about family, race relations, and rationality. These concepts evolved as Kentucky's legal culture mutated as the state transitioned from a conflicted border state with slaves to a developing free-labor, industrializing economy.

Yvonne Pitts is an assistant professor in the department of history at Purdue University. She received a Filson Fellowship at the Filson Historical Society in Louisville, Kentucky, and has been a fellow at the J. Willard Hurst Summer Institute in Legal History at the University of Wisconsin Law School. Dr. Pitts has been published in *The Journal of Women's History*.

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To my family:
Those related by blood and those related by affection

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Acknowledgments

The cultural importance of inherited property first struck me when I was sitting in an airport on my way to a history conference during graduate school. A woman sitting across from me was on the phone, emotionally describing how she had found her late "Granny's crochet hook." She was gently holding this worn crochet hook as though it were a talisman imbued with the spirit and memory of her late grandmother. The hook itself was available in any craft store for a couple dollars. It occurred to me that the hook had taken on immense emotional value as a material symbol of the obviously close relationship she had with her grandmother. Of course, inherited property often has great monetary value and lacks the sentimental attachments of that particular crochet hook. I realized, though, that if I intended to write about the multiple historical meanings of inheritance, I had to look at inheritance practices as conveying more than material wealth. They transmitted all manner of familial affection, angst, and memories. That moment led me to think much more deeply about inheritance, not just as the transfer of wealth, but also as the transmission of a lifetime of emotions, ranging from fervent love to deep enmity.

This project began while I was in a seminar at the University of Iowa School of Law on "Gender and the Law," co-taught by my mentor and dissertation advisor, Linda K. Kerber, and Patricia Cain, who became my second reader on my dissertation. I owe Linda Kerber an enormous debt of gratitude for her insightful guidance, her encouragement, and her support. Linda's scholarship was revelatory for me, but it is her remarkable kindness and generosity to aspiring young scholars I will not forget. Patricia Cain patiently led me through the law of wills, ever reminding

me that good legal history demands good legal training. I also wish to thank the other members of my dissertation committee: Allen Steinberg, Leslie Schwalm, and Douglas Baynton. Sarah Hanley and Susan Lawrence read drafts and offered valuable comments. Sharon Romeo and Heather Kopelson offered important insights through a supportive reading group in graduate school. James Mohr was kind enough to read an early version of Chapter 3 and offer comments and insight. Laura Edwards, Barbara Welke, and Diane Miller Sommerville have inspired me through their scholarship and gave valuable comments at early stages of the project at various conferences. I am certain that I never would have made it to the PhD program at the University of Iowa without my first mentor and my dear friend, Sandra VanBurkleo, at Wayne State University. Growing up in a neighborhood on the edge of Detroit where many of us were the first generation to attend college did little to prepare me for the challenges of advanced study in graduate school. When I arrived at Wayne State clad in combat boots and a tie-dyed shirt, Sandra saw something I was unaware I possessed and nurtured it with immense patience. She introduced me to the world of ideas and to legal history. She is a brilliant scholar, a talented artist, and a compassionate and empathic person. My life would have been much different without her influence.

I owe a great debt to many of my wonderful colleagues at Purdue University, especially Caroline Janney. She is a very dear friend, colleague in the best sense of the word, and a rigorous scholar for whom I have great admiration. She read through numerous drafts, pushed me to think about why Kentucky has an important legal history to tell, and has talked me off several ledges, sometimes late at night, always with humor. I also wish to thank Mike Morrison, Alicia Decker, Nancy Gabin, and John Larson, all whom have given me valuable support. I was fortunate enough to have a pre-tenure leave at Purdue University and was awarded a Library Scholars Grant that allowed me valuable research and writing time. Erica Cornelius Smith worked as a research assistant and spent many hours sifting through and scrupulously coding the original wills into a clean dataset, which she then helped me analyze. Her expertise in data analysis has made this project much better.

