IMPOSING THEIR WILLS: INHERITANCE PRACTICES, FAMILY, AND CAPACITY IN NINETEENTH CENTURY KENTUCKY

by

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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) by leaving much of her estate to her brother Josiah and his family. She also deviated from conventional inheritance patterns by disinheriting her other siblings and by emancipating her slaves and sending them to Liberia. Her disinherited heirs tried to overturn her will, claiming that Jane Miller's weakened mind allowed her chosen beneficiaries (including her slaves) to inappropriately influence her decisions.

During the trial over Jane Miller's will, relatives, neighbors, and her slaves appeared in court. Her relatives and neighbors told stories that spanned forty years, ranging from descriptions of her young adulthood to how her political and religious beliefs may have influenced her will-making decisions. Some witnesses described a pattern of aberrant mannerisms which they believed indicated her mental unsoundness. Others portrayed her as perhaps a bit eccentric, but a pious, intelligent, and morally scrupulous woman. As Miller's case indicates, writing a will was not a singular event but part of a lifelong process. William Miller's description of his sister's mental capacity

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[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).

reveals some of the ways community members assessed testators' abilities to transmit property posthumously. Miller referred to human abilities he described as "natural," a reference to his understanding of a hierarchy of universal, fixed values. Miller probably conditioned his assertion of his sister's "more than ordinary intelligence" on his assumptions about women's innate abilities. He referred to her perceived mental decline in tandem with her physical deterioration, marking the physical body as an external indicator of mental strength. These ideas about naturalness, gendered abilities, and physical and mental decline appeared repeatedly in testamentary capacity trials in nineteenth century Kentucky. Jane Miller's will and William Miller's testimony highlight the tensions and contradictions in an inheritance system based on freedom which was dependent on a contested standard of rationality.

This study examines inheritance practices in nineteenth century Kentucky. Most existing scholarship on inheritance takes legalist or quantitative approaches, often applying data from probate records in the service of broader studies on family life, wealth distribution or evolving married women's property laws.[2] These studies use the final product of the inheritance process – the will – to analyze wealth patterns, changing gender dynamics and women's increasing legal equality over time. Only recently have scholars turned to studying inheritance processes as integral to a broader cultural milieu

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[2] See for example, 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 – 162; 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* (Russell Sage Foundation, New York, 1970); Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (New York: New York University Press, 1991).

in which people interacted within legal institutions to impart social meanings to behaviors and shape structures of family.

Redefining inheritance as a process brings into sharp relief how wealth transmission between generations was fundamental to constituting authority in the family. In order to delineate the contours and boundaries of inheritance processes, I have focused on challenges to wills based on testators' capacity to write a valid will. These challenges illuminate a lynchpin in economic and familial relations. Who has the mental ability and the legal authority to select beneficiaries and to transmit material wealth and socio-economic benefits, including (before 1866) human beings held in bondage? The state had an interest in validating specific inheritance patterns in order to assure a stable property regime through the orderly transmission of wealth. Property-holders used promises of inheritance to control heirs' and potential beneficiaries' behavior. Bloodline relatives, caretakers, enslaved people, and legitimate and illegitimate offspring saw inheritance as a means of improving their economic fortunes through testamentary rewards for their meritorious behavior toward testators in an era in which state-sponsored social services were primitive or non-existent. As the lawyers defending Jane Miller's will reminded the Court, "No brother but Josiah H Miller offered her a home and gave her protection in her days of poverty and want."[3]

The practices of inheritance law – publicly reading and recording wills, determining intestacy division, the physical transfer of the deceased's property to heirs and beneficiaries – shaped how families understood their most intimate relationships and how those relationships were presented to the community. Property had important

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[3] "Apellant's Brief," in *Sarah v. Miller*, (1864),Case 74, Box 3, KCAR, KDLA.

material and economic value to heirs and beneficiaries. Beyond its practical and financial uses, property became imbued with cultural and symbolic meanings that sometimes outstripped its market value. Community members, medical experts, and local elites manipulated the meanings of inheritance practices to negotiate the boundaries of the family as the foundational unit of Kentucky social relations.

Testamentary capacity trials brought into public discussion complex issues involving responsibility and obligation within families and local communities. Disinherited heirs-at-law challenged wills for complex reasons. In many cases, they believed that a testator's mental disease caused him or her to write a will contrary to longstanding wishes and affections. Other motivations included greed or freedom from constraining devises that set conditions on their behavior. As beneficiaries, women were particularly vulnerable to constraining devises in part because Kentucky's restrictive laws closed other avenues through which women could access property. Some testators disinherited daughters who married contrary to their wishes. Testator Conrad Rompf wrote a will in 1885 in which he disinherited his daughter Juliana for conducting an illicit affair. He also believed that she practiced witchcraft.[4] Although inheritance law appeared neutral in terms of favoring one sex over the other in ability to inherit, in practice it was not. Sons rarely had to choose between a marital partner or paternal ire and disinheritance. Disinheriting daughters and devises to wives contingent on their continued widowhood reveal how a body of law seemingly neutral to gender roles in practice reinforced patriarchal authority.

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[4] *Schildnecht v. Rompf's Ex'x,* 4 S.W. 235 (1887).

As disinherited heirs-at-law brought suits to claim familial wealth, they had to assemble a viable case that would convince judges and juries of the testator's insanity. In *Gordon v. Morrow* (1889), the beneficiaries' attorneys argued that testator Mattie Gordon's aunt had said she was "mad because she had not received as much as she thought she should have received and said she would break the will."[5] Whatever the complex motivations behind these suits, it fell upon the challengers to prove the testator was insane or unduly influenced in order to overturn the will. That the challengers initiated suits believing that they would prevail tells us how they used law and understood prevailing social ideas about sanity, morality, and gendered conduct. These trials also reveal communities, jurists, and medical experts grappling with the extraordinarily difficult task of understanding "free will" and its relationship to the human mind in all its physical, spiritual, and emotional incantations. In approaching the evidence in these trials, I have avoided passing judgment on whether a particular testator was "really" insane by contemporary or historical standards. Instead, I examine how people perceived insanity and the power of the legal label of "capacity" to affect wealth transmission and authority.

This work explores the dialogic interactions between local community members, county judges and juries, local physicians and medical experts, and the Court of Appeals' judges. (The Court of Appeals was Kentucky's highest court in the nineteenth century. Their rulings set precedent and established case law.) The Court of Appeals' judges frequently acted as conservative brakes on emerging legal and medical trends. In the late 1860's for example, the Court of Appeals appeared ready to accept "moral insanity" as a

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[5] "Brief for Appellants," in *Gordon v. Morrow*, (1887), Case 19068, Box 813, KCAR, KDLA.

condition that precluded testators from writing valid wills. Poised to grant more weight to medical experts' testimonies in the mid-century, by the mid-1880's this trend reversed itself and the Court of Appeals judges made clear that they determined capacity and would impose a legal and not a medical standard. Broadly, their testamentary capacity jurisprudence over the nineteenth century indicates that they were committed to balancing the political and social imperatives of fostering stable family units against the republican promise guaranteeing white male independence through control over private property and dependents.

For men, the Court's reluctance to accept new definitions of insanity worked to protect their property rights while containing acceptable and sanctioned male testation patterns within legitimate family, bounded by law and social custom. For women, the Court's solid defense of male testamentary privilege and its protection of marital unity meant that women's testamentary wishes were held to a double standard of legal and mental capacity, both positing the universal testator as a white male head-of-household. By virtue of sex, women were aberrant testators. They had to meet a legal standard for capacity dependent on their marital status and a masculine standard of mental capacity dependent on socially inscribed behavior and appearance. Women's sexual behavior, sanctioned as wives or scrutinized as single women mattered greatly when witnesses and juries evaluated their ability to write a valid will.

Occasionally female testators prevailed, particularly when the Court of Appeals expressed skepticism about local juries and witnesses who imposed their own judgments on testators. Community members often articulated their ideas about how testators should distribute property. Such opinions were derived through daily knowledge of

testators' personal relationships. For example, in *Ross v. Weaver* (1881), Robert Heard, a juryman, commented that he believed that Ann Cooke's estate "ought to go to her relations."[6] Testator Anne Cooke had disinherited her sister in favor of James Ross, her alleged "paramour." Clearly, some community members believed that by virtue of Ann Cooke's immoral conduct her testamentary devises should be cancelled in favor of those sanctioned by the legislature and community. In this case, the Court of Appeals upheld Cooke's right of testamentary freedom against the perceived arbitrariness of local juries. As important as the Court of Appeals jurisprudence is to understanding testamentary capacity, focusing on high court decisions exclusively ignores how relatively powerless local actors like slaves, married women, and local individuals used and influenced inheritance law.

My methodology privileges local, county level inheritance disputes and trial records. By focusing on the words and actions which brought people into court and what they said in courtrooms illuminates how ordinary individuals created and maintained inheritance practices. Personal papers and diaries in which individuals grapple with the meanings of inheritance allow me to interpret inheritance practices outside of formal legal institutions. I have also endeavored to incorporate the voices of Kentucky physicians, journalists, and literary figures, such as widely read author James Lane Allen who portrayed an often-idealized vision of Kentucky society. When possible, I sought out the experiences and voices of African-American Kentuckians. These perspectives allow me to locate inheritance practices – which are ultimately about authority – in the specific local context of nineteenth century Kentucky to make broader claims about the

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6 "Testimony of Robert Heard," in *Ross v. Weaver* (1881), Case 13247, Box 527, KCAR, KDLA.

centrality of inheritance practices for regulating the ways in which people conducted their lives. By integrating sources generated outside legal institutions such as the courthouse and statehouse, I aim to bridge the institutional confines of legal institutions by anchoring legal culture in everyday social relations.

Recently, a generation of scholars has sought to break down barriers between "legal history" and "social history using legal records." Historian Ariela Gross has broadly termed these new approaches and methodologies as "cultural-legal history."[7] Some of these new approaches include: viewing trials as narratives or performances; emphasizing the agency of outsiders and dependents to influence law; and evaluating how some trials laid bare seemingly irreconcilable tensions and knotty contradictions in ideology and practice. New methodologies use legal sources such as trial briefs, depositions, testimonies, subpoenas and jury instructions to tease out how legal processes simultaneously provide a window into particular, concrete events and the broader cultural resonance of those events. Many of these historians view the local, day-to-day uses of law as sometimes politically and socially subversive while also agreeing with critical legal scholars that the law often reinforced the agendas of the economic and political elites.[8]

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[7] Ariela Gross, "Beyond Black and White: Cultural Approaches to Race and Slavery," *Columbia Law Review* 101 (April 2001), 644.

[8] Some scholars employing these new approaches to legal sources include: Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton: Princeton University Press, 2000); 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 – 770; Michael J. Pfeifer, *Rough Justice: Lynching and American Society, 1874 – 1947* (Urbana: University of Illinois Press, 2005); Diane Miller Sommerville, *Rape and Race in the Nineteenth Century South* (Chapel Hill: University North Carolina Press, 2004); Barbara Welke, *Recasting*

When witnesses testified about testators' capacity to write a will, competing trial narratives emerged, which told stories and articulated values about property, family, and inheritance. When telling these stories, witnesses and lawyers writing briefs made choices to emphasize particular details and downplay, ignore, or even re-write others. These narratives reflected the interests and viewpoint of the narrating party rather than an unbiased re-telling of events. Across state geography and time, certain images consistently reoccurred, such as the worthy, often needy beneficiary unjustly wronged by the insane testator or the profligate child deserving disinheritance. This study locates these images in cultural and legal values that gave them specific form and substance. Together, these narratives, tropes, and images constituted a socially and legally powerful grammar of capacity. Through the grammar of capacity, courts and communities assigned values and meanings to relationships between family members and to individuals' behavior within communities. It articulated normative and prescriptive rules which determined mental soundness and legal ability to participate fully in inheritance practices.

Studying this grammar of capacity goes beyond its discursive value in illuminating ideologies and values. Testation was part of a legal process in which words made events happen. Writing a will often expressed a testators' values, feelings about their families, and their sense of justice. Testator Henry Ackler wrote a will in which he distributed his estate evenly between his children, except for his daughter who received

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American Liberty: Gender, Race, Law and the Railroad Revolution, 1865-1920 (Cambridge: Cambridge University Press, 2001).

an additional one hundred and seventy dollars "for services rendered."[9] Ackler recognized and tangibly rewarded his daughter. Once probated, his words translated into economic gain for his daughter beyond that received by his other children. At the same time, it positively reinforced the narrative of the dutiful child serving her father.

Nineteenth century Kentuckians thought very seriously about the gravity and multiple meanings of writing a will. Discussions of testation were not confined to elderly people in private consultation with lawyers. In 1887, friends, family, and her physician surrounded twenty-five year old testator Mattie Gordon when "she was told that she could not recover and had better dispose of her property."[10] Gordon wrote her will on a Thursday and died the following Sunday. As newspapers, medical writings, and personal correspondence demonstrate, epidemics, disease and accidents were constant companions to every Kentucky family. Lexington resident Susan Yandell wrote to her father of the unexpected virulence of a cholera epidemic in 1833. After assuring her father that she and her family were well, she wrote that "Cholera has visited us in a severe form than most of our physicians expected. In the last 7 or 8 days, from 65 to 75 deaths have occurred from it."[11] Concerns about impending mortality sparked musings about inheritance. In the same letter, Yandell described a man struck quickly with cholera, describing how the victim "was taken about 2 o'clock & died the same evening. A friend of his . . . was laughing & joking about Cholera & sent him word that he would come &

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9 "Will of Henry Ackler," Harrison County Will Book F, (1847-1853), 576, Harrison County Court Clerk Records, KDLA.

10 "Brief for Appellants," in *Gordon v. Morrow*, (1887), Case 19068, Box 813, KCAR, KDLA.

11 Susan Yandell, to David Wendel, June 7, 1833, Mss. A Y 21; FL 12, Yandell Family Papers, Filson Historical Society, Louisville, Kentucky (hereafter FHS).

write his will if he was going to die."[12] These passages reveal the quickness with which death could strike individuals. They also show how the desire to express testamentary wishes accompanied contemplation of death.

For women, childbirth brought a constant reminder of mortality. In 1837, Kentuckian Ellen Green wrote to her husband Hector expressing fears about her upcoming delivery. She told Hector that "whether she survives that awful hour, yet rests alone with providence." Green then turned to her wishes for her property, telling her husband that she has "enclosed a will made by me some time since," and that if her baby was a girl she wanted "what little dress or Jewelry I have, I wish taken care of for her."[13] Inheritance practices were part of daily life; they were not confined to the occasional trial or the public unveiling of a deceased testator's will.

Mental disease touched all families in all social and economic classes. Lexington resident Susan Yandell reported to her mother that Henry Clay's eldest son Theodore was "taken to the Lunatic Asylum, three miles from town a few days since. It is generally supposed that his derangement is in a great measure owing to intemperance."[14] Local courts often mediated familial and community relationships with individuals with mental disease. In circumstances in which individuals with mental disease disrupted local communities or could not support themselves, courts determined their future and oversaw the distribution of state resources for the care of "lunatics." Courts and local juries decided who was insane, appointed guardians, and committed "dangerous" or pauper

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[12] Ibid.

[13] Ellen Green to Hector Green, August 27, 1837, Mss. G796A, Box 2, FL 14, Green Family Papers, FHS.

[14] Susan Yandell to Sarah Wendel, October 13, 1831, Mss. Y 21; FL 10, Yandell Family Papers, FHS.

individuals to asylums. Susan Yandell noted that the legal system and the community were involved in determining whether or not Theodore Clay was insane. She told her mother that Clay "was brought to court and allowed the privilege of summoning witnesses to prove that he was not insane."[15] These trials occurred with some regularity and as Yandell's letter indicates, were part of neighborhood news and gossip networks. Since 1793, county trial records are sprinkled with "Lunatic Inquests" in which county judges heard from committees and determined "the support, respect and safe keeping of any person who shall be so found to be of unsound mind."[16] Local physicians, neighbors and family members appeared in courts during lunatic inquests to provide evidence, assume guardianship of "lunatics" or for court permissions regarding their support and estate management. Although mental disease may not have touched all families directly, mentally unsound individuals inhabited most local communities.

Kentucky provides fertile ground for interrogating how capacity structured family and wealth distribution. As an upper South slave state, Kentuckians shared attitudes with their southern counterparts. Simultaneously, many Kentuckians looked across the Ohio River to the industrializing north as a model for social and economic labor. Lemuel Porter, a physician in Warren County during the mid-nineteenth century, expressed ambivalence about how he believed slavery inhibited Kentucky's ability to industrialize. Porter lamented that real estate prices would not rise quickly because only "manufacturers can permanently improve a town. These we cannot expect to grow up

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[15] Ibid.

[16] 1794 Ky. Acts, Ch. 95, § 1.

here in the heart of a slave state where labor is so high & scarce."[17] During the antebellum era, statutory, particularly property law, grounded Kentucky firmly in the relations of slavery.

Kentuckians carried on a vibrant long-running debate over the virtues of slavery and free labor. Until about 1850, Kentucky in contrast to most other slave states, had vibrant anti-slavery societies dedicated to promoting colonization and slave manumissions through wills as means to gradual emancipation. This anti-slavery impulse did not preclude a commitment to black inferiority; instead, it reflected a belief that slavery adversely affected white morality and degraded white labor. After a failed 1849 attempt to alter the state constitution to allow potentially for gradual abolition of slavery, anti-slavery forces increasingly became marginalized in local and state politics. Until then, many slaveowners and non-slaveowners viewed slavery as an evil necessary to control the black population; after 1850 most Kentuckians joined with their southern counterparts to proclaim slavery a necessary good.[18] Many historians partially attribute Kentucky's decision to remain in the Union during the Civil War to an attempt by the pro-slavery majority to protect Kentucky slavery. Henry Watterson, the post-war editor of the *Louisville Courier-Journal* observed that "Kentucky's head was with the Union and her heart was with the South."[19] After the war, Watterson along with Kentucky's

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[17] Diary of Lemuel C. Porter, April 5 & 6, 1859, Mss. BI / B763, FHS.

[18] Harold B. Tallant, *Evil Necessity: Slavery and Political Culture in Antebellum Kentucky* (Lexington: University of Kentucky Press, 2003), and Steven Channing, *Kentucky: A Bicentennial History* (New York: W.W. Norton & Co., 1977).

