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.

property in most legal constructions but also as persons in other areas.[14] Inheritance law revealed such a contradiction, which was drawn from competing values at the core of the legal system. It recognized free will *and* moral obligations to others.

Historian Susanna Blumenthal has written a "doctrinal story" of testamentary capacity jurisprudence in which she finds that by the end of the nineteenth century, appellate judges were hesitant or "conservative" in affirming findings of testamentary incapacity, seeking instead to guard expressions of "human autonomy."[15] Jurists became disillusioned with medical experts' increasingly influential trial testimonies and research findings, which were based in a medical determinism that too often found testators insane. The very notion of free will came under assault. After their predecessors revealed the problems with applying efficient legal rules based in medical and legal science, late nineteenth-century mandarin writers came to terms with "apparently perverse wills precisely because of their doubts … and because of the value they placed on the idea of human freedom."[16] This acceptance augured the development of the turn-of-the-century modernism that informed the thinking of legal pragmatists and legal realists. The intellectual history of law need not embrace an overly deterministic evolutionary functionalism in explaining change over time. Jurists ceded the advantages of medical experts' efficiency and scientism to a much messier and less coherent application of legal rules to protect testamentary freedom and the legal concept of free will. As Blumenthal has argued elsewhere, mandarin texts remain a vital, if overlooked, element of the conglomerate sources of law.[17]

Another group of historians shifted the scope from case law and panorama of doctrine to the microcosm of the local. These historians approached law as unfolding daily through gritty confrontations far removed from the rarefied seminar rooms and sedate judicial chambers where elites debated the "rule of law." Historian Ariela Gross has termed this approach "cultural-legal history."[18] These historians show

[14] Ariela Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton: Princeton University Press, 2000).
[15] Blumenthal, "The Deviance of the Will," 1199.
[16] Ibid., 1034.
[17] Susanna Blumenthal, "Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History," *Law and Social Inquiry* 37 no. 1 (Winter 2012): 167–86.
[18] Ariela Gross, "Beyond Black and White: Cultural Approaches to Race and Slavery," *Columbia Law Review* 101 (April 2001): 644. Gross was not the first scholar to advocate using this sort of approach, which drew from the work of law and society historians and critical legal scholars. For a discussion of the roots of this approach, see Hendrik

how outsiders and dependents influenced legal change by focusing on the myriad sites where law happened every day: taverns, streets, brothels, kitchens, slaves' quarters, newspapers, and county courtrooms.[19] Legal history and ordinary people's interactions with law looked much different from this perspective. By viewing trials as competing narratives or performances, these historians laid bare the seemingly irreconcilable social and cultural tensions that often receded into the background in mandarin texts. Law was a way for ordinary people to both claim and destabilize authority, and a lens through which they envisioned their relations to people and objects.[20]

Integrating these two approaches to the doctrinal and the local reveals the moral and legal complexity of inheritance practices and testamentary capacity jurisprudence. From this vantage point, it becomes clear that the legal and social practices of inheritance reverberated through an American society that placed high value on wealth and status acquisition. Laura Edwards has demonstrated the insights this methodological integration yields in *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South*.[21] She unmasks the operation of localized law that was "virtually undetectable" in histories focused on mandarin texts. Edwards reveals the existence

Hartog, "Snakes in Ireland: A Conversation with Willard Hurst," *Law and History Review*, 12 no. 2 (Autumn 1994): 370–90; William E. Forbath, Hendrik Hartog, and Martha Minow, "Legal Histories from Below," *Wisconsin Law Review* (July/August 1985): 759.

[19] Scholars employing these new approaches to legal sources include: Steven Wilf, *Law's Imagined Republic: Popular Politics and Criminal Justice in Revolutionary America* (New York: Cambridge University Press, 2010); Gross, *Double Character*; Walter Johnson, *Soul by Soul: Life inside the Antebellum Slave Market* (Cambridge and London: Harvard University Press, 1999); Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* (Urbana: University of Illinois Press, 1997); Laura F. Edwards, "Law, Domestic Violence, and the Limits of Patriarchal Authority in the Antebellum South," *The Journal of Southern History* 65 no. 4 (1999): 733–70; Diane Miller Sommerville, *Rape and Race in the Nineteenth Century South* (Chapel Hill: University of North Carolina Press, 2004); Barbara Welke, *Recasting American Liberty: Gender, Race, Law and the Railroad Revolution, 1865–1920* (Cambridge: Cambridge University Press, 2001); Joshua Rothman, *Notorious in the Neighborhood: Sex and Families across the Color Line in Virginia, 1787–1861* (Chapel Hill: University of North Carolina Press, 2003).