I have admired the scholarship of Chris Tomlins since I first read it in graduate school, and his work continues to provoke and challenge my thinking. To work with him as the series editor has been an absolutely amazing experience. This project is undoubtedly much better for his comments and direction. I also owe a debt of gratitude to Abby Zorbaugh at Cambridge University Press for her patience and good nature. I have

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There are those too who have influenced this project in immeasurable, invaluable ways, although some of them have no idea what testamentary capacity is or why I have been obsessed with it for so long. Marla Hurst, Lynnette Grays, and Merrie "Maddog" Daniels have supported me through some very difficult moments. My brother, Bill Pitts, sister-in-law Diana Pitts, and their beautiful children, Kayla, Gracie, and Will reminded me to eat lots of ice cream and to go outside. My aunt and uncle, Joe and Pat Pitts, have never wavered in their support. My father Bill Pitts's quiet intelligence and my mother Helen Pitts's unconditional support inspire me still. Without their encouragement and love, I would not have completed this project. My mother did not live to see the end of this project, but she always had more faith than I that it would get done. I miss her terribly still. I met Michelle Rhoades, my partner of more than a decade, at a friend's house in graduate school. Michelle is a talented scholar, a formidable chef, a wonderful raconteur, and I am grateful to share in her love and passion for life. She and our son Robert remind me daily of all the beautiful, magical things in life that cannot be found in a book.

Contents

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Introduction

In 1858 at the Trigg County, Kentucky courthouse, William Miller described his deceased sister Jane Miller as "naturally a woman of very strong mind and of more than ordinary intelligence but in her latter years her mind had become greatly weakened by her long continued bodily infirmity."[1] Miller appeared in court because he was involved in a will dispute – a testamentary capacity challenge – over his sister's last wishes concerning her property. Jane Miller had behaved like many other testators (people who wrote wills) in leaving much of her estate to her brother Josiah and his family. She simultaneously deviated from conventional inheritance practices by disinheriting her other siblings and emancipating her slaves. Her disinherited heirs tried to overturn her will, claiming that Jane Miller's weakened mind allowed her chosen beneficiaries to inappropriately influence her decisions. In the language of the law, they claimed that Miller lacked testamentary capacity and wrote her will under the undue influence of her beneficiaries, including the slaves she manumitted. While disputed wills make up a small portion of all wills submitted for probate, these cases reveal a critical juncture where legal conceptions of free will, family, and the limits of the "privateness" of property meet.

In the American legal system, inheritance has traditionally bound families together through property transfers while exposing conflicts over legitimacy, authority, and social and sexual behavior. It reveals the uneasy coexistence of two elements of American social and legal practices in

[1] "Testimony of William H. Miller," Transcript, *Sarah v. Miller* (1864), Case 74, Box 3, Kentucky Court of Appeals Records (hereafter KCAR), Kentucky Department for Libraries and Archives, Frankfort, Kentucky (hereafter KDLA).

the nineteenth century. The first was a much older, deeply rooted preference for shared blood as a conveyor of social identity, legal status, and rights.[2] Traditional inheritance, dating back into the mists of Americans' English past, dispersed wealth through a patriarchal legal structure that favored male descendants over female descendants. Even bastardy and poor laws demonstrated the importance of determining blood relation, if only to deny inheritance rights and assign paternal financial responsibility.[3] The second element was the impulse toward individual autonomy and contractual rights, which began to eclipse the primacy of blood.[4] Testamentary freedom, with its attendant right to disinherit bloodline heirs, had its statutory roots in the sixteenth century and reflected the nascent coherence of the values that would develop into liberal individualism. It allowed responsible individuals to express their sense of morality and familial justice and acknowledged that factors such as affection, retribution, or obligation (to individuals, churches, or other institutions) might impose debts upon testators that blood did not.