[19] Henry Watterson, "The South at Christmas" in Arthur Krock, ed. *The Editorials of Henry Watterson, Compiled with an Introduction and Notes by Arthur Krock* (New York: George H. Doran Co., 1923), 21.

heavily Democratic majority celebrated Kentucky's southern ties and Rebel sympathies. As historians have wryly observed, Kentucky seceded from the Union after the Civil War.[20]

The destruction of slavery shaped changes over time in Kentucky testation patterns and in how Kentuckians conceptualized the family and the household as overlapping yet distinct entities. Before the Civil War, the most common form of inter-racial devises was manumissions. By freeing a slave, the testator also deprived his or her heirs-at-law of property. Occasionally, slaveholders also devised property to newly manumitted slaves. These wills received close examination by local communities. During trials disputing these wills, the blood or sexual relationships between the testator and beneficiaries were defended or derided by the litigants. Slaves were part of the household and to some testators, part of the family.

After the Civil War, inter-racial testation patterns changed, as did jurists' and family members' scrutiny of non-conforming wills. Rather than interracial devises, one of the foci of postbellum trials became testators' reasons for disinheriting children and wills in which testators devised to second wives. Few white testators continued to devise property to mixed race beneficiaries. When they did, the testator usually made an explicit connection to service, as when testator white James Young devised a share of property to Mary, identified as "col girl" because it was "due her for services rendered me in my old

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[20] Michael A. Flannery, "Kentucky History Revisited: The Role of the Civil War in Shaping Kentucky's Collective Consciousness," *The Filson Club History Quarterly* 71 no. 1 (Jan 1997), 37 and E. Merton Coulter, *The Civil War and Readjustment in Kentucky* (Chapel Hill, 1926), 329.

age."[21] After the War, the overwhelming majority of testators ignored African American household members in inheritance practices. Court transcripts indicate that several testators' households included African-American servants, some of whom testified at trials. Far more frequently testators recognized white relatives as caretakers and contributors to the household through testamentary gifts. In *Bush v. Lisle* (1889), testator Frank Lisle devised his estate to his sister Manerva with whom he had lived while suffering from advanced syphilis. An African American boy who testified at the trial was hired by Manerva and contributed to caretaking duties but was not recognized in the will. As historian Kimberly Shreck has argued in her examination of testation patterns among a Missouri interracial family, "post-bellum social order could not tolerate or accommodate the persistence of some aspects of antebellum life, especially the conflation of interracial households and families."[22] The scrutiny of testators' wills shifted to focus on how the white family distributed wealth between generations, reflecting a social and legal concern with consolidating property and social status among whites.

This dissertation is arranged thematically. Chapter One begins with a discussion of the structure of family by analyzing Kentucky laws and social customs that defined sexual and familial relationships. I explore social and community attitudes toward the rights and obligations that inhered in familial relationships, particularly those concerning the transmission of wealth. I investigate how testamentary freedom sometimes subverted prevailing, legally sanctioned familial structures by recognizing obligations or affections

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[21] "Will of James Young," Warren County #4 (1862-1889) 114, Warren County Court Clerk Records, KDLA.

[22] Kimberly A. Shreck, "Splitting Heirs: Gender, Race and the Properties of Unreconstructed Households," Ph.D. Diss., University of Missouri – Columbia, 2004, 3.

that existed outside the borders of social custom and legal legitimacy. This prevailing social ideology, supported by the legal system, posited blood relatives as natural heirs, and created a system in which in a "just will, " testators were expected to distribute their property equitably among blood relatives. To devise otherwise, particularly in favor of an unsanctioned sexual relationship was equated with unnaturalness, immorality, and violation of natural hierarchies.

The second chapter explores cases in which testators manumitted slaves or made interracial devises. In several cases, testators recognized concubines and acknowledged other illicit relationships while disregarding legally legitimate sons, daughters, and relatives. In contests over wills involving slave manumissions, slaves had legal standing as the party defending the will and actively participated in a legal system that overwhelmingly fused skin color to status as property. Testators who emancipated slaves threatened racial hierarchies by converting slaves from property to personhood, and by legally recognizing slave humanity, sometimes at the exclusion of bloodline kin. Testators and black beneficiaries destabilized dominant ideals that rewarded white, legally legitimate families through social and legal privileges, including the expectation of inheritance. The racially determined laws of marriage, miscegenation, and legitimacy merged seamlessly with the ostensibly neutral laws of inheritance.

Next, I analyze testamentary capacity jurisprudence from the perspective of medical experts, both local and national. As the nineteenth century progressed, lawyers litigating testamentary capacity cases increasingly turned to expert medical witnesses to explain insanity and convince juries of the sanity or insanity of testators. Expert testimony brought new forms of knowledge and authority into courtrooms. Medical

experts' explanations reveal how doctors situated judgments about the legitimacy of personal relationships in scientific authority through medical diagnoses of insanity. A contentious dialogue emerged in medical journals in which doctors discussed and debated the meanings of legal definitions of capacity. Overwhelmingly, experts saw themselves as the appropriate judges of fairness, morality, and just property disposition, superceding testators and local juries. In this logic, medical diagnoses sanctioned by legal authority either opened or closed gateways to rights and legal responsibilities, including testamentary freedom. Jurists and judges however, moved to confine the legal and social influence that experts exerted through participation in judicial proceedings.

In Chapter Four I examine the discussions of physical infirmities and disabilities that suffuse transcripts and decisions. Witnesses frequently discussed physical disabilities of testators, linking them to mental unsoundness and moral turpitude. The challengers to testators' wills drew attention to testators' physical deformities and bodily decay to argue that dependent, uncontrollable bodies mirrored uncontrollable minds, which lacked mental capacity. The body served as an external indicator – a text to be read – through which the state of the testators' intellect and sanity could be ascertained. Lawyers' briefs to the Court of Appeals also described testators using the language of deformity and disability. These reoccurring descriptions emphasize how disability and physical appearance served as legal evidence in determining who had the right to decide the distribution of property.

The final chapter turns to married women's testamentary capacity cases. Kentucky passed the first statute granting married women limited rights to write a will in 1852. Soon thereafter, disinherited husbands and children brought suits claiming that as

married women, female testators did not meet statutory requirements and lacked the legal capacity to write a valid will. Although the legislature increasing expanded married women's testamentary rights, local courts and Kentucky's highest court, the Court of Appeals, moved to protect male prerogative and limit female property rights by narrowly construing married women's testamentary capacity statutes. Throughout the nineteenth century many judges maintained a continuing commitment to protect men's property rights against incursions by wives who asserted testamentary power and threatened to subvert their husbands' marital rights. The lower courts and the Court of Appeals reinforced the social and cultural ideologies that cast the husband as the engine of household wealth production and the wife as non-productive and ancillary.

CHAPTER I
"BE RECONCILED WITH PARENTAL JUSTICE": INHERITANCE PRACTICES IN FAMILIES

In 1884, in Kentucky's Gallantin County Circuit Court a jury heard conflicting testimony describing Samuel Bledsoe. One witness described him as a man of "good judgment" while another referred to him as "crippled in his head."[1] No one had petitioned to commit Bledsoe to a lunatic asylum, nor was he claiming insanity as part of a criminal defense. In fact, Samuel Bledsoe had died eight months earlier. He had written a will leaving most of his estate to his youngest daughter, Manerva. His other six children sued in court to overturn the will on the grounds that Samuel Bledsoe lacked the mental capacity to write a valid will. It fell to the jury to decide which of the two narratives presented in the courtroom was true: that Bledsoe's will reflected the wishes of a rational, independent property-owner or that it represented the ramblings of a mentally incapacitated man influenced by his avaricious daughter, Manerva.

In challenges to wills like the Bledsoe case, courts and communities employed a grammar of capacity to regulate the transfer of property within families. This grammar was predicated on ideological tropes depicting a familial order deemed natural through law and according to God. This ideology of naturalness was imbricated deeply in maintaining the orderly transmission of wealth between legally defined, consanguineous generations of family. This inheritance system worked to assure the ideological and material continuity of southern white households. Testamentary freedom (allowing individuals to choose beneficiaries through a will) sometimes subverted legally and

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[1] "Testimony of John R. Brown," and "Testimony of BF Furnish," Transcript of *Bledsoe's Ex'x v. Bledsoe*, (1886), Case 17095, Box 716, KCAR, KDLA.

morally sanctioned families by recognizing obligations or affections that existed outside the borders of social custom and legitimacy. When disinherited family members who would have inherited had there been no will (heirs-at-law) challenged wills on mental capacity grounds, they contended that mental unsoundness led testators to violate the natural order. Trials allowed judges and juries to judge the rationality of testators' choice of beneficiaries and decide if these choices would be executed. Prevailing nineteenth century gender and racial ideologies informed how courts and communities understood conceptions of family and mental capacity, which mediated access to inherited wealth and economic citizenship. Challenges to wills, like *Bledsoe's Executors v. Bledsoe* (1886) reveal fault lines in the ideology that used the family as a metaphor for Southern society and as the embodiment of natural relations between people.

Ordinary Kentuckians understood family as a social and economic unit in which members had culturally defined obligations and rights. Parents expected children obediently to supply labor, care, and affection in return for inheritance. Appropriate gendered behavior influenced how courts and communities understood testators' desires and beneficiaries' worthiness to inherit. The second half of this chapter explores how nineteenth century Kentuckians understood the meanings of capacity. Capacity had social and legal dimensions; it could refer to one's mental faculties, as in mental capacity, or it could refer to the ability to exercise a legal right, as in legal capacity. In many testamentary capacity cases, judgments about one's mental capacity determined legal capacity. Individuals used many criteria to evaluate testators' mental capacity: how they interacted within their families and communities, how they worked or conducted business, and their attitudes and behavior toward racial others.

Statutory law and custom shaped marriage, legitimacy, and household relations, all of which influenced families. Historians including Laura Edwards, Peter Bardaglio, Nancy Bercaw and many others have explored these aspects of law and how they affected social and political relations.[2] Their work documents how household relations were critical to class formation, to enforcing racial boundaries and to understanding southern politics. Indeed, the recent explosion of "household studies" demonstrates the centrality of the household and the family for understanding broader political, social, and ideological developments in southern history.

Legal scholars have analyzed how inheritance affected economic stability and property ownership for men and women. Using inheritance records to analyze quantitatively how wealth distribution patterns changed over time, these studies generally show distribution patterns in which surviving spouses increasingly gain control over property with legitimate children receiving the remainder of the estate. [3] Almost uniformly, they show the percentage of female testators slowly rising, which broadly corresponds to nineteenth century Kentucky testation patterns. These distribution studies

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[2] See Peter Bardaglio, *Reconstructing the Household: Families, Sex and the Law in the Nineteenth Century South* (Chapel Hill and London: The University of North Carolina Press, 1995); 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, 1861 –1875* (Gainesville: University Press of Florida, 2003); Laura F. Edwards, *Gendered Strife and Confusion: The Political Culture of Reconstruction* (Urbana: University of Illinois Press, 1997);Carole Shammas, *A History of Household Government in America* (Charlottesville: University of Virginia Press, 2002).

[3] 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 Michel 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). Most studies deal with wills written in Northern states and counties, and many focus on colonial New England or the Early Republic.

analyze probated wills, but do not address overturned wills or the challenges behind them. Nor do many of these studies analyze disinheritance or the nexus between the legal structure and social values that shaped the act of writing a valid will.

Historians of household relations have recognized how private property determined status, wealth, and power within families and broader communities while scholars of inheritance have explored how inheritance law governed private property distribution. Few historians have recognized inheritance practices as central cultural and legal rituals that shaped and were shaped by how communities understood familial relations. Almost everyone was involved in some form of inter-generational property transfer. Every time a close family member died, surviving family participated in the process of distributing the deceased's property. Without a will, state intestacy law determined the distribution of the estate. Even in estates too small to go through the probate process, surviving family members informally distributed the deceased person's property. Furthermore, will disputes in county courts made public inheritance practices by involving community members as litigants, witnesses, or jury members. Testators were aware that will challenges could and did occur; as testator Moses Kimbrough pleaded in his 1872 will, 'I hope no one will try to Brake [sic] or trouble with this deed in any manner shape or form for I think this is a just will."[4] Whether or not individuals or their relatives wrote wills, almost everyone was exposed to discussions about family through participation in inheritance practices. Testamentary capacity trials reveal how

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[4] "Will of Moses Kimbrough," Harrison County Will Book J, (1870-1877), 261, Harrison County Court Clerk Records, KDLA.

community members, juries, doctors, and lawyers involved in disputes over wills thought about families, property and sanity.

In her study of the seventeenth century Puritan witchcraft trials, historian Carol Karlsen argues that witchcraft accusations against women sometimes functioned to restore to men property that had passed to female heirs. Statistically, these female heirs were much more vulnerable to witchcraft accusations than non-property-holding women or men. Karlsen contends that these women "were aberrations in a society with an inheritance system designed to keep property in the hands of men."[5] In the religiously ordered Puritan society, the community regulated the transmission of property through charges of witchcraft, which stripped some women of the capacity to hold and devise property. In this respect, in nineteenth century Kentucky the tropes of madness functioned much like the tropes of witchcraft. Disinherited heirs-at-law used the languages of science and madness rather than those of demonic possession to restore the state sanctioned vision in which property transmission remained within consanguineous families.

Inheritance practices not encoded into law illuminate how people understood reciprocal obligations and expectations between family members. These expectations included promises from one generation to the next that the white family would be culturally and materially reproduced through inheriting property, slaves, and financial resources. Inheritance allowed testators, who were often male heads-of-household, to assert authority and demonstrate their benevolence by offering protection and comfort to

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[5] Carol F. Karlsen *Devil in the Shape of a Woman: Witchcraft in Colonial New England* (New York: Vintage Books, 1987).

succeeding generations. Inheritance promises also served as a form of social welfare by which testators exchanged promises of wealth for care during old age and sickness. Testamentary capacity trials serve as an important site for analyzing how families understood the symbolic and cultural values of property and inheritance, and for understanding the cultural expectations that daily influenced how individuals within families negotiated their identities. When testators bequeathed outside of accepted patterns, they presented alternative visions of family and of social relations in which affection and obligation did not equate necessarily with shared blood or marital ties.

Family was a social concept, constructed through custom, law, and community ethos.[6] "Family" referred to an organic unit bound at least rhetorically by ties of blood, marriage, and/or affection. Historian C. Vann Woodward has commented that the southern family "is an inclusive rather than an exclusive institution, one extending beyond the customary boundaries to embrace more than blood kin, common color, or those of equal status."[7] Historians agree that family served as a metaphor for southern society throughout the nineteenth century. It provided an organic model for understanding the South's political and social structures based on masculine authority and dependency. Family also served as an anchor for personal identity for southerners; men were masters and leaders in their households and in broader society, while women were defined through their roles as wives, mothers, and dependents.

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[6] Stevenson, *Life in Black and White*, xiii; Carol Bleser, ed. *In Joy and In Sorrow: Women, Family, and Marriage in the Victorian South, 1830-1900* (New York: Oxford University Press, 1991); Nancy Bercaw, ed. *Gender and the Southern Body Politic* (Jackson: University Press of Mississippi, 2000).

[7] C. Vann Woodward, "Introduction," xxi, in Bleser, ed. *In Joy and In Sorrow*.

White southerners understood family capaciously. Ownership and forced servitude did not contradict including slaves in the unit that white slaveholders imagined as their family.[8] Southerners saw slaves' inclusion in the family as ordained by God and enacted into law. In the *Almoner*, an 1815 journal published in Lexington, Kentucky, one author suggested that "the black part of their family shall be called daily. . . to worship along with the white part."[9] Including slaves in the imagined family was no mere religious prescription. When questioned about the health of her neighbor's family in a will challenge, Lucy Ann Magruder testified that the testator's family "never had much sickness. . . but they had a good deal of sickness among his black family."[10] In the worldview of slaveowners, counting slaves as part of the family reflected a natural hierarchy and did not preclude abuse and compelled labor.

This vision of an inclusive family had practical and economic rationales beyond a desire to fulfill God's plan. An inclusive family made everyone in the household a dependent of the head-of-household, a view reinforced through law, religion, and custom. Ideally, a man governed a household in his capacity as father, husband, and master. Whether the household contained slaves or not, the hierarchical organization of the household concentrated his authority. These designated family roles rested upon beliefs about racial and gender hierarchies and allowed heads-of-households to maintain the

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[8] Eugene Genovese, " 'Our Family, White and Black': Family and Household in the Southern Slaveholders' Worldview," 69 – 87, in Bleser, ed. *In Joy and In Sorrow.*

[9] Anonymous, "An Enquiry Concerning the Duty of Christian Heads of Families Toward their Black Servants," *The Almoner* (Lexington, Ky.) 1 no. 6 (May 1815), 274.

[10] "Testimony of Lucy Ann Magruder," in Transcript, *Ridgway v. Hall,* (1871) Case #4387, KCAR, KDLA.

order necessary to control efficiently the processes of production in agrarian communities where the household was also the workplace.[11] Calling the household members a "family" conveniently lent them credibility as an organic, religiously sanctioned group bound to one another by legal, moral and customary ties.

This inclusion did not mean that all family members were accorded equal treatment by slaveholders or by the law of domestic relations.[12] When many testators wrote wills, the rhetoric of the inclusive family broke down and slaves became part of the testator's property used to identify and reward white family members.[13] At the same time, some testators used their wills to convey an image of themselves as benevolent patriarchs. Warren County testator Charles Smith willed that "old Ominda [was] to be at liberty to do as she may wish tho [sic] to be under the protection and control" of his son, Benjamin Smith.[14] Smith refused to give Ominda her freedom. Instead his devise was both coercive and paternal. Ominda remained a slave, while at the same time Charles Smith claimed to grant her liberty and protection under his son's watchful eye. According to the terms of the will Benjamin would have to support Ominda; she may have been nearing an age where her productive labor had little value and statutory law prevented Smith from manumitting her without financial support.

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[11] Eugene Genovese, " 'Our Family, White and Black' in Bleser, ed. *In Joy and In Sorrow*, 72-3.

[12] For a discussion of familial imagery, see also Stephanie McCurry, *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York: Oxford University Press, 1995), 208-38.

[13] Genovese, " 'Our Family, Black and White, 69 – 87, in Bleser, ed. *In Joy and In Sorrow*,".