[20] Some of the most recent and exciting historiographical interventions are discussed in "*Symposium Issue:* 'Law As…' Theory and Method in Legal History," *UC Irvine Law Review* 1 no. 3 (September 2011).

[21] Laura F. Edwards, *The People and Their Peace: Legal Culture and the Transformation of Inequality in the Post-Revolutionary South* (Chapel Hill: University of North Carolina Press, 2009).

of idiosyncratic yet powerful legal processes grounded in maintaining "the peace," a set of values that placed communal interests over those of individuals. "The peace" worked through the interdependency of all community members, rather than gaining its legitimacy through values based in a discourse of individual rights. Law was organic but still distributed power through dominant/subordinate relationships such as master/slave and husband/wife. Eventually, state law came to dominate legal narratives after a concerted effort by legislators and jurists to eradicate localized law's influence. Their focus on protecting property rights led them to develop a much more visible body of rationalized state law grounded in individual rights as an antidote to inchoate legal localism. Eventually, this state law prevailed, while legal localism remained hidden as archival echoes of an earlier world view.

This study seeks to build on evidentiary methods elucidated by Edwards and others, which examine mandarin texts as separate from and in contentious conversation with localized law.[22] Law was, as Christopher Tomlins has argued, a "modality of rule" shot through society.[23] Placing local legal texts (defined broadly to include popular, ephemeral, and extralegal sources) alongside and contrapuntally to doctrine and appellate case law reveals new insights into both categories. Although distinct, the boundaries between mandarin and localized law were permeable, each accruing values from the other. Inheritance law had its own version of "the peace," balancing a concern for doing justice to testators' family members and heirs with an equal and eventually dominant preoccupation with protecting the semblance of testators' free will. By the turn of the twentieth century, the legal process of testation had become standardized, with lawyers' and layman's manuals containing elaborate instructions, forms, and warnings about potential legal hazards.[24] This systemization of inheritance law emerged in part because of the persistence of bloodline inheritance as an ideal even as the post–Civil War legal regime embraced a deep commitment to individual rights as the guardians of liberty. Disinheriting bloodline heirs was risky business even for the most resolute testators, and formality and systemization offered some protection.

[22] Susanna Blumenthal has written an excellent essay describing this development in "Of Mandarins, Legal Consciousness, and the Cultural Turn in US Legal History."

[23] Christopher L. Tomlins, *Law, Labor, and Ideology in the Early American Republic* (New York: Cambridge University Press, 1993), esp. chapter one, 19–34.

[24] See, for example, G. A. Gaskell, *Gaskell's Compendium of Forms, Educational, Social, Legal and Commercial …* (Chicago: Standard Publishing, 1889), which had four versions of wills in which testators could insert the appropriate information.

Even as the formalization demanded by state law eventually triumphed, localized law never completely disappeared.[25] Elements remained, insinuated into legal digests through case law that elaborated on the meaning and application of formalized legal tests for testamentary capacity. Litigants drew on both the formalist law expressed in treatises and appellate court decisions and localized law in will challenges. When necessary, they argued in terms of a strict, formalist legal understanding of capacity to demonstrate that at the moment of writing the will, testators met or failed these established legal tests. At other times, and sometimes in the same cases, litigants advanced their claims by drawing on a much more expansive understanding of capacity grounded in their interpretations of years of familial history. In some areas of testamentary capacity law, localized law ran parallel to and converged, only to separate again from its mandarin counterparts as it developed across time. For example, testators who manumitted or left property to slaves faced allegations of insanity from unhappy heirs in a legal climate that made all manumissions increasingly difficult by mid-century as sectional tensions grew. Still, testators resolutely continued to manumit slaves until the Civil War. This commitment to recognizing African American beneficiaries in spite of legal barriers in state law and possible capacity challenges was followed by white testators' overwhelming repudiation of naming African American beneficiaries after emancipation even though state law no longer made such devises so difficult. In these intervals between localized law and state law, capacity was defined.

Capacity itself was a concept crucial to localized, state, and even constitutional law. It determined how much and under what conditions individuals could participate in their communities and how the American legal system distributed rights. Capacity was and is antecedent to political, social, and legal participation. Almost every debate in American history over the exercise or expansion of legal rights included lengthy discussions about whether a particular group possessed the capacity or rationality to execute the right. Suffrage, property rights, access to education, and jury service for women and African Americans serve as

[25] Edwards makes this point when discussing the nature and presentation of claims made by freed people in the aftermath of the Civil War. Edwards, *The People and Their Peace*, 286–98. In inheritance law, this persistence of localism was ensured less by external legal or constitutional events than by the intractable problems inherent in applying a universal legal standard of capacity.