In the lives of nineteenth-century Americans who wished to dispose of their property, writing a will was much more than a singular act undertaken in the last years of one's life. Rather, many family members participated in testamentary decision making, all with different motivations and opinions on the moral rectitude of the testator's choices. The result of this process, the will, was – and still is – often subjected to the scrutiny of the community through the probate procedures, legal challenges, and neighborhood gossip networks. The legal challenges to wills on the ground of lack of capacity (testamentary capacity cases) are the subject of this book.

From Shakespeare's King Lear to Doris Duke, each generation has its cautionary tales about inheritance disputes, depicting family relations

[2] For a study that illustrates the importance of blood and legal ties, see Carolyn Earle Billingsley, *Communities of Kinship: Antebellum Families and the Settlement of the Cotton Frontier* (Athens: University of Georgia Press, 2004).

[3] James Ely, Jr., "'There Are Few Subjects in Political Economy of Greater Difficulty': The Poor Laws of the Antebellum South," *American Bar Foundation Research Journal* 10 no. 4 (Autumn 1985): 869–72.

[4] On the importance of blood and legal relations as determinative of rights, see Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage and the Market in the Age of Emancipation* (New York: Cambridge University Press, 1998); Peter Bardaglio, *Reconstructing the Household: Families, Sex and the Law in the Nineteenth Century South* (Chapel Hill: University of North Carolina Press, 1995); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* (Chapel Hill: University of North Carolina Press, 1985).

gone awry, casts of alienated heirs, designing lawyers, and decedents of questionable sanity. National headlines dramatize the importance of inheritance. Recent examples include the salacious suit over the inheritance left to Hollywood personality Anna Nicole Smith by her elderly oil baron husband, and the dispute over New York philanthropist Brooke Astor's will, replete with accusations of elder abuse, dementia, and forgery. Nineteenth-century Americans breathlessly watched their share of inheritance dramas, like the tawdry, often vicious, public unfolding of disputes over the wills of Cornelius Vanderbilt and Caroline Fillmore, the widow of President Millard Fillmore. During the process of writing wills and dispersing property, inherited property becomes inscribed with cultural and symbolic values that sometimes far exceed its economic value. Whether a thimble collection or a family mansion, these items become symbols of years of family history.

How and why does inherited property, a legal fiction at its core, become laden with social and cultural values that both reflect and inflect our notions of familial order? Intergenerational property transfers link relationships in the intimate familial realm to the public, legal, and economic worlds. According to eighteenth-century English jurist William Blackstone, testamentary freedom made a man "a good citizen," allowed him to punish "heirs disobedient and headstrong," and let testators provide for "the exigence of their families."[5] Whether decedents transferred property through a will, according to intestate laws, or informally among family members, inherited property publicly encoded value judgments about relationships between individuals.

When testators reached their "dead hands" from the grave to continue controlling their property, they did so because they met a legal standard of mental capacity.[6] William Miller's testimony about his sister Jane highlights the tensions and contradictions in this standard. He probably derived his assertion of her "more than ordinary intelligence" from his assumptions about women's innate abilities within a hierarchy of fixed, gendered values. He referred to her perceived mental decline in tandem with her physical deterioration, marking her physical body as an external indicator of her internal mental strength. Other witnesses told stories that spanned forty years, describing Jane Miller's young adulthood

[5] William Blackstone, *Commentaries on the Laws of England, Book the Second* (Oxford: Clarendon Press, 1775), 11–12.

[6] The image of the "dead hand" has been associated with wills and trusts for centuries. See Lawrence M. Friedman, *Dead Hands: A Social History of Wills, Trusts, and Inheritance Law* (Stanford: Stanford University Press, 2009).

and giving their opinions as to how her political and religious beliefs may have influenced her will-making decisions. Neighbors described her strange appearance and erratic behavior, which they believed indicated her mental unsoundness. Others portrayed her as perhaps a bit eccentric, but a pious, intelligent, and morally scrupulous woman. The multiple depictions of the same woman reveal how ordinary people had a range of ideas about mental unsoundness and sanity. They also believed they could pass judgment of the rectitude of testators' wills because these decisions affected people they knew in the local community. Trial witnesses believed they had some propriety over other community members' testamentary decisions, evinced in strongly opinionated testimony and by their willingness to state whether they thought the will was just.