[14] " Will of Charles Smith," Warren County Will Book D (1827-1862), 239-40, Warren County Court Clerk Records, KDLA.

Sexual coercion by white males upon slave women resulted in offspring with shared blood ties in the same household. White males rarely acknowledged these ties during their lives or in their wills; when they did, the economic relations of slavery frequently conditioned their recognition. In one Kentucky will dispute, testator Austin Hubbard devised his estate to his enslaved mulatto daughter, Narcissa. Before Narcissa could receive the estate, Hubbard stipulated that her inheritance was contingent on "her owner. . . let[ting] her go for a moderate price."[15] If her owner refused to agree to a "moderate price," then Hubbard devised his estate - including Narcissa - to his illegitimate son. Although Hubbard recognized shared blood ties with his enslaved daughter, this recognition was predicated on the economics of slavery. The court sustained Hubbard's devises, reinforcing the race-based conflation of family member with property. They held that making Narcissa's freedom conditional upon her purchase and subsequent manumission "for a moderate price" was a reasonable attempt to "counteract the cunning and avarice . . . among his heirs."[16] Indeed, recognition of interracial affective or blood ties through inheritance created contentious disputes between family members. These cases are analyzed more fully in Chapter Two.

The Civil War and the African American emancipation had significant consequences for how Kentuckians thought about family. As slavery eroded, sharecropping and tenancy became the dominant systems of agricultural labor, particularly in Kentucky's hemp farming regions and in the central and western tobacco

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[15] *In re Hubbard's Will*, 29 Ky. 58 (1831).

[16] Ibid.

growing areas.[17] Manipulation of the ideology of family became a tool in the effort to keep property from African American ownership and to shore up white privilege. White families no longer recognized African Americans as part of the inclusive household, as white masters became employers and lost responsibilities previously incurred in slavery.

As historians of slavery have noted, enslaved people had vibrant kin networks and families under slavery, although they were unrecognized by law.[18] Once African American families gained recognition through citizenship and access to legal marriage, African American men assumed legal responsibility as the heads of families. The reconstruction of black families severed the legal and rhetorical ties that had bound them to white families. As Kentucky novelist James Lane Allen lamented in a description of post Civil War Kentucky, "the preexisting order had indeed rolled away like a scroll." He described labor relations as "a difficult agreement to effect at all times, because will and word and bond were of no account."[19] Black sharecropping families became independent units, no longer part of the relations of dependency that had forced them to labor for the landholding white household.

These African American families negotiated labor contracts with white property owners as new systems of agricultural labor emerged. White sharecroppers sometimes had the advantage of working on the land of white kinfolk, which could lead to tenancy or outright land ownership. Even if shared blood ties existed between white landholders

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[17] Steven Channing, *Kentucky: A Bicentennial History* (New York: W.W. Norton & Co., 1977, 137.

[18] Herbert Gutman, *The Black Family in Slavery and Freedom, 1750-1925* (New York: Vintage, 1977); Brenda E. Stevenson, *Life in Black and White.*

[19] James Lane Allen, *The Reign of Law: A Tale of the Kentucky Hemp Fields* (New York: The Macmillan Co., 1900), 52-53.

and black sharecroppers, these ties were rarely acknowledged.[20] These new constructions of family and property virtually eliminated inter-racial devises that had occurred (albeit rarely) between white testators and African Americans during the antebellum era. A random sample probate records of two Kentucky counties indicate that 8.3% of testators writing wills before 1864 emancipated slaves and/or left them property.[21] In postbellum wills, only 1.7% of testators made interracial devises, and some of those appear to be to former slaves who remained with white testators as servants after the war.[22] The new ideological family that emerged after the Civil War was either white or black.

In post-war Kentucky, inheritance disputes became the domain of whites almost exclusively, although some black property-holders wrote wills. At the appellate level, these wills were never challenged on mental capacity grounds by disinherited heirs-at-law, and I have discovered no challenges at the county level involving African American testators. The emphasis in testamentary capacity jurisprudence after the Civil War changed from juries scrutinizing devises in which testators emancipated or devised to black heirs (a topic covered in the next chapter) to how testators expressed obligations and affection through devises within white families. Reconstruction was marked by an

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[20] Jacqueline Jones, "The Political Economy of Sharecropping Families: Blacks and Poor Whites in the Rural South, 1865-1915," in Carol Bleser, ed. *In Joy and In Sorrow*, 198.

[21] N = 233 total wills sampled in Harrison County and Warren County. Twenty wills contained provisions for conditional or immediate emancipation.

[22] N = 238 total wills written after 1864. In these devises, I identified interracial devises by either specific mention of "colored" following the heir's name, or if the devise was to a "faithful servant," which usually indicated a former slave.

attempt to restore racial and gendered hierarchies in families and society.[23] Clearly, as testamentary capacity challenges reveal, the capacious vision of family had new limits.

Many people died without writing a will, allowing by default the state to determine the distribution their estate. Without accurate death records by which to compare the number of deaths with the number of estates probated, it is difficult to compile statistics on how many people wrote wills and how many people died intestate (without a will). Fortunately, nineteenth century Harrison County Court clerks kept a Decedent Index that noted the method of distribution of all estates that that the court oversaw including testate and intestate estates. This index most likely does not include people who died possessed of very little wealth. Between 1795 and 1905, wills controlled 38.3% of all estates that went through the court.[24] This finding conforms roughly with other historians' conclusions that testate decedents (those dying with a will) constituted about one-third of all decedents during the nineteenth century.[25]

Intestacy laws, or statutes dictating the distribution of an estate when a testator died without a will, laid out the state's perception of testators' probable intent on how they would have devised had they written a will. It also elucidated what the state sanctioned as "natural" dispositions. Statutes governing intestacy reveal how the law ranked and rewarded sexual, biological, and generational relationships through wealth

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[23] LeeAnn Whites, *The Civil War as a Crisis in Gender: Augusta Georgia, 1860-1890* (Athens: University of Georgia Press, 1995).

[24] Harrison County Court Decedents Estate Index, 1795 – 1905, Harrison County Court Clerk Records, KDLA.

[25] Shammas, Salmon, and Dahlin, *Inheritance in America*, 15-17.

distribution.[26] During the first half of the nineteenth century, Kentucky intestacy statutes favored male relatives over female relatives and the paternal family over the maternal side, reflecting a sex bias toward male property-holders and a distribution scheme that valued more highly paternal over maternal bloodlines. By 1850, when Kentucky legislators reworked the statutory code, intestacy distribution equally distributed property between children, with the dower or widow's thirds set aside for the life of the widow.[27]

Statutory law guaranteed wives dower, or one-third of the estate for life use if the marriage produced children. If a husband wrote a will, he could leave his wife control or outright ownership of more than one third of his estate, but not less. When a husband died, his widow's control over her dower property remained limited. Widows only had control of the dower estate for their maintenance and could not will or convey it.[28] Rather than grant widows financial independence, legislators designed dower laws to prevent impoverished wives from becoming wards of the state. Husbands could make provisions to will dower land after their wives' deaths; in the event of intestacy, the land passed to the heirs-at-law after the widow's death.

As opposed to intestacy law's pre-determined distribution plans, writing a will emphasized the freedom of individual testators to choose beneficiaries sometimes at the expense of members of the immediate family. Writing a will did not guarantee the

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[26] Adrienne D. Davis, "The Private Law of Race and Sex: An Antebellum Perspective," *Stanford Law Review* 51 (Jan 1999): 226 -231.

[27] Ch. 106, §4, *Revised Statutes of Kentucky Approved and Adopted by the General Assembly 1851 and 1852 and in Force From July 1852* (Cincinnati: Robert Clarke & Co., 1860).

[28] See Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986) for a discussion of the legal rights and disabilities of women during the antebellum era; *Revised Statutes of 1852,* Ch. 106, § 4.

certainty of its execution. If someone raised objections to the probate of the will and the local judge considered the objections valid, the case then would be heard in one of the county's courts. In testamentary capacity cases, the beneficiaries stood as the defendants, and the heirs-at-law were the plaintiffs. After appealing through the highest county court, the next step involved a possible appeal by the losing party to the state level, the Court of Appeals.[29] At the county trial, the plaintiffs attempted to convince a jury (or rarely a panel of judges) that the testator was legally insane and/or illegally influenced by the will's beneficiaries to make specific devises. Often, these charges appeared together, particularly in cases in which testators emancipated slaves or made interracial devises. The test for testamentary capacity was a simple, three-pronged legal test that has remained almost unchanged to the present. To write a valid will, testators needed only to have sufficient capacity to comprehend the extent and condition of their property, to recognize the natural objects of their bounty, and to have a fixed purpose in mind when devising their property.[30]

Some Kentuckians rejected testamentary freedom as catering to the whims of aging testators. Several witnesses claimed that only after the onset of insanity did the testator deviate from convictions that intestacy laws provided a just distribution plan. In the 1873 contest over John P. Wills' will, one witness testified that Wills had said "no man ought to made a will after he was sixty five years old [and] that he was opposed to

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[29] The Court of Appeals did not rehear the case, although it did accept new briefs arguing the legal points on both sides. It used the lower court transcript to decide issues of fact. Therefore, the testimony that the county court jury heard was sent to the Court as the transcript of the case.

[30] See *Den v. Vancleve*, 5 N.J.L. 589 (1819). For a Kentucky version of this test, see *In re Reed's Will*, 41 Ky. 79 (1841) in which the Court of Appeals notes that testator "had a settled purpose for many years," recognized his children, albeit unequally, and identified all portions of his estate.

making wills. That the law made a good enough will."[31] The Court of Appeals took such declarations seriously. In another dispute, after favorably reviewing a jury's verdict overturning William Harrel's will, Justice Robertson noted that Harrel had "declared that the law made the best will . . . He also said, not long before his death, that he desired an equal distribution of his estate among his children. In confirmation of that . . . he, by extraordinary remonstrances, prevailed on one of his sons to die intestate."[32] These appeals by courts and community members to the virtues of intestacy distribution reflected a belief in the justness of equal distribution and distrust of testators' sense of justice. The public act of probating and distributing the estate to the heirs-at-law reinforced the state-sanctioned family.

The right to will property tapped values central to how Americans understood freedom. It accompanied a host of other property rights that held sacred private ownership of property.[33] According to political philosophers, the sanctity of private property was central to the defense of individual liberty and the creation of an independent, self-reliant citizenry capable of virtuous participation in the Republic. Most nineteenth century jurists agreed that to write a will, testators needed only to meet a low standard of mental capacity. The notable exception involved married women, whose testamentary rights fell under testamentary capacity jurisprudence (see Chapter Five for a discussion of married women's testamentary capacity).

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[31] "Testimony of Benjamin Ellsberry" in Transcript, *Wills v. Lochnane* (1871), Case # 5843, Box 229, KCAR, KDLA.

[32] *Harrel v. Harrel* 62 Ky. 203 (1864).

[33] See James W. Ely Jr. *The Guardian of Every Other Right: A Constitutional History of Property Rights*, 2nd ed. (New York & Oxford: Oxford University Press, 1998), 3.

Although wills frequently redistributed large quantities of wealth, not all testators had large estates.[34] Wills involving small estates reflected a testator's sense of justice or equity. Testator Reubin Beck devised his entire estate to his youngest brother, "having a knowledge that there can be but little, think it not worth dividing among my other relatives."[35] Barzilla Baird's personal estate, which she divided equally between her children and her grandson sold for $290.85 in 1871.[36] Had Baird not written a will, her grandson's share would have been split between his surviving brothers and sisters. Disinherited heirs-at-law went through the trouble of bringing suits to contest wills in estates of all sizes as well. In the contest over Rachel Higdon's will, which the heirs-at-law pursued to the Court of Appeals, Higdon's estate sold for a total of $202.50.[37] Disinherited heirs had complex reasons for disputing wills beyond monetary gain, including a desire to redeem their honor after the dishonor sometimes caused by the implications of disinheritance.

Through wills, testators made symbolic as well as material statements to their heirs-at-law and beneficiaries. Wills gave material effect to affectionate relationships. They identified chosen beneficiaries, anointed favorites and chastised others by

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[34] Shammas, Salmon, and Dahlin, *Inheritance in America*, 15-17. Their study estimates that during the late nineteenth century wills dictated distribution of 62% of all personal wealth. This included personalty and realty in individual estates in Bucks County in Pennsylvania.

[35] "Will of Reubin Beck," Warren County Will Book D (1827-1862), Warren County Court Clerk Records, KDLA. It is difficult to know the actual size of Beck's estate as he passed property to an heir without a sale. In cases in which the testator mandates a sale, usually probate records include an estate inventory or bill of sale.

[36] "Will of Barzilla Baird," 174 and "Sale Bill of Personal Estate of Barzilla Baird," 176-177, in Harrison County Will Book J (1870-1877), Harrison County Court Clerk Records, KDLA.

[37] *In re Higdon,* 29 Ky. 444; "List of the Sale of the Estate of Rachel Higdon," Nelson County Will Book G (1831-1835), Nelson County Court Records, 70-1, KDLA.

expressing the testator's feelings through the quantity and quality of gifts. Moreover, these transfers ensured the passage of social and economic status from one generation to another. Ultimately, wills, by translating affection into property, blurred distinctions between the ostensibly private relationships and the public economy.

Wills served purposes beyond recognizing affective relationships.[38] When devising property unevenly, testators often mentioned the desire to compensate a beneficiary for care during old age and sickness, revealing a rudimentary welfare system. Francis Edwards devised his entire estate to Elijah Bailey, on the condition that "he keep me until my death and if he does not keep me . . . whoever takes care of me during my life shall have all of my property at my death."[39] Making devises contingent on care suggested that testators believed that younger generations needed incentive to ensure good treatment during old age. As C.D. Bradley, a Kentucky attorney observed, writing a will allowed testators

> to reward their children and others who are kind and protectors in sickness and old age and cut off such as neglect their duty they owe to parents and relations. Unhappily unless there was some such motive in addition to the sense of duty, many would suffer & die for want of attention in the midst of plenty.[40]

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[38] Glendyne R. Wergland, "Men, Women, Property, and Inheritance: Gendered Testamentary Customs in Western Massachusetts, 1800-1860, Or Diligent Wives, Dutiful Daughters, Prodigal Sons, Westward Migration, Reciprocity, and Rewards for Virtue, Considered." Ph.D. Diss. University of Massachusetts, 2001, 1.

[39] "Will of Francis Edwards," Will Book L (1882-1897), 306, Harrison County Court Clerk Records, KDLA.

[40] "Appellant's Brief" in *Sarah v. Miller* (1864) Case # 74, Box 3, KCAR, KDLA.

The idea that heirs required motive beyond duty and affection to care for aging parents contradicted the rhetoric that portrayed families as inclusive, organic units in which ties of affection and responsibility bound generations together. Indeed, some Kentucky testators used promises of material reward to discourage children who might neglect their parents. Isaac Conrad bequeathed his son Jackson "the plantation wherein I now live" as long as Jackson "maintain[ed] me and my wife with all things necessary."[41] Of course, some children could not afford to provide care for ailing parents without financial assistance. Whether by choice or necessity, some families functioned on two levels: as organic units, duty-bound by affective ties, and as a collection of individuals pursuing their own economic interests, in which goods or services were traded for wealth. The reciprocal agreements between parents and children influenced how testators devised their property and firmly linked the private world of family to the public economy.

Testation, like property ownership, was overwhelmingly a male privilege which reinforced patriarchal authority within individual households.[42] Coverture, testamentary law, and the exclusion of women from many forms of commerce placed control of inheritance primarily in the hands of men in their roles as fathers, husbands and masters.[43] Writing a will presented male testators with opportunities to reward or punish

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41 "Will of Isaac Conrad," Will Book F (1847-1852), 292, Harrison County Court Clerk Records, KDLA.

42 Still, female testators represented an important minority. In a random sample of 134 wills from Harrison County, Kentucky, 16 (8.4%) were written by female testators. Harrison County Will Books B – H (1818-1864), Harrison County Court Records, KDLA. For an analysis of differing patterns of testation between men and women see Chapter 5. For another historical analysis in Petersberg, Virginia, see Lebsock, *The Free Women of Petersburg,* 133-144. Lebsock concludes that women wrote wills within a culture of "personalism" and tended to pick favorites and reward personal loyalty when distributing property.

43 See Salmon, *Women and the Law of Property*, for a discussion of the legal rights and disabilities of women during the antebellum era.

family members by making bequests conditional on their beneficiaries' behavior. William Cox of Trigg County left his wife Rebeca control of his real and personal estate during her lifetime or widowhood. [44] This devise granted only "control" and not full ownership. As long as she remained a widow, Rebeca could use the property, but could not sell or significantly alter it. At her death, or if she chose to remarry, the property would be distributed among his six children. Cox also added a clause concerning his daughter Rutha's choice of a husband, decreeing that if she "marries Nelson More, she is not to have an equal share. I give her Rutha A. Cox five dollars."[45] These devises ensured that even after death William Cox retained authority over his wife and daughter's future marriage decisions. Their financial welfare remained contingent on his legal authority as father and husband. Such devises reinforced and extended patriarchal power of husbands and fathers over their dependents.[46]

Cox's authority as a white master also extended beyond the grave. Perhaps doubting his slaves' obedience or distrusting his wife's disciplinary ability, he added a clause mandating that "if any of the negroes belonging to my estate will not obey their mistres [sic] she has the rite [sic] to sell said negroes."[47] This clause negated the legal default in which the estate, including the slave property, would have remained intact until Rebeca Cox's death or remarriage. The persistent threat of sale served as a warning to

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[44] "Will of William Cox," Trigg County Will Book E, "28, Trigg County Court Clerk Records, KDLA.

[45] Ibid.

[46] 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 – 162. Fellows discusses how male patriarchal privilege subverts women's legal rights and convinces women that it is in their best interests.

[47] "Will of William Cox," 28.

the enslaved people on the Cox farm that their community remained precarious and was based on their continued ability to meet Rebeca Cox's expectations. William Cox's devise granted Rebeca Cox new authority as a white master by allowing her to make a conditional sale of the slaves. At the same time, William Cox had created a powerful disincentive toward her remarriage. Cox devised to Rebeca the power associated with white mastery, while carefully controlling her marital status by linking remarriage to a loss of her financial security. Indeed, testamentary freedom represented enormous power over spouses, family, and slaves.

Historians have written extensively about the masculine culture of honor, which historian Bertram Wyatt-Brown describes as resting on "family integrity [and] clearly understood hierarchies of leaders and subordinates."[48] In the culture of honor, a white man's words represented his identity, publicly and internally. Kentucky novelist James Lane Allen effused that courage "is the greatest quality of the mind – next to honor."[49] Wills served as an ideal instrument for declaring oneself as a man of honor. They literally represented testators' last public declaration and allowed testators to demonstrate their generosity and visions of familial justice. The ritual of publicly reading and executing the will served as a final gesture by which testators sealed their reputations.

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[48] Bertram Wyatt-Brown, *Southern Honor: Ethics and Behavior in the Old South* (New York: Oxford University Press, 1982), 72. See also Kenneth S. Greenberg, *Honor & Slavery: Lies, Duels, Noses, Masks, Dressing as a Woman, Gifts, Strangers, Humanitarianism, Death, Slave Rebellions, The Proslavery Argument, Baseball, Hunting and Gambling in the Old South* (Princeton: Princeton University Press, 1996); and James C. Klotter, *Kentucky Justice, Southern Honor, and American Manhood: Understanding the Life and Death of Richard Reid* (Baton Rouge: Louisiana State Press, 2003).

[49] James Lane Allen, *The Choir Invisible* (New York: The Macmillan Co., 1898), 70.

As William Cox's devise concerning his daughter indicates, some testators bequeathed unevenly with an eye to retribution when they believed that their children had dishonored them or challenged their authority. While children were dependents in their parents' households, parents had several avenues by which to compel obedience and respect, ranging from cajoling to corporeal punishment.[50] "Parental Authority," an article appearing in 1846 in the *Louisville Weekly Journal* counseled that if fathers teach their sons "submission to authority," sons will develop "a habit of filial reverence. . . that can never be broken."[51] Once children became adults however, parents had fewer means of compelling obedience. Inheritance served as one medium that allowed fathers to retain authority over their children.

Respectful, obedient behavior by children toward their fathers reinforced social hierarchies and the southern system of honor. The Kentucky Court of Appeals reluctantly accepted disobedience by adult children as a reason for disinheritance. In the 1873 dispute over John P. Wills' will, the Court agreed that "He (like men of his temperament sometimes do) doubtless determined that those of his family who would not respect his feelings and wishes should enjoy no part of his estate."[52] Wills had disinherited his granddaughter because she married against his wishes. The Court concluded that Wills remained consistent and rational in his devises, explaining that "His

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[50] Sarah Woolfolk Wiggins, "A Victorian Father: Josiah Gorgas and His Family," in Bleser, *In Joy and Sorrow*, 233. Wiggins notes that childrearing practices changed over the nineteenth century, from a belief that a child's will must be broken through submission to authority to an ideal in which children were shaped through moderation and voluntary obedience resulting from affection and mutual respect.

[51] "Parental Authority," *Louisville Weekly Journal,* February 11, 1846.

[52] *Wills v Locknane* 6 Ky. Op. 632 (1873).

regard for all the members of his family who yielded to him that degree of obedience and respect to which he conceived himself entitled" justified his uneven devises. Disobedience, even by adult children, disrupted the hierarchy that ordered relations upon which family reputation and paternal honor were built. Parents expected respect from their children, and in return passed on the family wealth and status to obedient children who carried on the family name and reputation.

The reasons for which parents disinherited disobedient sons and daughters differed according to parents' gendered expectations of behavior. Frequently wills record testators' disapproval of their daughters' choices over domestic and marriage issues. Testators used the deprivation of inherited property as a means of punishing disobedient daughters who asserted marital independence. Bannister Taylor made his reasons for disinheriting his daughter clear by devising that

> My daughter Martha, without my knowledge, has. . . become the wife of an unprincipled scoundrel by the name of James Minor, and as a mark of my disapprobation of her disobedience and disrespect to her parents. . . I so order and direct that neither my said daughter, Martha, and the said James Minor shall ever receive or enjoy any part or portion of my estate.[53]

Martha had challenged Taylor's authority by eloping with James Minor. Taylor used one of the few weapons he had; he made a public declaration of her insubordination and punished her by eliminating her from the material rewards expected by most daughters. Taylor's will makes clear that he was angered not only over Martha's disobedience but also over her "disrespect to her parents." Although testators also

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[53] *Taylor v Minor* 13 Ky. Op. 450 (1885).

disinherited sons for their marital choices, adult daughters' primary filial responsibility was to marry well, whereas parents had differing expectations for sons as economic producers and heads-of-households.

Testators disinherited sons who had abandoned their parents, or disagreed or dishonored them in business dealings.[54] Testator John Hays disinherited his son Henry who "left the parental care of me when underage" and divided his estate equally among his remaining children.[55] Benjamin Hewitt wrote a will explicitly to disinherit his son Anderson who "was going to kock [sic] me in the head & Kill me because I wanted him to pay me for the land that he . . . lived on."[56] Similarly, in the Bledsoe case, witnesses testified that Samuel Bledsoe's son William had been disrespectful and threatened violence over a wagon both men used for their farming business. In these cases, errant sons had challenged their fathers' authority.

In most cases in which testators disinherited their children, a complimentary narrative to the reasons for disinheritance emerged in which the favored beneficiaries went above and beyond the call of duty to provide the testator with care or comfort. Testators praised these beneficiaries while disinheriting other heirs due to disobedience or a perceived lack of respect. When disinherited heirs brought grievances against the unequal testamentary distribution to court, they argued that their behavior did not deserve

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[54] Glendyne Wergland draws the same conclusions based on her much larger sample of Massachusetts wills. See Wergland, "Men, Women, Property, and Inheritance."

[55] "Will of John Hays," Will Book #4 (1862-1889), 283-285, Warren County Court Clerk Records, KDLA.

[56] "Will of Benjamin Hewitt," Warren County Will Book #5 (1890-1906), 70, Warren County Court Clerk Records, KDLA.

disinheritance. Rather, the testator's mental unsoundness or the pernicious influences of another beneficiary led to the testator's devises, which they labeled as irrational and unjust.

These testamentary patterns reveal tensions in the ideological structure of the family; children were expected to demonstrate natural filial reverence and in turn they would reap the rewards of inheriting family wealth. In the Bledsoe will dispute, one witness testified that Bledsoe had little reason to disinherit William, who had "always treated him [Samuel Bledsoe] with respect like a child should treat a parent."[57] Instead, testation became a weapon in the limited arsenal of aging parents to assure respect, care, and obedience. Disinherited children claimed that their parents were insane for disinheriting them as the natural objects of their bounty. Children as challengers to parental wills manipulated the rhetoric of family and capacity to gain access to familial wealth. Although at times contradictory, several themes emerged that formed a grammar of capacity, resting on a subtext of common assumptions and values about rationality and insanity. These assumptions reveal how ordinary Kentuckians understood, debated, and manipulated discourses of capacity.

Despite a theoretical grant of broad freedom to testators distributing property, social and legal expectations that "the natural objects of the testator's bounty" would inherit prevailed.[58] Generally, the perceived naturalness of a relationship hinged on the

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[57] "Testimony of John Williamson," in Transcript, *Bledsoe's Ex'x v. Bledsoe* (1886), KCAR, KDLA.

[58] The phrase 'natural object of bounty' was used throughout the medical and legal and statutory texts discussing testamentary rights and testamentary capacity. For references in Kentucky cases, see *Johnson v. Moore's Heirs*, 11 Ky. 371 (1822) in which Court of Appeals referred to "the ties of natural affection to be the objects of his bounty."

legal legitimacy of a sexual or biological relationship, such as that between a husband and wife or a testator and his legitimate children.[59] In 1856 the Kentucky Court of Appeals noted that "If a testator has capacity to understand his obligations to his children, his disregard of such obligations does not render his will invalid, although it might prove that he was not in a proper state . . . to dispose of his estate with reason."[60] This system consolidated wealth among family and kin groups and discouraged interracial wealth transfers where sexual, but illegitimate and socially disdained relationships existed. These legal expectations converged with communal beliefs, creating networks of legal rights and social obligations between generations of kin.

When disinherited heirs brought suit claiming that testators were "insane" or mentally unsound according to statutory law, judges instructed juries to measure the testator's mental state against a legal test of rationality. In 1830, a Court of Appeals judge explained that "If the testator have not sufficient mind. . . to dispose of his estate 'with reason,' or according to any fixed judgment or settled purpose of his own, he is incompetent to make a will."[61] Although judges had different standards for "reasonableness," they generally equated it with the testator's ability to recognize his children. As the Court reasoned in 1856, if the testator "had sufficient capacity to dispose of his estate in a rational manner, he must necessarily have had capacity enough,

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[59] Brian Alan Ross, "Undue Influence and Gender Iniquity," *Women's Rights Law Reporter* 19 (Fall 1997), 102.

[60] *Tudor v. Tudor*, 56 Ky. 383 (1856). The 1860 edition of Kentucky's Revised Statutes of 1852 also quotes this case as well, embedding the holding in Kentucky statutory law. See Ch 106, § 2, n. 1, *Revised Statutes of Kentucky Approved and Adopted by the General Assembly 1851 and 1852 and in Force From July 1852* (Cincinnati: Robert Clarke & Co., 1860).

[61] *Shropshire v. Reno*, 28 Ky. 91 (1830).

not only to know his children, but also to understand his obligations to them as a parent."[62] Judges, juries, and witnesses equated an ordered, sane mind with the perceived justness of the will toward the heirs-at-law. In testamentary capacity trials, the testimonies of ordinary people created the narratives rationality or irrationality upon which juries ruled, although doctors and medical experts increasingly appeared as medical authorities as the nineteenth century progressed.[63] The jury balanced a narrative describing the insane actions of the testator against the alleged egregious behavior of the heirs-at-law, which the will's beneficiaries claimed justified disinheritance. To complicate matters, the beneficiaries presented narratives depicting themselves as worthy of a wise and just testator's beneficence.

John Locke wrote in *On Civil Government*, "The freedom . . . of man, and liberty of acting according to his own will, is grounded on his having reason."[64] Religious doctrine emanating from the Second Great Awakening as well as the secular philosophy of Ralph Waldo Emerson championed the virtues of free will. Ordinary Kentuckians understood willpower as a separate mental power that, in a well-balanced mind, governed the emotional, moral, and intellectual function.[65] As historian Elaine Frantz Parsons

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[62] *Tudor v. Tudor,* 56 Ky. 383 (1856).

[63] The views of the medical experts and the elite discourses of insanity will be explored more fully in Chapter Three. Although women did write wills, to a large extent they were measured against a standard based on traits and behaviors considered masculine. As I argue in Chapter Five, this when courts and communities measured women against this standard, it created a rhetorical dissonance that challenged understandings of free will.

[64] John Locke, *Second Treatise of Government,* Ed. by C.B. McPherson (Hackett Publishing Company, Indianapolis and Cambridge, 1980).

[65] Bardaglio, *Reconstructing the Household,* 27; Thomas Cooley, *The Ivory Leg in the Ebony Cabinet: Madness, Race, and Gender in Victorian America* (Amherst: University of Massachusetts Press, 2001), 47;

observes, one meaning of manhood "was a certain form of willpower. Independence and strength of will were highly gendered qualities, yet nineteenth century Americans considered the possession of free will as a precondition of full personhood for both men and women."[66] Even the unschooled frontiersman trumpeted by Jacksonian Democrats had "common sense." Prevailing gender ideology in the South held that white men were rational, honorable, independent thinkers. Conversely, black men were considered innately savage, irrational, and governed by emotional faculties. The rational man's volition or willpower allowed for self-sovereignty which was an important masculine virtue necessary for freedom.[67]

In *The Story of American Freedom,* historian Eric Foner argues that "of the lines circumscribing the enjoyment of freedom, none have been more persistent than those drawn on the basis of race, gender and class."[68] Capacity discourses fused beliefs about individuals' innate abilities – their capacity - to their sex or race. By using the language of capacity, courts and communities could make distinctions where law supporting prevailing ideologies began to fracture. For example, the prevailing racial ideology in Kentucky shaped how witnesses described mental capacity in the Bledsoe trial. Bledsoe's longtime neighbor Thomas Baker testified that, "I don't think he had the

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Robert M. Ireland, "Insanity and the Unwritten Law," *The American Journal of Legal History* 32 no. 2 (1988), 166.

[66] Elaine Frantz Parsons, *Manhood Lost: Fallen Drunkards and Redeeming Women in the Nineteenth Century United States* (Baltimore: The Johns Hopkins University Press, 2003), 12. Parsons notes that the narrative of the female drunkard who lost willpower to alcohol did not have the same social currency as that of the male drunkard.

[67] Female testators were considered more likely to be irrational and susceptible to nervous disorders and were compared to a male standard of sanity.

[68] Eric Foner, *The Story of American Freedom* (New York: W.W. Norton and Co, 1998), xx.

capacity to make a will. . . . he thought the rebels and rebel sympathizers even to the women and children ought to be hung and he would head a band of negroes to help do it."[69] Bledsoe opposed the Confederacy and its vision of racial hierarchy. Furthermore, Bledsoe advocated black-on-white extralegal violence as a form of justice. In Kentucky, white-on-black extralegal violence became common after legal emancipation, with ninety-three lynchings occurring between 1867 and 1871.[70] Headlines in local and national papers consistently carried reports of alleged African American barbarity met by mob justice.

The suggestion of inverting racial hierarchies through violence led Baker to conclude Bledsoe lacked mental capacity. Baker explicitly referred to Bledsoe's conviction that female rebel sympathizers should be hung. White vigilantes sometimes justified lynching through moral outrage at allegations that black men raped white women. In 1870, the *Chicago Tribune* picked up a story from the *Cincinnati Enquirer* titled "Lynch Law in Kentucky: Negro Outrages White Girl and is Hung by a Mob."[71] When Bledsoe suggested that blacks should hang white female sympathizers, his verbal violation of southern white womanhood may have inspired vindictiveness in Baker or convinced Baker of Bledsoe's mental unsoundness. Baker's remark illuminates a worldview in which sane white men supported a social order based on racial inferiority and justified extra-legal violence as protection for white women. Other witnesses

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69 "Testimony of Thomas Baker," *Bledsoe's Ex'x v. Bledsoe,* (1883) Case 17095, Box 716, KCAR, KDLA.

70 George C. Wright, *Racial Violence in Kentucky, 1865 – 1940: Lynching, Mob Rule and "Legal Lynchings"* (Baton Rouge: Louisiana State University Press, 1990).

71 "Lynch Law in Kentucky: Negro Outrages White Girl and is Hung by a Mob," *The Chicago Tribune,* August 28, 1870.

described Bledsoe as "extreme and fanatical in religion and politics."[72] Had Bledsoe made the same statements about retribution by whites on blacks and declared himself a staunch Democrat, those facts would have been unremarkable.

Gender ideology also shaped how capacity was understood. If the law provided no basis upon which to challenge testamentary rights of unmarried or widowed women, the grammar of capacity, framed in gendered language certainly did. In 1862, widow Eliza B. Atkinson devised her estate to her caretaker and his family, with whom she had lived during a sickness that eventually led to her death. She disinherited her deceased husband's children from his first marriage. The Court of Appeals, in overturning her will, concluded that Atkinson was "wrecked in intellect," caused by a "disease peculiar to her sex." The Court cited Atkinson's predilection toward "dress[ing] in gaudy colors as any of the young ladies . . . ma[king] love to young men and conduct[ing] herself in such an unbecoming and frequently indecent manner."[73] The judges and many witnesses believed that Atkinson was insane. They compared her behavior to an ideal determined by sex and age and used deeply gendered language to describe transgressions that served as evidence of her incapacity.

Regardless of class, white men had free will to make reasoned decisions concerning their households and dependents. During the antebellum era, a precarious ideological unity connected all southern white men that espoused white male liberty and

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[72] "Testimony of Hugh Montgomery," in Transcript of *Bledsoe's Ex'x v. Bledsoe*, (1886), KCAR, KDLA.

[73] *Pecancet v. Grayson*, 60 Ky. Op. 80 (1872).

independence, separating them from the enslaved and degraded black laborer.[74] Even as this unity across social classes broke down during and after the Civil War, the idea that whiteness represented independence and rationality did not disappear; instead it gained strength as a tenet of scientific racism. After the Civil War, white politicians used the rhetoric of capacity to disparage black politicians and women as unfit for rational, independent political decision-making.[75] If the just testator was a white, independent, rational man doing his final act of justice, then the unsound testator had lost his ability to govern, became weak, dissipated, and dependent.

Dependency, either mental or legal, disqualified a person from the right to exercise testamentary freedom. In *Shropshire v. Reno* (1830), the Court contended that "*Femes covert* [married women], minors under prescribed ages, persons of unsound minds, are not, therefore, permitted to make wills, because it is deemed safer that the property of such persons should be distributed by the law, than by any ostensible act of themselves."[76] The groups that court cited as lacking legal capacity were dependents either of a male-head-of-household or of the state. Mental unsoundness meant that a testator had lost the freedom to make independent, rational decisions. A delusion, another person, addiction to alcohol, laudanum, or even a fanatical commitment to religion were cited as causes that created a mental imbalance that precipitated a loss of free will.

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[74] See Stephanie McCurry. *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country* (New York: Oxford University Press, 1995), 6; J. William Harris, *Plain Folk and Gentry in a Slave Society: White Liberty and Black Slavery in Augusta's Hinterlands* (Wesleyan University Press, 1985), 6.

[75] Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863 – 1877* (New York: Harper and Row, 1988), esp. Chapter Eight.

[76] *Shropshire v. Reno,* 28 Ky. 91 (1830).

Lawyers and witnesses consistently constructed courtroom narratives in which testators lost independence and became physically and mentally dependent on others. In the *Shropshire* case (1830), the Court of Appeals noted that testator Walter Shropshire was "childish and flighty," and "complained in a puerile manner." These descriptions emasculated and infantalized Shropshire. The Court rhetorically stripped him of his manly independence by portraying him as an ineffective, whining child. Children's dependency deprived them of free will, as did their underdeveloped intellects. As the respected Louisville physician Dr. Charles Caldwell noted in an address titled "Mental Cultivation," No study of an *abstract nature* should ever be assigned to pupils, while under their twelfth or fourteenth year. . . . they are incompetent to do it."[77] When witnesses and court justices described testators as childish, they implied that the previously independent, manly testator had regressed into a state of incompetent dependency.