The formal practices of inheritance law – publicly reading and recording wills, determining intestacy division, transferring of the deceased's property to heirs and beneficiaries – shaped how families understood their most intimate relationships. Testamentary capacity trials made public complex issues involving responsibility and obligation within families and local communities. Although the family was often depicted as a bedrock institution, in reality families were fragile, requiring maintenance through legal oversight and social regulation. Inheritance served as one such mechanism. Behind the seemingly strict legal formalism of inheritance law lay all manner of cultural conflict. Although states' laws differed, especially concerning married women's testamentary rights, all states shared a goal of making post-mortem property transfers uniform and predictable. In spite of legislative and judicial efforts to realize these goals, local legal practices also provided opportunities for litigants in will challenges to challenge or even subvert those values the statutes or judiciary sought to strengthen.

Historians have written extensively about inheritance.[7] Social historians have availed themselves of the benefits of probate records, which

[7] Hendrik Hartog, *Someday All of This Will Be Yours: A History of Inheritance and Old Age* (Cambridge: Harvard University Press, 2012). James Mohr, *Doctors and the Law: Medical Jurisprudence in Nineteenth Century America* (New York: Oxford University Press, 1993); James Mohr, "The Paradoxical Advance and Embattled Retreat of the 'Unsound Mind': Evidence of Insanity and the Adjudication of Wills in Nineteenth Century America," *Historical Reflections* 24 no. 3 (1998): 415–35; Susanna Blumenthal, "The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth Century America," *Harvard Law Review* 119 (2006): 959–1034. See Bardaglio, *Reconstructing the Household*; Brenda E. Stevenson, *Life in Black and White: Family and Community in the Slave South* (New York: Oxford University Press, 1996); Nancy Bercaw, *Gendered Freedoms: Race, Rights and the Politics of the Household in the Delta,*

county court clerks carefully preserved because they recorded property transactions. Much of the older scholarship on inheritance took quantitative approaches, often applying data from probate records in the service of broader studies on property, family life, and wealth distribution.[8] In the 1980s, women's historians delved into the history of inheritance to help elucidate the slow progression of married women's property laws and the struggles for women's equality.[9] Inheritance law likewise has been central to historians of the South who have explored how antebellum testamentary practices disrupted slavery by exposing the contradictions between recognizing slaves' humanity and their legal definition as property.[10] All of these studies recognize, rightly so, that inheritance is about power.

1861–1875 (Gainesville: University Press of Florida, 2003); Carole Shammas, *A History of Household Government in America* (Charlottesville: University of Virginia Press, 2002). Most studies deal with wills written in Northern states and counties, and many focus on colonial New England or the Early Republic.

[8] See, for example, Lee J. Alston and Morton Owen Shapiro, "Inheritance across Colonies: Causes and Consequences," *The Journal of Economic History* 44 no. 2 (June 1984): 278; Richard Chused, "Married Women's Property and Inheritance by Widows in Massachusetts: A Study of Wills Probated between 1800 and 1850," *Berkeley Women's Law Journal* 2 (Fall 1986): 42–88; Carole Shammas, Marylynn Salmon, and Michael Dahlin, *Inheritance in America from Colonial Times to the Present* (New Brunswick and London: Rutgers University Press, 1987); David E. Narrett, *Inheritance and Family Life in Colonial New York City* (Ithaca: Cornell University Press, 1992); Mary Louise Fellows, "Wills and Trusts: The Kingdom of the Fathers," *Law and Inequality: A Journal of Theory and Practice* 10 no. 1 (Dec. 1991): 137–62; Suzanne Lebsock, *The Free Women of Petersburg: Status and Culture in a Southern Town, 1784–1860* (New York: W.W. Norton & Co., 1984); Marvin B. Sussman, Judith N. Cates, and David T. Smith, *The Family and Inheritance* (New York: Russell Sage Foundation, 1970); Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (New York: New York University Press, 1991).