The testator's own moral failings often led to a state of incapacity. Throughout the nineteenth century, challengers impugned testators' ability to exercise free will by alleging that testators ceded free will to alcoholic dependency. The Court of Appeals viewed chronic drunkenness with great suspicion; in *Allison's Devisees v. Allison's Heirs* (1838) the Court compared intemperance with incapacity of a child, describing the testator as "very intemperate; and when in his cups . . . exhibited marks of imbecility and childishness."[78] Losing free will to drink meant that the drunkard had lost his manhood,

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[77] Charles M. Caldwell, "A Succinct View of the Influence of Mental Cultivation on the Destinies of Louisville, An Introductory Lecture Delivered at the Opening of the Louisville Medical Institute," *Louisville Journal of Medicine and Surgery* (1838), 1.

[78] *Allison's Devisees v. Allison's Heirs,* 37 Ky. 90, (1838).

made clear by his neglect for his familial and social responsibilities. Even if a usually intemperate testator was sober at the moment he wrote the will, many people believed that his addiction to drink had eroded the mental faculties responsible for making moral decisions. Reverend Joseph Ramsey testifying in the 1873 will dispute called the testator John Wills an "intemperate man," concluding "the natural tendency of ardent spirits is to impair the mind and to destroy the moral honor."[79] In such cases, testators' own internal weaknesses and immorality caused a descent into alcoholic dependency and mental incapacity.

Challengers also coupled charges of mental incapacity with undue influence. Undue influence meant that the testator's will reflected the desires of a beneficiary who had unlawfully manipulated the testator to make favorable devises. Disinherited family members charged one of the testator's beneficiaries for illegally directing the testator toward making "unnatural" bequests. Usually, testators disinherited the "natural object" of their bounty for a less socially reputable beneficiary such as a slave, concubine, or distant and wayward relative. In 1883, the Court defined undue influence as "Influence obtained by flattery, importunity, threats, superiority of will, mind, or character. . . which would give dominion over the will of the testator to such an extent as to destroy *free* agency. . . the law condemns as undue."[80] To the Court, the destruction of the property-owning testator's free will to another person's will represented a state of mental

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[79] "Testimony of Joseph Ramsey," Transcript, *Wills v. Locknane,* (1873), Case 5843, Box 229, KCAR, KDLA.

[80] *Wise v. Foote,* 81 Ky. 10 (1883).

dependency. The testator's masculine independence was lost to mental weakness and the influencer's perfidy.

The Court of Appeals tolerated - even expected - persuasion from legitimate or "natural" relations, as they ruled in *Secrest v. Edwards* (1862). "Lawful influence," Justice Peters held, "such as arises from legitimate or social relations, must be allowed to produce their natural results even upon last wills and testaments."[81] In *The Law of Wills* (1866) oft-cited jurist Issac Redfield saw the law as maintaining morality by excluding influence emanating from relationships not sanctioned by the law. Influence arising from legally unsanctioned relationships resulting in inheritance Redfield believed "do[es] violence to the morality of the law . . . if we should apply this rule to unlawful as well as to lawful relations."[82] In this view, beneficiaries in legitimate relationships were granted greater latitude when assessing the legality of their influence on the testator's estate decisions; these beneficiaries were expected to reap material benefits from their socially and legally sanctioned relationships. Reinforcing the previously discussed capacity standard that required testators to recognize the "natural objects" of their bounty, undue influence jurisprudence anticipated that testators would favor their heirs-at-law rather than deny them their material legacy. To do otherwise, if not symptomatic of insanity, represented a testator susceptible to the illicit seductions of an unworthy and often unrelated beneficiary.

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[81] *Sechrest v. Edwards,* 61 Ky. 163 (1862).

[82] Isaac Redfield, *The Law of Wills, Embracing the Making and Construction of Wills; The Jurisprudence of Insanity; The Effect of Extrinsic Evidence; The Creation and Construction of Trusts, So Far As Applicable to Wills, with Forms and Instructions for Preparing Wills* Part I, 2nd ed. (Boston: Little Brown and Co., 1866), 466.

During the antebellum era, contestants coupled allegations of mental incapacity and undue influence to overturn the wills of testators who manumitted slaves. Sane testators had legal right to manumit slaves. Testator George Weir directed his executor to hire out his slaves for two years, and then manumit and give them the proceeds of their labor.[83] After concluding that the other provisions in Weir's will reflected a sane mind, the court admitted that "whether any morbid delusion, amounting to insanity. . . influenced him to emancipate his slaves is the only question about which we have felt any difficulty." The court concluded with some distaste, "whatever may be the effect of the emancipation of his slaves, he had the right to liberate them."[84] While the court disapproved of "letting loose, in the bosom of a slave community, a degraded cast of manumitted negroes" they recognized the theoretical right of sane men to manumit slave property. Communities however, viewed manumissions with skepticism, questioning the testator's sanity and always alert to treachery and influence by slaves. By marshalling images of mentally unsound testators victimized by mendacious slaves, disinherited heirs-at-law played off community fears of empowered slaves controlling testators to gain freedom. Overturning the will, they argued, would rectify such affronts to the system of slavery and to themselves as the unjustly disinherited legitimate family.

The discourses of capacity and undue influence, shaped by racial ideology, provided ready tropes to discredit emancipatory wills without threatening all rational white men's independence. In fourteen of forty-one antebellum Court of Appeals testamentary capacity trials (34%), testators manumitted slaves immediately or

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[83] *In re Weir's Will,* 39 Ky. 434 (1840).

[84] Ibid.

conditionally. In eight of the fourteen cases involving manumission (57%), the challengers alleged that the slaves exerted undue influence over the testator. In a sample of testation patterns of probated wills written before 1865, only 8.3% had provisions for manumissions. If 34% of the wills reaching the Court of Appeals involved manumissions and the average percentage of testators manumitting slaves was about 8.3%, this disparity suggests that emancipatory wills had a much greater likelihood of being challenged. It also suggests that the Court of Appeals consistently maintained an interest in overseeing the jurisprudence governing testamentary manumissions, reflecting the confluence of social and legal concern for the maintenance of the racial order.[85] Discourses of capacity served as an opportunity to regulate emancipatory wills in a manner that ostensibly neutral slave law governing manumissions did not. Labeling testators who emancipated slaves as mentally unsound excluded them from the polity of rational, free-willed white men. Simultaneously it reaffirmed the image of the strong, independent patriarch who naturalized racial hierarchy by passing property and slaves to white family members.

After the destruction of slavery, Kentuckians, along with the rest of the South, began to reconstruct a social and familial order no longer supported by a system legalized racial bondage. White Kentuckians struggled to regenerate a social hierarchy that would order the family while retaining white supremacy. The figure of the interloper who unduly influenced the testator to disinherit his children changed. No longer did challengers depict the interloper as an African American exerting influence over a weakened testator. After 1864 testators rarely made interracial devises although as

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[85] N= 233 total antebellum wills in Harrison County and Warren County (25% sample of all wills written between 1818 and 1864). 20 wills made manumissions, conditionally or outright.

historians have demonstrated, interracial relationships, sexual and otherwise, continued.[86] Instead, challengers identified the influencer as member of the testator's immediate family, favored because of their deceitful and unlawful manipulation of the testator's affections. In cases where the testator had remarried after the death of his first wife challengers often pointed to the testator's second wife. According to the challengers, the second wife turned the testator's affections against his children by his first marriage and deprived these legitimate children of their rightful inheritance.

Cases that indict the second wife as the undue influencer reflect an overall tightening of the boundaries of family and more intense scrutiny of any will that did not devise equally to all heirs-at-law. In *Broaddus' Devisees v. Broaddus' Heirs* (1874), George W. Broaddus left his estate to his second wife Cynthia for her life, after which it would descend evenly to their five children. He disinherited his children from his first marriage, noting that "I have heretofore given money and property as much of my estate as I feel able to give them."[87] Witnesses had testified that Broaddus never would have disinherited his first set of children without Cynthia Broaddus' manipulation while he was ill.

The challengers' lawyers depicted George Broaddus as an infirm victim held hostage to his second wife's pernicious influences. They claimed that when a testator's first wife died, "her husband will not . . . forget her children . . . unless made to do so. It is unnatural." They depicted Cynthia Broaddus, the second wife, as an object of lust

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[86] Martha Hodes, *White Women, Black Men: Illicit Sex in the Nineteenth Century South* (New Haven: Yale University Press, 1997).

[87] "Will of G.W. Broaddus," in Brief for Appellants, *Broaddus' Devisees v. Broaddus' Heirs,* (1874), Box 266, Case 6767, KCAR, KDLA.

rather than affection, contending that she was "stout, vigorous & luscious. He was a man of strong passions & was doubtless hunting such a woman." They eliminated companionate love and affection toward Cynthia as an impetus for her inheritance. They then explained how Cynthia Broaddus deprived her husband of independence and free will claiming that she "teased and vexed him. . . that his will was broken down . . and he at last did that which when he was strong and free he declared he would never do."[88] The brief contrasted this image of the second wife as a vampish pretender to Broaddus estate against the hardworking first wife. They claimed that Broaddus' first wife "by prudence, industry & economy assisted him in making his fortune."[89] The second wife contributed nothing to the economic prosperity of the family and served merely as a sexual outlet for George Broaddus. In this way, the challengers framed the idea of legitimate heirship around the premise that second wives and stepmothers were not a part of the nuclear family worthy of inheritance.

By emphasizing that Cynthia Broaddus did not belong to the original family, they attempted to convince the jury that she was an interloper who worked to fracture natural family relations between a father and his children. She prevailed by making her husband mentally and physically dependent on her. The jury and the challengers made clear to the community that all heirs-at-law must be vigilant about dangerous influences existed within the boundaries of legal legitimacy. Indeed, *Broaddus' Devisees v. Broaddus'*

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[88] "Brief for Hs & C," *Broaddus' Devisees v. Broaddus' Heirs* (1874), Case 6767, Box 266, KCAR, KDLA.

[89] Ibid.

Heirs (1874) suggests that the postbellum white family was a fragile unit that required legal and communal monitoring to ensure the orderly transmission of wealth and status.

Late into the nineteenth century, second wives still received special scrutiny. In *Zimlich v. Zimlich* (1890), Joseph Zimlich left his second wife Elizabeth Zimlich part of his estate and almost wholly excluded two sons, Mike and Andrew, from the first marriage. [90] The disinherited sons portrayed their stepmother Elizabeth Zimlich as a deceitful pretender trying to steal the rightful inheritance of the first-born sons. The contestants' lawyers alleged that Joseph Zimlich "became offended . . . at the plaintiffs which ripened into a settled aversion, and his last wife. . . widened the breach with a view to produce a will in favor of herself and her children."[91] To emphasize Joseph Zimlich's dependent mental state, the contestants and their witnesses stripped Joseph Zimlich of masculine rationality by referring to him as "a mere child."[92]

Elizabeth Zimlich's attorneys countered the images of her as a wily predator with a narrative that portrayed her as the archetypal middle-class Victorian goodwife. They constructed her as "affectionately performing the marital duty of a dutiful wife, of loving and cherishing her husband until death do them part."[93] They presented the sons as examples of filial duty gone awry, noting that they disobeyed Joseph Zimlich and

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[90] *Zimlich v. Zimlich,* 90 Ky 657, (1890) and Kentucky Court of Appeals Records, *Zimlich v. Zimlich,* 90 Ky 657, Case # 20314, Box 874,Transcript Volume 1.

[91] "Plaintiff's Instructions to the Jury," in *Zimlich v. Zimlich* (1887), Jefferson County Court of Common Pleas Files, Case #28025, Box 339.

[92] "Brief for Appellees," in *Zimlich v. Zimlich* (1890), Case # 20314, Box 874, KCAR, KDLA.

[93] Ibid.

"deserted and abandoned their father in his old age."[94] The notion that the testator held social obligations to those who remained loyal to him suffused the transcripts as a justification for his seemingly aberrant testamentary actions. The Kentucky Court of Appeals agreed with this rationale, noting in their decision that while Elizabeth Zimlich may have influenced her husband, she "had the kind of influence over him that a good wife usually has over a kind and considerate husband."[95] By presenting Elizabeth Zimlich as to adhering to the late nineteenth century gendered role of a good wife, Elizabeth Zimlich reinforced the prevailing gender ideology. Although the local jury may not have approved of her or of Joseph Zimlich's will, the Court of Appeals found no grounds to overturn the devises. Elizabeth Zimlich's behavior attested to her worthiness as a beneficiary. By choosing beneficiaries considered worthy, Joseph Zimlich appeared rational and wise. His will stood the legal and social tests of rationality used to monitor family and property.

The focus of undue influence cases turned from antebellum relationships between slaves and testators toward a postbellum concern with shoring up the nuclear white family after the dissolution of slavery. Once slaves were excluded from white households, the legitimate, recognized family became bound by shared race and status, rather than juxtaposed against an enslaved racial other. Instead of slaves, second wives who inherited became a category of suspect dependents, especially when children resulted from the second marriage. Disinherited heirs rarely accused first wives of exercising undue influence. They were part of the natural familial order, and shared

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94 "Brief for Appellants," *Zimlich v. Zimlich* (1890), Case # 20314, Box 874, KCAR, KDLA.

95 *Zimlich v. Zimlich*, 90 Ky 657 (1890).

blood ties with the testators' children. Second wives, often younger than first wives, appeared in the family later, did not share blood with the testator's first set of children, and threatened to create more heirs. In cases of manumitted slaves or second wives, these heirs interceded between testators and their children, with tenuous claims as "natural" heirs. Disinherited heirs-at-law argued against their worthiness to inherit. They employed the culturally constructed discourses of family and capacity to challenge the testator's freedom to devise property.

Disinherited heirs used the idea that familial affection flowed naturally to children to frame one form of insanity, an "unnatural aversion," as the opposite of undue influence. In undue influence cases, the challengers usually claimed that the beneficiary manipulated the testator's affection for their benefit. Excluded heirs-at-law often framed the reason for their omission as an "unnatural aversion" in which the testator lacked affection, instead expressing unnatural dislike or odium toward them. The challengers argued that an insane delusion caused the testator to ostracize a family member for whom he had previously held natural affections. Influential treatise writer Isaac Redfield noted, "Where a man is insane in respect to his nearest relations and the disposition of his estate, he is incapable of making a will."[96] Alleging insanity toward the nearest relation used the cultural power of the idea that devising to one's children was natural. In the *Bledsoe* case, for example, the challengers claimed that Samuel Bledsoe held an unnatural aversion toward his son William, at the same time that they also accused Manerva Bledsoe of exercising undue influence. Dr. SB Robinson testified that "There is insane aversion where a parent takes an aversion to a child without cause. It is an evidence of

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[96] Redfield, *The Law of Wills,* 72.

insanity."[97] These trials involved scrutiny of the testator's behavior as well as the disinherited heirs and beneficiaries. Witnesses testified as to whether the heir-at-law's conduct reasonably justified disinheritance or if the heir was indeed the object of the testator's insane aversion.

Courtroom debates over the existence of an unnatural aversion sometimes arose when disinherited heirs asserted sexual independence against the testator's wishes. If the will's beneficiaries argued that the disinherited heir lost all claim to inheritance due to their disobedience, the testator's dislike was justified and he appeared to be making a rational decision. When the beneficiaries alleged that the disinherited heir dishonored the testator due to an exercise of sexual independence, they emphasized the right of fathers to control their children's marital decisions and arrange the legitimate line of descent for the family's name and wealth. Conversely, the disinherited heir usually contended that the testator developed an unnatural aversion toward him or her and entertained imaginary delusions about their sexual proclivities.

In *Taylor v. Minor* (1885), Bannister Taylor disinherited his daughter Martha Minor for marrying J.C. Minor. Martha Minor's assertion of sexual independence defied Taylor's paternal power to approve his daughter's choice for a husband. Martha Minor disputed the will, claiming that her father harbored an "insane aversion" against her and her husband. This case demonstrated the fault lines in the ideology of family. Taylor disinherited his daughter, an act considered unnatural according to law and custom. Martha Minor, however, had asserted female sexual independence and dishonored her

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97 "Testimony of SB Robinson," Transcript of *Bledsoe's Ex'x v. Bledsoe*, (1886), Case 17095, Box 716, KCAR, KDLA.

father by eloping against his wishes. The Marion County Circuit Court overturned the will, and the Court of Appeals affirmed, noting in part that they believed Taylor had little reason to disapprove of James Minor. Taylor's aspersions were unfounded. They concluded that Minor was "of excellent character" and that Taylor's reasons for excluding his daughter "could only have been conceived by a disordered mind."[98] The court believed that Bannister Taylor was insane because he failed to recognize James Minor as a man of respectable and honorable character. The jury chose to limit the testator's independence by declaring him delusionary. They upheld the transmission of property to legitimate children, rather than sanction Taylor's wishes, which they dismissed as delusional. They also implicitly sanctioned Martha Minor's decision to elope, perhaps only because the all-white male jury agreed that her husband's character was honorable.

British philosopher Edmund Burke observed that 'The power of perpetuating our property in families is one of the most valuable and interesting circumstances . . . which tends the most to the perpetuation of society itself."[99] Family cannot be understood apart from how the transferring private property and material possessions served as a mechanism for controlling family members and their behavior. Testators used wills to express complex emotions. Property became more than property – inheritance fetishized property into an expression of affection or odium by testators toward beneficiaries and heirs-at-law. Exploring the cultural and legal values that influenced testation practices

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[98] *Taylor v Minor,* 12 Ky. Op.450 (1885).

[99] Edmund Burke, *Reflections on the French Revolution and Other Essays* (New York, EP Dutton & Co., 1910) 49, quoted in Marvin B. Sussman, Judith N. Cates, and David T. Smith, *The Family and Inheritance* (Russell Sage Foundation, New York, 1970), 4.

reinforces historians' views that family and property were the foundation of southern social relations throughout the nineteenth century. Analyzing testation practice, particularly disinheritance patterns, allows a broader, previously unexplored look into how familial boundaries of inclusiveness and exclusiveness were drawn. While bloodline proximity was a powerful determinant of inheritance, the ideals of reciprocity, economic concerns, and the southern honor code mattered as well. Indeed, to interpret testation practices as largely determined by birth order or sex oversimplifies the issue.

Although depicted as a bedrock institution, familial relations were fragile, requiring maintenance through legal oversight and social regulation. Inheritance served as one such mechanism. Testamentary freedom meant that inheritance practices could destabilize families through a testator's rejection of heirs considered deserving of the fruits of the familial estate. Testation also could reaffirm familial order by ritually transmitting property to deserving beneficiaries. Inheritance practices also functioned to reinforce masculine prerogative by which fathers and husbands publicly punished errant heirs-at-law through deprivation of familial resources and the shame of disinheritance.

Families and communities debated the merits and rationality of testators' perceptions of and behavior toward their heirs-at-law and beneficiaries. Disinherited heirs litigated in court to acquire property and to restore reputations damaged by the messages encoded in testators' wills. Although legally, any property-owning man who knew his relations and his property and had a fixed purpose in devising it could choose his beneficiaries, the testators' family, courts and the local communities subjected wills to far more scrutiny. The legal test for testamentary capacity served as a starting point for public and private debates over testamentary distribution of property. In challenging a

will, disinherited heirs challenged the testator's power over property by manipulating the discourses of capacity and rationality by publicly presenting alternative depictions of the most intimate familial relations made public in the testamentary capacity trial. Indeed, inheritance firmly linked the intimate, private world of family to the public world of economic relations.

Challengers relied upon several powerful archetypes of mental unsoundness in courtroom narratives. These archetypes had in common the image of the mentally unsound testator losing his independence to physical and mental dependency. The challengers used the grammar of capacity by depicting a testator as becoming dependent on an imaginary delusion, another person's will, or alcohol to influence property distribution. This theme of independence lost played powerfully with juries and audiences who understood masculinity, authority and whiteness as inseparable from the ability to independently exercise free will. The ability to exercise free will was conditioned by prevailing racial and gender ideologies.

Just as racial and gender ideologies informed how communities understood the capacity of testators, these ideologies also informed how witnesses testified about the conduct of the heirs. Heirs had responsibilities, determined by race, status, and gender to their families. The beneficiaries emphasized the importance of these roles and the necessity of punishing offenders through the deprivation of the familial estate. When challengers employed images of irrational and delusional testators, the will's proponents countered with images of justice and honor avenged, reconstituting the language of testamentary capacity to reaffirm and strengthen the nuclear family and the hierarchy that ordered it.

CHAPTER II
"I DESIRE TO GIVE MY BLACK FAMILY THEIR FREEDOM": MANUMISSIONS, FAMILY AND CAPACITY

Jane Miller of Trigg County, Kentucky died in 1858, possessed of an estate in enslaved persons valued at over sixteen thousand dollars.[1] When her brother Isaac discovered that through her will, she had destroyed her property value and his inheritance by emancipating her slaves, he initiated a legal suit to void the will. Isaac Miller claimed that his sister lacked the mental capacity needed to write a valid will and her slaves unduly influenced her to free them. Two Trigg County juries and numerous witnesses agreed with Isaac; Jane Miller was indeed insane. They based their conclusions on testimony that noted her "remarkable aversion to male society" and her self-imposed isolation from the white community, choosing to live instead near her slaves.[2] Kentucky's highest court, The Court of Appeals however, disagreed with Trigg County residents and upheld Jane Miller's will.[3] For Jane Miller's slave Sarah and her family, the plaintiffs in the case, the victory was pyrrhic; by the time the Court of Appeals affirmed the will in 1864 they had spent six years after Jane Miller's death in slavery.

Sarah v. Miller (1864) and similar cases involving manumissions or interracial devises compelled courts and communities to balance testators' property rights against threats of social and racial disorder brought about by unconventional wills. In many contested antebellum wills testators freed slaves, recognized concubines, and

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[1] "Appraisement of Jane Miller's Estate," Trigg County Will Book E (1855-1861), Trigg County Court Clerk Records, KDLA.

[2] "Testimony of William H. Miller," Transcript, *Sarah v. Miller*, (1864), Case 74, Box 3, KCAR, KDLA.

[3] *Sarah v. Miller*, 62 Ky. 259 (1864).

acknowledged other illicit relationships while disregarding legally legitimate sons, daughters, and relatives. In *Denton v. Franklin* (1848) for example, Edmund Talbot left much of his estate to Hannah, his African-American mistress, freed his slaves, and largely excluded his legitimate white children as heirs.[4] Testators who emancipated slaves threatened racial hierarchies by converting enslaved people from chattel property to legal personhood and by legally recognizing slave humanity sometimes at the exclusion of white kin. Testators and black beneficiaries destabilized dominant ideals that rewarded white, legally legitimate families through social and legal privileges, including the expectation of inheritance.

This chapter explores how during Kentucky's antebellum period, ostensibly neutral testamentary capacity jurisprudence was deeply invested in maintaining material and affectionate bonds between generations of white families. Bloodline legitimate heirs disputed the sanity of testators who challenged the ideal of beneficiaries as family members who were white and legitimate. In cases in which testators made devises outside of familial and racial boundaries, communities attempted to strip aberrant testators of rationality. These challenges allowed anomalous devises to be explained away. They supported traditional patterns of testation and as the workings of a rational mind. Labeling testators who emancipated slaves as mentally unsound allowed courts and communities to patrol the boundaries of race and the limits of acceptable post-mortem property transfers.

Historians have argued that southern social structure rested on maintaining a status-based patriarchal and racial order within households, which affirmed the

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[4] *Denton v. Franklin*, 48 Ky.28 (1848).

naturalness of the master/slave relationship.[5] Indeed, historian Peter Bardaglio believes that the household "not only constituted the chief vehicle for the exercise of power in southern society but also served as the foundation of southern public beliefs and values."[6] When testators ignored the hierarchies established within the household and distributed property outside of racial group, they questioned the naturalness and legitimacy of the household order. Mark Tushnet, a scholar of slave law, observes, "So long as individuals are authorized to dispose of their property as they choose, a society runs the risk that an inadequately socialized owner will disrupt the harmonious social relations that should order it."[7] Many historians analyzing the legal underpinnings of the southern household, family, and slavery have focused on slave law or the law of domestic relations which regulated relations between husbands and wives, masters and slaves, and parents and children.

Other historians have probed the criminal law to explore how legal systems categorized and punished consensual and coercive sexual conduct between individuals and within families based on racial categories and legal status.[8] The laws governing

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[5] In a study of the history and practice of estate law Adrienne Davis analyzes testamentary and intestate (property distribution without a will) distributions involving white testators and African-American heirs. She concludes that this body of private law is as significant as public law in constructing and reinforcing racial hierarchies. My study is both narrower and broader than Davis' in that I am limiting my source pool to primarily testamentary capacity cases, and am using cases that involve contested wills between white testators and white heirs as well as interracial contests. See Davis, "The Private Law of Race and Sex, 221-288.

[6] Bardaglio, *Reconstructing the Household,* xi.

[7] Mark V. Tushnet, *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest* (Princeton: Princeton University Press, 1981), 181.

[8] Bardaglio, *Reconstructing the Household*; Martha Hodes, *White Women, Black Men*; Diane Miller Sommerville, "The Rape Myth in the Old South Reconsidered," *The Journal of Southern History* 61 no. 3. (Aug. 1995): 481-518.

miscegenation, fornication, adultery, and rape dictated how interracial sexual behavior would be interpreted and punished by the law. As historian Sharon Block has demonstrated, the law defined similar sexual assaults differently depending on the race and legal status of the victim.[9] White female servants who had been sexually assaulted by their masters could bring rape charges, while black female slaves had no legal recourse against their masters' coercive sexual advances. Within marriages, wives had no legal recourse against sexual assaults by husbands under rape laws which shielded husbands from charges of marital rape. As this historiography makes clear, race and legal status determined the boundaries of the family, marriage, and licit and illicit sexual conduct.

Analyzing criminal law, slave law, and domestic relations law has yielded critical insights into how the law and communities regulated families and sexual relationships through attaching privileges and disabilities depending on race and legal status. This current historiographical focus however, has obscured the how social and legal definitions of mental capacity also were critical to regulating the racialized boundaries of family. In most testamentary capacity cases courts determined whether testators' behavior and choices of beneficiaries reflected a sound mind. These cases allowed courts and communities to pass judgment on the rationality of testators' choices and decide if these choices would be given the imprimatur of legitimacy. Analyzing the regulation and

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[9] Sharon Block, "Lines of Color, Sex and Service: Comparative Sexual Coercion in Early America," in *Sex, Love, Race: Crossing Boundaries in North American History*, edited by Martha Hodes (New York: New York University Press, 1999): 141 – 163.

contestation of testamentary devises reveals how discourses of capacity and insanity served as a test to determine property rights and defined the racial boundaries.

When relatives brought charges of insanity or undue influence to overturn a will, they frequently presented these allegations using gendered language. Lawyers and witnesses often described the testators' behavior as deviating from established gendered codes that dictated proper behavior for men and women. Citing Jane Miller's "remarkable aversion to male society" as indicative of insanity is one example. An unmarried woman who avoided men constituted noticeable and deviant behavior within the rubric of Trigg County gender relations. The gendering of capacity discourses is discussed in more detail in Chapter Five.

Similarly, challengers often described the behavior of black beneficiaries in gendered and racialized terms, emphasizing degeneration from the ideal of the well-behaved male or female slave. These witnesses framed their description of the beneficiaries' behavior in terms of gendered transgressions, explicitly questioning their worthiness to inherit. In *Minor's Heirs v. Thomas* (1851) Jeremiah Minor almost completely disinherited his legitimate white children, leaving his estate to his "black family."[10] One witness testified that "his [Minor's] negro woman Fan had complete control over him and could make him do anything she pleased."[11] This description portrayed a usurpation of Minor's masculine authority and highlighted the undeserving,

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[10] "Will of Jeremiah Minor," *Thomas & c. of color v. Jeremiah Minor's Heirs & c.*, Scott County Court Order Book #20, (1847), 164, Scott County Court Clerk Records, KDLA.

[11] "Testimony of Thomas Catlett," *Thomas & c. of color v. Jeremiah Minor's Heirs & c.*, Scott County Court Order Book #21, (1849), 104, Scott County Court Clerk Records, KDLA.

potentially dangerous behavior of a female slave. Fan inverted the master/slave relationship and usurped Minor's authority as the male head-of-household. This testimony created calamitous images of gendered and racial disorder.

Sarah v. Miller (1864), *Minor's Heirs v. Thomas* (1851) and *Denton v. Franklin* (1848) stand in a long line of Kentucky cases in which relatives contested wills on the grounds that the testator was insane.[12] These cases raised broader issues involving the legal and communal regulation of the process through which the household would be materially reproduced. Transmitting property and slaves through inheritance reproduced the status, wealth, and material foundations of the white family and the household in the next generation. It also reproduced African-American slavery and white mastery by promising future generations of white families that slaves and their offspring would seamlessly pass as property between generations.

Like other border states with perhaps the exception of Maryland, Kentucky has been understudied as a slave state. Many southern historians deliberately exclude from their studies Kentucky and other slave states that officially did not secede from the Union during the Civil War.[13] While Kentucky may not have had as many slaves as lower

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[12] Social standing and class influenced how people understood insanity. Testators ranged from relatively poor to immensely wealthy, so the effects of class consciousness need to be analyzed on a case-by-case basis. I believe that across social classes, certain tropes emerged that identified insanity. In both of the cases cited above, the primary issue was filial duty and the testator's obligations and behavior toward their sons. I will discuss class as it intercedes in each case.

[13] For example, Bardaglio and legal scholar Mark Tushnet exclude Kentucky. Bardaglio excludes Kentucky in order to focus "attention on those state where slavery thrived and where ruling elites and their white followers were most self-conscious about their Southerness, to the point that they ultimately left the Union." Although Kentucky never officially left the Union, many Kentuckians ardently supported the Confederacy. See Bardaglio, *Reconstructing the Household*, xvii, and Tushnet, *The American Law of Slavery*, 10.

south states, by the late antebellum it ranked third in the number of slaveholders.[14] Kentucky supplied the lower South with an ongoing supply of slaves through the slave trade, firmly enmeshing many Kentuckians in the southern slave economy and culture.[15] Evidence indicates that some testamentary capacity cases were tied up in the local politics of slavery, abolition, and the colonization movement. Matthew Mayes, the attorney who represented Jane Miller's slaves, served as the vice-president of the Kentucky State Colonization Society, which promoted the emigration of freed slaves to the African colony of Liberia.[16] Mayes most likely was less concerned with the Miller's familial conflicts than with promoting colonization as a viable testamentary choice. Still, the debate over whether states like Kentucky were more northern or southern in their overall economies and development remains open; while important, it is beyond the scope of this chapter except as it intercedes in terms of property and slave law.

The division between local and state courts created tensions between how local communities and the Court of Appeals monitored testamentary behavior and understood insanity. In spite of the law's predisposition toward a biologically defined, racially homogenous, and legally endorsed family, the Court of Appeals indicated that they would not tolerate lower courts arbitrarily usurping property owners' right to dispose of their property through a will. In overturning the Bracken County Court's rejection of Reuben

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[14] Stuart Seely Sprague, "The Kentucky Pocket Plantation: Sources and Research Strategies, Mason County as a Case Study," *The Filson Club Quarterly* 71, no. 1 (January 1997), 69.

[15] Walter Johnson discusses the organized and efficient trafficking of enslaved persons from upper South states to the Louisiana slave pens. See Walter Johnson, *Soul by Soul: Life Inside the Antebellum Slave Market* (Cambridge and London: Harvard University Press, 1999), 47-57.

[16] *Tri-Weekly Yeoman*, January 27,1855.

Cochran's will in 1814, the Court of Appeals chastised the lower court for impinging on testators' freedom and property rights. They remarked that "we cannot think a Court justifiable in arresting the will of a man, and thereby perhaps causing his estate to pass contrary to his own wish and will."[17] Similarly, two Trigg County juries overturned Jane Miller's will. The Court of Appeals upheld the will in 1864, finding that "on the subject of capacity the testimony is, both numerically and morally, overwhelming in favor of a disposing mind."[18] Violation of local social practices, long-nurtured hostility or goodwill toward testators, or sympathy with or dislike of disinherited relatives could sway jurors on the county level, although these reasons did not pass legal muster. The Court of Appeals however, had to appear neutral, use established legal tests, and balance testator's property rights against the claims of the heirs-at-law. Its decisions were binding, set precedent, and made case law. Furthermore, some scholars argue that southern appellate courts were sensitive to abolitionists' increasing scrutiny of courts that molded theoretically neutral property law to serve the interests of the slaveholding class, particularly in cases involving slave property.[19]

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[17] *In re Cochran's Will*, 6 Ky. 491 (1814). In this will, the testator had devised land to his two illegitimate daughters and his slaves to his nephew.

[18] *Sarah v. Miller*, 62 Ky. 259 (1864).

[19] This scrutiny would apply particularly to cases involving slave manumissions. Debate persists between scholars on whether the execution of law gave slaves some modicum of justice in the southern court system. Tushnet believes that the desire to develop a justifiable body of law led judges to maintain the integrity of procedural law through legal formalism. These procedural safeguards granted slaves some protections if their cases reached appellate courts. Christopher Waldrep studied race law in Kentucky and agrees with Tushnet. Christopher Waldrep, "The Impact of Race Law on Kentucky," *The Register of the Kentucky Historical Society* 90 no. 2 (Spring 1992): 165 – 182. Historian Arthur Howington argues that in testamentary emancipations, slaves received fair trials and lower and appellate courts recognized slave humanity. See Arthur F. Howington, " 'Not in the Condition of a Horse or an Ox': *Ford v. Ford*, the Law of Testamentary Manumission, and the Tennessee Court's Recognition of Slave Humanity," *Tennessee Historical Quarterly* 34 no. 3 (1975): 249 – 265. Conversely, Michael Hindus argues that harsh restrictions

The most controversial devises in antebellum Kentucky were those that emancipated enslaved people. Manumitting slaves through wills occurred more often and more easily before 1852 laws required freed slaves to move outside Kentucky borders in order for the manumission to take effect.[20] In a random sample of 134 wills written by Harrison County testators between 1818 and 1864, eleven wills (8.2%) included some form of either immediate or conditional manumission.[21] These contentious devises were closely watched by both the enslaved people they involved and the deceased testators' white families.

In contested wills involving emancipations, slaves often became plaintiffs defending the will although Kentucky law prevented them from testifying. Legally prohibited from bringing suits in almost all other instances, Kentucky law allowed a slave to bring suit to "establish his right to emancipation" in a case involving a manumission through a will.[22] This legal rule was uniform across most southern slave states. The

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on black civil rights, including prohibitions against testimony, illegally recruited juries and local sentiment cast the legal process as a tool of the ruling class to enforce submission. See "The American Law of Slavery, 1810-1860: A Study in the Persistence of Legal Autonomy," *Law and Society Review* 10, no.1 (1975), 131; Michael Hindus, "Black Justice Under White Law: Criminal Prosecutions of Blacks in Antebellum South Carolina," *Mississippi Valley Historical Review* 63 (1976): 575-599; and Michael Hindus, *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767-1878* (Chapel Hill: University of North Carolina Press, 1980).

[20] Ch. 43, Art. 9 § 4. *Revised Statutes of Kentucky Approved and Adopted by the General Assembly 1851 and 1852 and in Force From July 1852* (Cincinnati: Robert Clarke & Co., 1860). This law meant that the testator needed to provide cash security for the slave, as well as financial means for the slaves to relocate. Relocation even in free states was hampered often by restrictive laws preventing the migration of free blacks.

[21] The sample (n = 25%) is taken from Harrison County Will Books B – H (1818-1864), Harrison County Court Records, KDLA.

[22] Ch. 43 Art. 10 § 4, *Revised Statutes of Kentucky Approved and Adopted by the General Assembly 1851 and 1852 and in Force From July 1852* (Cincinnati: Robert Clarke & Co., 1860).