[9] Fellows, "Wills and Trusts: The Kingdom of the Fathers"; Chused, "Married Women's Property and Inheritance by Widows in Massachusetts"; Shammas, Salmon, and Dahlin, *Inheritance in America from Colonial Times to the Present*; Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986); Lebsock, *The Free Women of Petersburg*.

[10] Arthur F. Howington, "'Not in the Condition of a Horse or an Ox': *Ford v. Ford*, the Law of Testamentary Manumission, and the Tennessee Courts's Recognition of Slave Humanity," *Tennessee Historical Quarterly* 34 no. 3 (1975): 249–65; Adrienne D. Davis, "The Private Law of Race and Sex: An Antebellum Perspective," *Stanford Law Review* 51 (January 1999): 221–88; Yvonne Pitts, "'I Desire to Give My Black Family Their Freedom': Manumissions, Inheritance, and Visions of Family in Antebellum Kentucky," 50 – 73, in Angela Boswell and Judith McArthur, eds., *Women Shaping the South: Creating and Confronting Change*. Columbia: University of Missouri Press, 2006; Bernie D. Jones, *Mixed Race Inheritance in the Antebellum South* (Athens: University of Georgia Press, 2009).

LEGAL NARRATIVES AND EVIDENCE OF LAW

This study draws on two methodological approaches, each associated with a distinct evidentiary base, each producing a distinct narrative of the nature of legal change in general and the development of testamentary capacity jurisprudence in particular. In the first, historians scrutinize what Robert Gordon has called "mandarin" law, or the texts produced by legal elites, a category that included state high court and federal judges, treatise writers, prominent jurists, law professors, and state and federal lawmakers. These historians analyzed how law shaped political and economic structures, how constitutional doctrine and appellate case developed, and how market capitalism and legal liberalism emerged.[11] Gordon saw virtue in using these texts because they are "among the richest artifacts of legal consciousness" and represent the "most rationalized and elaborated legal products."[12]

This rationalization and elaboration was itself a goal for the early nineteenth-century legal elites. Many jurists believed that law should be, as treatise writer Tapping Reeve was purported to say, a "science ... a regular well-compacted system."[13] In the early days of the American republic, this scientific rationalism, a product of the Enlightenment, when translated into legal practices, provided a powerful tool for protecting the newly articulated rights held by American citizens. It also structured and justified how courts and legislatures assigned rights and legal disabilities through a hierarchy determined by sex, race, and property ownership. If this rationalism in law led to enlightened justice, its shortcomings were made apparent when two areas of law conflicted with each other. One such area was the contradiction between laws that defined slaves as

[11] See, for example, John Phillip Reid, *Rule of Law: The Jurisprudence of Liberty in the Seventeenth and Eighteenth Centuries* (Dekalb: Northern Illinois University Press, 2004); William Novak, "Law, Capitalism, and the Liberal State: The Historical Sociology of James Willard Hurst," *Law and History Review* 18 no. 1 (Spring 2000): 97–146; Morton Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge: Harvard University Press, 1979).

[12] Robert Gordon, "Critical Legal Histories," *Stanford Law Review*, 36 no. 1/2, Critical Legal Studies Symposium (January 1984): 120. Gordon's point in 1984 was that the new critical legal historians would use mandarin texts but also look beyond them to other sources of law.

[13] Timothy Dwight, *Travels in New England and New York* (London: W. Baynes and Son, 1823), 4, 295, quoted in Howard Schweber, "The 'Science' of Legal Science: The Model of the Natural Sciences in Nineteenth-Century American Legal Education," *Law and History Review* 17 no. 3 (Fall 1999): 421.

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