Kentucky Court of Appeals' decision which affirmed slaves' right to sue for manumission reflected the central tension between slave humanity and their status as legal property. In *Bodine's Will* (1836), testator Catherine Bodine manumitted her slave Jenny, to take effect when Jenny passed child-bearing years. When the attorney working for the enslaved beneficiaries presented the will for probate, Bodine's heirs-at-law sued to overturn the will, arguing that in her current state of bondage, Jenny had no legal personhood to pursue her future manumission. The Court affirmed that

> The reason why a human being doomed to legal slavery cannot sue, is, not because he has not . . . personal existence or capacity, but is altogether arbitrary, and springs from the felt necessity of withholding from slaves all *legal* rights. . . But, although the law of this State considers slaves as property, yet it recognizes their personal existence, and, to a qualified extent, their natural rights.[23]

The Court recognized the central tension is the legal rules governing manumission. Enslaved people had "personal existence or capacity," but the logic of property law required that they be denied legal personhood. *Bodine's Will* as an inheritance contest between white bloodline heirs-at-law and Catherine Bodine's desire to posthumously manumit her slave demonstrates how testators' inheritance practices forced the Courts to recognize a legal space, albeit limited, in which enslaved persons had "personal existence, or capacity."

As litigants, African-Americans actively used this body of law to contest their bondage and publicly voice their dissatisfaction with slavery. In Jane Miller's will contest, all twenty-five African-Americans who had been her slaves appeared in Trigg

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[23] *Bodine's Will*, 34 Ky. 476 (1836).

County Court to declare their intent to emigrate to Liberia, as required by the will for their emancipation.[24] In doing so, they sent a clear message to the white population in Trigg County; they preferred freedom to bondage even if it meant severe dislocation.[25] Their act explicitly questioned the ideology that promoted the benign nature of slavery. As one of the few areas that allowed slaves active engagement with civil law, this body of jurisprudence marks a largely unexamined area of enslaved people's struggle for freedom as slaves became legal parties in their quest to move from commodified wealth to personhood.[26]

When slaves brought suits to uphold their masters' wills, their actions reveal how enslaved people actively contested their status as property and challenged the legally and socially sanctioned vision of family as white and biological.

The Court of Appeals heard thirty-eight challenges to wills written before 1865 on capacity or undue influence grounds. Of those cases, twenty-five, (78%) involved slave property. Of these twenty-five cases, fourteen cases (56%) contained wills that either emancipated slaves outright or contained devises for future or conditional emancipation.

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[24] Testamentary conditions that slaves emigrate to Liberia, an African colony established in an effort to remove free African-Americans from the United States became increasingly common as laws restricting the residences of freed slaves increased. The American Colonization Society and its state branch, the Kentucky Colonization Society raised money and organized emigrations. Although the numbers of freed slaves emigrating to Liberia remained small, using Liberia and the Colonization Society provided a means for testators to circumvent laws restricting manumissions. For a discussion of the Kentucky Colonization Society see Charles Raymond Bennett, "All Things to All People: The American Colonization Society in Kentucky, 1829 – 1860," Ph.D. dissertation, University of Kentucky, 1980.

[25] Transcript, *Sarah v. Miller*, Box 3, Case # 74, KCAR, KDLA.

[26] For a discussion of slaves' suits in testamentary emancipations, see Arthur Howington, " 'Not in the Condition of a Horse or an Ox', 249 – 265. A more recent study of emancipation and manumission during the antebellum see Judith Schafer, *Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846 – 1862* (Baton Rouge: Louisiana State University, 2003).

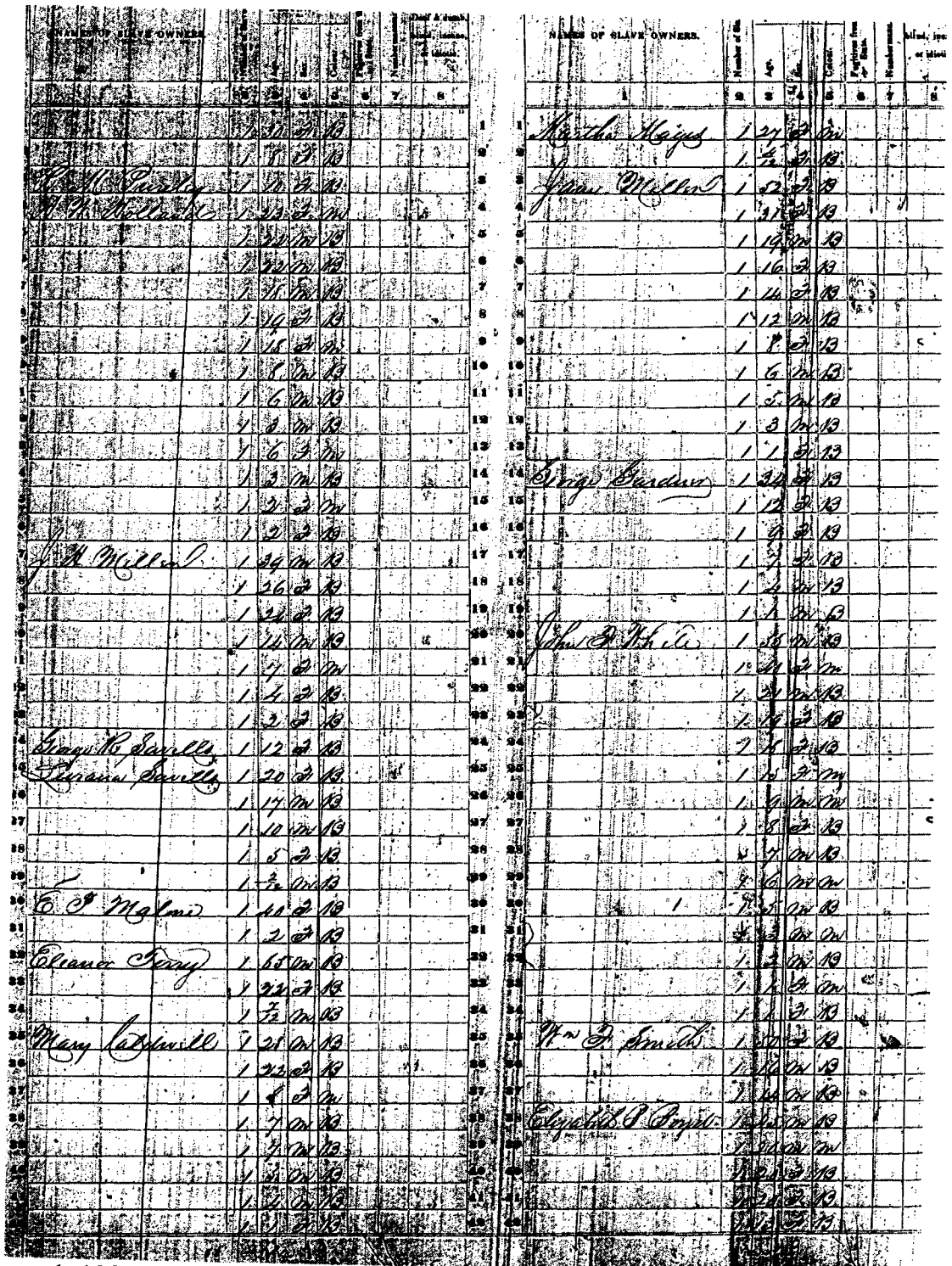

Figure 1. 1850 Trigg County Slave Census recording Jane Miller's slaves, some of whom became Miller's beneficiaries through their manumissions. Miller died in 1858.

Source: Trigg County Slave Census for 1850, KDLA.

These statistics demonstrate the centrality of slave property and importance of maintaining status as a slaveholder among the heirs of white testators.

Making charges of undue influence allowed the challengers to the will to focus on the beneficiaries' behavior and legal status of their relationship with the testator. Ordinary Kentuckians and jurists alike believed that male masters were vulnerable to slaves or African American beneficiaries exercising undue influence to deprive testators of free will. When slaves became beneficiaries, white family members viewed them as interlopers in the natural family order. In 1839 David Roper bequeathed his personal estate to his former slaves, whom he had manumitted two years previously. Roper's daughter, Susannah Langdon, challenged the manumission deeds and the will on the grounds that the ex-slaves Hector and Lucy had unlawfully influenced Roper. The county court jury overturned the will, a decision affirmed by the Court of Appeals.[27] After describing Roper as "naturally weak," Court of Appeals contended that Hector and Lucy attended "to his wants and he was much under their influence and control, and there is good reason to believe that Lucy used means to prejudice and embitter his mind against his children."[28] Langdon accused her father of physical and mental dependency on his slaves. Her strategy reaffirmed the racial hierarchy in which white masters exercised control over submissive slaves. Her strategy worked; the jury overturned the will, excluding an aberrant testator from the category of rational white men worthy of wielding power.

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[27] Although the Court of Appeals agreed that Roper probably was unduly influenced and mentally incapacitated, they remanded the case for a new trial because of misleading instructions the trial judge delivered to the jury.

[28] *James v. Langdon*, 46 Ky. 193 (1846).

In *Denton v. Franklin* (1848), the Court of Appeals judges partially justified overturning Edmund Talbot's will by pointing to the relationship between Talbot and his beneficiary, his emancipated black mistress Hannah. The challengers alleged that Hannah unduly influenced Talbot. The undue influence charge became particularly volatile when witnesses described an illicit sexual relationship between the testator and a black concubine. Finding that Edmund Talbot had "familiar intercourse" with his former slave Hannah, the Court railed against the will, holding that "The very fact, that he undisguisedly yielded to an influence of such a character, and lost, under its exercise, apparently all independence of thought and action, leads irresistibly to the conclusion, that his mental faculties had given away.[29] Hannah's sexual power over Talbot brought him "into complete and continued subjection."[30] Such reasoning drew upon the tropes of the dangerous and unrestrained sexuality of African-American women, which had the power to overcome white rationality.

Through allegations of undue influence, challengers called attention to legally unsanctioned and/or socially repugnant relationships, such as illicit interracial sexual relationships or illegitimate paternity. This structure carried an implicit bias against interracial sexual relationships. Miscegenation laws prohibited white testators and black partners from legally legitimizing their relationships through marriage. The

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[29] *Denton v. Franklin* 48 Ky. 28 (1848).

[30] Ibid.

jurisprudence of testamentary capacity and undue influence was inherently pre-disposed to overturn devises to illicit and interracial sexual partners.[31]

Enslaved people were acutely aware of the uncertainties brought about by their master's death. While enslaved people's lives were fraught with the uncertainty of sale at any time, the master's death guaranteed a change in ownership and often a change in residence.[32] James C. Pennington, an escaped slave, vividly described the apprehension occasioned when slaves passed as property between generations. "It is very rarely the case that a slave's condition is benefited by passing from the old master into the hands of one of his children," Pennington remarked.[33] "The decline is so rapid and marked," he continued, ". . . that the children of slaveholders are universally inferior. . . mentally, morally, physically, as well as pecuniarily . . . and this is a matter of most vital concern to the slaves." [34] Other slave narratives document how the death of a master brought a profound change in circumstances including the separation of families.[35] Frederick

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[31] Davis, "The Private Law of Race and Sex," 241.

[32] As Walter Johnson notes in his study of the slave trade, masters might sell slaves for many reasons, ranging from debt to perceived insolence. Johnson, *Soul by Soul*, 31-37.

[33] James C. Pennington, "The Fugitive Blacksmith; or Events in the History of James C. Pennington," in *I was Born a Slave: An Anthology of Classic Slave Narratives, Volume Two* 1849- 1866, ed. Yuval Taylor, (Chicago: Lawrence Hill Books, 1999), 148.

[34] Ibid.

[35] The well-known narratives of Sojourner Truth and Frederick Douglass both document the dislocations anxiety cased by the death of a master and division of his estate, with or without a will. See Sojourner Truth, *The Narrative of Sojourner Truth, A Northern Slave, Emancipated from Bodily Servitude by the State of New York in 1828* (Boston, 1850) and Frederick Douglass, *Narrative of the Life of Frederick Douglass, An American Slave* (Boston: Anti-Slavery Office, 1845; reprint, New York: Dover Publications, 1995), 27.

Douglass described the division of his master's estate, recalling how it "sunder[ed] forever the dearest friends, dearest kindred, and strongest ties known to human beings."[36]

Many enslaved people remembered either direct or indirect promises from their masters that their wills would free them. At her mistress' death, Harriet Jacobs "could not help having some hopes she had left me free."[37] When the will was read, "we learned that she had bequeathed me to her sister's daughter, a child of five years old. So vanished our hopes."[38] Slaveowners' wills and depictions in popular fiction indicate that owners sometimes kept their promises. Such was the case for an emancipated woman identified as "Louise" in former slaveholder turned abolitionist Martha Griffith Browne's 1857 novel about the slave South.[39] In the novel written to mimic an autobiography, freedwoman "Louise" recalled,

> I was sold to James Canfield, a bachelor gentleman in New Orleans and I lived with him, as a wife, for a number of years. At the death of this man I was set free by his will, and three hundred dollars were bequeathed me by him. I had saved a good deal of money during his lifetime, and this, with his legacy, made me independent.[40]

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[36] Douglass, *Narrative,* 27.

[37] Harriet Jacobs, *Incidents in the Life of a Slave Girl,* in *I was Born a Slave: An Anthology of Classic Slave Narratives, Volume Two* 1849- 1866, ed.Yuval Taylor (Chicago: Lawrence Hill Books, 1999), 546.

[38] Ibid.

[39] Martha Griffith Browne, *Autobiography of a Female Slave,* (New York: Redfield, 1857), 310, "Documenting Southern History Website" http://docsouth.unc.edu/browne/browne.html. Last checked on January 20, 2006.

[40] Ibid.

Browne depicted sexual relationship between Canfield and Louise as central to the emancipation, which occurred only after Canfield's death. Such instances did occur in Kentucky; in *Johnson v. Moore's Heirs* (1822) testator George Moore emancipated an enslaved woman with whom he had lived "in a state of concubinage."[41] Unfortunately, the surviving case files do not include testimony from the trial.

These emancipations at first appear to subvert the institution of slavery by destroying slave property and demonstrating the benevolence of white masters who acknowledged interracial sexual relationships. These manumissions withheld mastery from another white person. Such devises explicitly recognized slave humanity by transforming slaves from chattel to legal personhood. These testators also recognized that enslaved people desired freedom over slavery. To conclude however, that testator who manumitted slaves intentionally struck a blow against the power of white patriarchy overlooks the timing of these devises and the coercive power relations inherent in sexual relationships between white masters and enslaved women.

In her novel, Browne portrayed the sexual relationship between Canfield and Louise as central to Louise's emancipation. Although Browne described Louise as a "wife," Louise would have lacked even limited legal protections such as dower and divorce (for desertion or inhumane treatment) that the law granted white wives. Interracial relationships existed in a legal universe that highlighted the near-absolute power of white masters who were deemed sane. Men who waited until their deaths to emancipate enslaved concubines reinforced the politics of coercion and submission

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[41] *Johnson v. Moore's Heirs*, 11 Ky. 371 (1822).

between master and slave. Legal scholar Davis argues enslaved concubines' "future was contingent on their continuing to please the men who enslaved them, and was defined by them daily."[42] The relationship between enslaved women and white masters turned on how the legal categories defining race, status and sexuality mutually constituted personhood in a legal system that denied enslaved women ownership of their bodies. Browne's portrayal of Louise suggests that the enslaved character did not overtly or consistently resist her master's sexual advances. Enslaved women who provided sex to their masters had no legal right to deny them sexual access. White men possessing property rights in enslaved concubines' bodies had the legal freedom to destroy this property right by emancipating them at any time during their lives. Instead these testators chose to keep their concubines in submission until the relationship ended with their deaths. Although husbands had a property right in wives' bodies, white wives had some legal recourse to divorce, separation, or protection from family and friends.

These kinds of manumissions simultaneously reinforced and disturbed the sexual and racial hierarchies in the South by recognizing affectionate and sexual interracial unions, while maintaining enforced obedience through enslavement during the lifetime of the master. Even in cases in which masters and slaves clearly did not have a sexual relationship, masters retained possession and control over slaves until their deaths. In one will dispute over a manumission, the Court described testator Eliza Ann Hamilton as "entertain[ing] conscientious scruples upon the subject of slavery. . . . She repeatedly expressed her determination that her slaves should never serve any other person but

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[42] Davis, "The Private Law of Race and Sex," 267.

herself."[43] Although Hamilton believed it was her "moral duty" to emancipate her slaves, she retained them until her death. Hamilton's actions suggests that she was of two minds on slavery; it was a abstract evil, but on a daily level she believed that she was a beneficent master who rejected the excesses and tyranny of the system. Perhaps her economic circumstances prevented her from emancipating them during her lifetime. Still, testators who manumitted slaves avoided the social and economic consequences of their actions while living.

Slaves whose masters promised testamentary manumissions struck Faustian bargains. They needed to maintain behavior that would encourage their masters' desire to manumit them while making choices about daily control over their own lives. Although her meaning was not entirely clear, Browne alluded to this dynamic when Louise referred to her post-emancipation life, commenting, "In activity I stifle memory, and for awhile I am happy, or, at least, tranquil."[44] Browne's story and the surviving evidence from testamentary manumissions reveals the difficult choices made by enslaved people as they negotiated unequal power relations with their masters.

Testators and their family members recognized the contentious and uncertain nature of manumissions. As testator Jane Miller's brother commented in a letter discussing her intended manumissions, "I well know the great difficulty that had attended the carrying out of all such wills trammeled by law suits. . . it amounts to a failure or very

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[43] *Berry v. Hamilton,* 49 Ky. 129 (1850).

[44] Browne, *Autobiography of a Female Slave,* 310.

annoying detentions."[45] For white families, slave manumissions rejected legally legitimate bloodline kin as beneficiaries when wills freed slaves rather than passing them to the next generation. Perhaps a more inexcusable outcome for the slaveholding class, manumissions represented a devise across color lines. In nullifying their value as property, these wills passed the value of each slave to him or herself rather than to the testator's family members – a devise of self-possession to each slave, in other words. Furthermore, these wills violated the white community's patterns of cementing inter-generational bonds forged by passing humans as legal property. "Gifts and inheritance," historian Walter Johnson notes, "were equally important means by which slaveholders used slave property to bind families and generations together."[46] If inheriting slaves was a means of binding white families together through slavery, manumissions often led to outright hostility within white families and between the emancipated slaves and heirs-at-law.

By 1822, the Court of Appeals had established its preference for beneficiaries who shared kin and race with the testator, and its disdain for testamentary gifts resulting from interracial relationships. George Moore died in 1822, emancipating his black concubine (she was not named in the record) and devising property to her and several other unrelated beneficiaries. Moore, who had never married, disinherited his brothers. They challenged the will claiming Moore was "deranged on the subject of his relatives"

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[45] Transcript of *Sarah v. Miller*, KCAR, KDLA.

[46] Johnson, *Soul by Soul*, 101.

and that his concubine and other devisees unduly influenced Moore.[47] The Court agreed, ruling that Moore's brothers had become the objects of his "hatred and disgust," and Moore's reasons for his feelings appeared "futile and groundless."[48] To the Court, the will itself served as evidence of legal incapacity; they ruled that had Moore held an unnatural aversion toward unrelated persons rather than those "supposed by the ties of natural affection to be the objects of his bounty, we should have no difficulty in sustaining this will."[49] The Court made clear that had Moore devised to his relatives rather than his concubine, who they believed "possessed considerable influence" over him, his will would have been probated as reflecting a sound and rational mind. The Court equated mental incapacity with testators who devised outside of bloodline kin.

J. Cabell Breckinridge, the lawyer for the will's beneficiaries presented an alternative interpretation of Moore's relationship with his concubine than that presented by Moore's brothers. Breckinridge defended Moore's right as an independent citizen to pass property to whomever he chose. Breckinridge conceded that an affectionate relationship may have existed at least from the standpoint of Moore's concubine, noting that "this humble being" may have been the only "mourner that shed a tear upon his grave."[50] This did not excuse Moore's sexual conduct, which Breckinridge agreed was despicable. Breckinridge contended however, that Moore's interracial relationship was

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[47] "Reply to Petition for Rehearing, Submitted by Counsel for Appellant," *Johnson v. Moore's Heirs*, 11 Ky. 371 (1822).

[48] *Johnson v. Moore's Heirs*, 11 Ky. 371 (1822).

[49] Ibid.

[50] "Reply to Petition," *Johnson v. Moore's Heirs*, 11 Ky. 371 (1822).

an act "not of madness, but of lust."[51] Some men, he argued, "seek after the depraved indulgence of their foul and unnatural lusts, in an intercourse with the forbidden sex; or, descending one grade lower in the scale of turpitude, sport their manhood in brutal rivalship with the courser and the boar."[52] As distasteful as Moore's conduct was, Breckinridge defended it as within the boundaries of sane albeit deeply degenerate behavior. Breckinridge conceded that Moore's interracial relationship carried the same moral opprobrium as homosexuality and bestiality, but distinguished it from insanity. His castigation of Moore reinforced dominant ideas about the immorality of interracial relationships, yet held testamentary freedom as a precious right that required protection to ensure the independence of all testators.

The brief presented Moore's case as a broader need to protect the privilege and independence of testamentary freedom from encroachment by designing relatives, noting the issue was one of "legal privilege." Breckinridge insisted that a testator must be allowed to disinherit relatives. He argued that if an "execrable" offense could strip a testator of "the rights of free agency," then all testators' independence was at risk. In a statement calculated to resonate with the founding values of the Republic, Breckinridge appealed to the Court as "votaries of civil liberty."[53] Although the Court overturned the will depriving Moore's concubine of legal personhood, this early dispute illuminates how race and sex infused the exercise of property and inheritance rights. The battle being fought was not over the freedom claims of enslaved people. Rather, it was over the limits

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[51] Ibid.

[52] Ibid.

[53] Ibid.

of freedom and independence for testators, who were overwhelmingly white and male, when they crossed racial barriers.

Local communities made the connection between interracial relationships and insanity Witness testimony in two cases heard over twenty-five years after *Johnson v. Moore's Heirs* (1822) reveal how people in two small Kentucky communities articulated their ideas about the proper relationship between masters and slaves. In these two cases, *Denton v. Franklin* (1848) and *Minor's Heirs v. Thomas* (1851) when testators publicly recognized relationships as sexual or they resulted in testamentary gifts, local witnesses expressed disgust and consternation.[54] Their testimonies – usually the bulk of the evidence upon which the jury would rule – indicates that some local men attributed interracial devises and manumissions to an unsound mind. By defining sanity in terms of testators' devises, local men from the testator's community patrolled the boundaries of whiteness, family, and the limits of property rights.

In *Denton v. Franklin* (1848) Edmund Talbot and Hannah, a former slave emancipated by Talbot, had conducted a connubial relationship for many years in Henderson County.[55] Talbot's will emancipated his slaves, devised much of his property to them and Hannah, and left his son and two daughters small devises of land.[56] Similarly, in *Minor's Heirs v. Thomas* (1851) Jeremiah Minor, a Scott County testator,

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[54] *Denton v. Franklin,* 48 Ky. 28 (1848); *Johnson v. Moore's Heirs,* 51 Ky. 106 (1851).

[55] *Denton v. Franklin,* 48 Ky. 28 (1848).

[56] "Will of Edmund Talbot," *Talbott, Thos. D. and others vs. Hardwick, B.F. and others*, (April 1847), Case 7749, Henderson County Circuit Court Case Files, KDLA.

also emancipated his slaves in his will, referring to them as his "black family."[57] His brothers contested the will. In both cases the emancipated slaves participated as legal parties, litigating for their right to legal personhood. By litigating to uphold these wills the African-American plaintiffs simultaneously contested and reinforced an inheritance system that usually cast them as chattel property rather than legal persons. These wills and the trials that illuminated the relationships behind them suggest that these testators and their beneficiaries held ideas about family and property that deviated from the dominant constructions based on race and blood.

Lawyers for the heirs-at-law in both cases contested the wills on mental incapacity and undue influence grounds. These lawyers developed strategies that would allow a finding of insanity and overturn the testators' testamentary freedom while reaffirming generally the property rights that attended white manhood. The challengers' lawyers used two major arguments that appear throughout in these cases and other will disputes involving manumissions. First, they argued that the testators' mental capacity had significantly declined in the last years of their lives. In *Denton v. Franklin* (1848), witnesses testified that in the years before the will had been written, Talbot had been "sensible," and of "sound mind." Only as he aged did his mental capacity decline. Hector Green, the then-current county surveyor testified that by comparing records that Talbot, a former surveyor made earlier with those made later, he noted that, "his business capacity must have been much deranged & impaired in the latter years of his life."[58] In

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[57] "Will of Jeremiah Minor," *Thomas & c. of color v. Jeremiah Minor's Heirs & c.* (1849), Scott County Court Order Book #21, 102, Scott County Court Clerk Records, KDLA.

[58] "Testimony of Hector Green," in Transcript, *Talbott, Thos. D. and others vs. Hardwick, B.F. and others*, (April 1847), Case 7749, Henderson County Circuit Court Case Files, KDLA.

Jeremiah Minor's case, the mental decline also was attributed to his advanced age. Martin Bramlett, Minor's neighbor, testified that for until six years prior to his death, Minor was a "moral high minded honorable man," but during the last few years of his life, Minor lacked the "sense as a common boy of ten years."[59] This premise allowed them to explain why the master/slave hierarchy had been inverted. The testators' debilitated mental states allowed their slaves to influence their decisions, eventually leading them to disinherit their family. Although this strategy failed when the local courts refused to overturn these wills, the Court of Appeals found the testimonies credible enough to rule in favor of the heirs-at law in both cases.

Both cases focused on the sexual behavior of the testator and the African-American beneficiaries. In Edmund Talbot's case, his interracial sexual relationship became the focal point of the trial. Talbot though, had raised the ire of the community by violating an unwritten code that tolerated white men who pursued interracial relationships with African-American women as long as these relationships remained legally and socially unrecognized. The lawyers hoped to convince the jury that they would be doing their duty by sending a message to the community that while such relationships might be informally tolerated, formal recognition through a property devise would not be sanctioned.[60]

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[59] "Testimony of Martin Bramlett," *Thomas & c. of color v. Jeremiah Minor's Heirs & c.* (1849), Scott County Court Order Book #21, 102, Scott County Court Clerk Records, KDLA.

[60] For a broader discussion of the ramifications of interracial relationships, see Bardaglio, *Reconstructing the Household*, 48-64. More generally, see Martha Hodes, ed., *Sex, Love, Race: Crossing Boundaries in North American History* (New York: New York University, 1999).

During the county circuit court trial, witnesses testified that Hannah and Talbot lived as husband and wife. Although Talbot had emancipated Hannah years before his death, two of Talbot's acquaintances testified that although Hannah acted "unbecoming a servant," and worse, Talbot had not chastised her.[61] Witnesses portrayed Hannah as a duplicitous slave.[62] They refused to consider that perhaps Talbot and Hannah willingly had engaged in an affectionate, companionate relationship that deviated from the subjection of the master/slave relationship, or for that matter, the subordination in the husband/wife relationship.[63] They claimed that as a head-of-household and master, Talbot's worsening mental unsoundness had prevented him from exercising appropriate masculine authority over his dependents. John Denton recalled that he heard Hannah "abuse his the doctors sons in law in the Dr's presence & the Dr. said nothing but permitted it."[64] Talbot's friends, neighbors and business associates believed that these instances indicated Hannah's powers of persuasion and Talbot's weak and disordered mind. Hannah had usurped Talbot's authority once Talbot lost the rationality associated with masculinity and mastery.

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[61] "Testimony of Joseph B. Norman," and "Testimony of James Gillis," Transcript, *Talbott, Thos. D. and others vs. Hardwick, B.F. and others*, (April 1847), Case 7749, Henderson County Circuit Court Case Files, KDLA.

[62] Henderson County did have a small free black population of 125 people in 1850. J.D.B. DeBow, *Compendium of the Seventh Census* (Washington: Beverly Tucker, Senate Printer, 1854.) What made Hannah's situation unique was not her status – it was her relationship with Talbot.

[63] Adrienne Davis has analyzed similar cases in several southern states and found that the similar portrayals of interracial relationships by the white witnesses. See Davis, "The Private Law of Race and Sex," 262-265.

[64] "Testimony of John Denton," and "Testimony of John Dorris," Transcript, *Talbott, Thos. D. and others vs. Hardwick, B.F. and others*, (April 1847), Case 7749, Henderson County Circuit Court Case Files, KDLA.

For those who supported slavery and saw the institution as reflecting natural relations ordained by God and law, Talbot could commit no greater sin against his community or posterity. As pro-slavery theorist and one-time South Carolina senator William Harper noted in a frequently circulated essay,

> The licentious passions of men overcome the natural repugnance, and find transient gratification in intercourse with females of the other race. But it is a very different thing from making her . . . the companion of the bosom and hearth. Him. . . we should esteem as a degraded wretch. It is not only in defence of ourselves, of our country and of our own generation, that we refuse to emancipate our slaves, but to defend our posterity and race from degeneracy and degradation.[65]

According to Harper, Talbot and Hannah had violated a complex array of racial and gendered codes of behavior which structured social and legal relations in slave states. Hannah had assumed the role of plantation wife by sharing Talbot's bedroom and expressing judgments on the conduct of Talbot's children and their spouses. She occupied a racially determined position physically and symbolically reserved for white women. Moreover, Hannah also openly imposed on Talbot's authority as the male head of household by openly advising him in the masculine world of business affairs. John Dorris, who had lived with Talbot for several years, claimed that Hannah "had influence over him about plantation affairs & other matters."[66] Indeed, the Talbot household appeared chaotic and degenerate. A public finding of insanity would show the

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[65] William Harper, "Slavery in the Light of Social Ethics," in *Cotton is King and Proslavery Arguments*, (Augusta: Pritchard, Abbott & Loomis, 1860), 547 –626.

[66] "Testimony of John Dorris," Transcript, *Talbott, Thos. D. and others vs. Hardwick, B.F. and others*, (April 1847), Case 7749, Henderson County Circuit Court Case Files, KDLA.

community that only a mentally disordered man would allow such transgressions gendered and racial codes of behavior.

The plaintiffs presented Hannah as the true culprit, who exploited a mentally diminished, isolated man. Implicit in this reasoning was the premise that mastery required a strong, vigilant mind or dependents would exploit their master's weakness for their own benefit. It also upheld the mental and moral superiority of white men, as long as they remained sane, while highlighting the inherently mendacious nature of black women. Men perceived as losing mental acuity no longer could claim the privileges and responsibilities associated with masculinity or mastery, including the right to make decisions involving their property distribution.

In *In Re Singleton* the politics of race influenced how communities interpreted sexual behavior when the disinherited heir rather than the testator crossed racial boundaries. Jeconias Singleton died in 1836, a wealthy man by anyone's standard. He possessed a personal estate that sold for over sixteen thousand dollars and approximately eight hundred acres of land divided into several farms.[67] Singleton disinherited his son William, largely because William allegedly had engaged in a sexual relationship with his father's slave Harriet, and fathered her child. William Singleton contested the will, claiming that his father was delusional and labored under an insane aversion to him.

The case centered on how inter-racial sex affected the transmission of property between generations of white family members. Two competing narratives emerged in the *Singleton* Case (1839). First, the challengers brought the case to trial by claiming

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[67] "Sale Bill of Jeconias Singleton's Estate," Woodford County Will Book K (1834-1838), 398-405; "Will of Jeconias Singleton," Woodford County Will Book K (1834-1838), 335-337, Woodford County Court Clerk Records, KDLA.

William was a "most dutiful and faithful son," unfairly subjected to the "passionate, vehement and unnatural" behavior of Jeconias Singleton.[68] They argued that Jeconias Singleton entertained insane delusions about an "imaginary" sexual relationship between William and Harriet.[69] In the second narrative, the will's proponents claimed that the will was "not only rational, but eminently judicious."[70] They contended that Singleton, as a father and a practicing Christian did a "righteous deed" by disinheriting William who went from "the polluted embraces of a negro wench to the altar of the living God."[71]

Each narrative presented a different portrayal of William and Jeconias Singleton. The case turned on whether the jury chose to acknowledge and punish William's alleged sexual relationship with Harriet. If the jury upheld the will, they reaffirmed Jeconias Singleton's authority and implicitly sanctioned his vision of justice, in which white male sexual license with enslaved women justified disinheritance. One witness, Mr. Jessee contended that the alleged behavior should not influence Singleton's will, even if William had conducted an affair with the slave. Jessee argued that "no man in his proper senses would have acted towards his son as he did towards William, whether the charge was true or false."[72] Jessee excused William's behavior, believing that it should not affect inheritance within white families.

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[68] "Testimony of Ben Taylor" and "Testimony of Pastor Blackburn," cited in *In re Singleton*, 38 Ky. 315 (1839).

[69] *In re Singleton*, 38 Ky. 315 (1839).

[70] "Petition for a Rehearing by Mr. Hewitt," in *In re Singleton*, 38 Ky. 315 (1839).

[71] Ibid.

[72] "Testimony of Mr. Jessee," in *In re Singleton*, 38 Ky. 315 (1839).

If the will was overturned, then Jeconias Singleton lost his testamentary freedom and his ability to govern his domestic affairs was questioned. Jury and court found against the will. They avoided the issue of William's sexual transgressions by agreeing that they did not exist and were a delusion in the mind of Jeconias Singleton . In keeping with southern attitudes on interracial sex, the Court re-established white male authority at the expense of Jeconias Singleton's paternal authority. Once Singleton brought his son's transgressions into the realm of affecting property transmission, he lost his paternal authority. When William took the case to the Woodford Circuit Court, he challenged his father's authority, revealing the limits of an individual white patriarch's authority to enforce his vision of racial hierarchy. This case shows that the needs of reaffirming state-sanctioned inheritance patterns did not necessarily coincide with reaffirming the almost absolute power of individual white patriarchs.

Tropes emphasizing the cunning nature of African-Americans and the consequences of a weak and disordered patriarch emerged in the Minor will dispute. Although Jeremiah Minor was not accused of conducting a sexual relationship with his slaves, witnesses emphasized the slaves' immoral sexual conduct and Minor's inability to compel obedience from them. Neighbors marched out a parade of horribles to describe the conditions of the Minor farm, demonstrating the dangers posed by a mentally incapacitated master. John House, a close neighbor testified that Minor's negro quarter was a "sink of vice and debauchery."[73] Worse, he raised the specter of profligate white women prostituting themselves in mixed race liaisons, stating that "they [Minor's slaves]

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[73] *Thomas & c. of color v. Jeremiah Minor's Heirs & c.* (1849), Scott County Court Order Book #21, 101, Scott County Court Clerk Records, KDLA. Ironically, House had witnessed the will, but obviously had second thoughts about attesting to Minor's sanity by of signing the testament.

sold liquor and entertained white women of the basest and most abandoned character notoriously of bad virtue and fame." In slaveholding states, white women symbolized racial purity. Protecting their sexual virtue was essential to maintaining racial hierarchy and creating the next, racially pure generation of masters, citizens, and mothers.[74] As enslaved status was passed through the mother, this racial mixing represented not only racial degeneration, but also the possibility of the creation of an underclass of free mulattos.

Community members linked the reasons for testators' mental decline to a variety of reasons, including old age, illness, or death of a spouse. Often, they attributed the onset of the decline to a time when the testator became isolated from white society and lived almost exclusively with African-Americans. In the *Minor* case, John House testified that after Minor's wife died, "no white person lived with the old man."[75] In *Sarah v. Miller* (1864), female neighbors testified that Jane Miller rarely visited them or participated in Trigg County social rituals. Miller's physician called her a "recluse" who lived "only with her negroes for many years before her death."[76] Deprived of the civilizing influences of white society, these testators slowly became insane, and relinquished their authority and ultimately their property to their slaves.

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[74] Historians have written extensively on the symbolic attachments to southern white womanhood, as well as the legal and social mechanisms which governed white women's sexual behavior. See Bardaglio, 58 – 78, Victoria Bynum, *Unruly Women: The Politics of Social and Sexual Control in the Old South* (Chapel Hill and London: University of North Carolina Press, 1992), 35-42.

[75] "Testimony of John House," *Thomas & c. of color v. Jeremiah Minor's Heirs & c.* (1849), Scott County Court Order Book #21, 101, Scott County Court Clerk Records, KDLA.

[76] "Testimony of Dr. Burnett," Transcript, *Sarah v. Miller*, (1864), Case 74, Box 3, KCAR, KDLA.

In *Minor's Heirs v. Talbot* and *Denton v. Franklin*, local judges and all-male juries remained hesitant to overturn the wills of other male masters and property owners. Local juries upheld the wills in spite of condemnatory testimony. Although witnesses testified that Jeremiah Minor's and Edmund Talbot's mental capacity had declined in recent years, previously both testators had enjoyed reputations as respected men who adhered to their roles as businessmen, community leaders, slaveowners and moral examples in the community. In many respects they had upheld the local gender conventions for men of their class and color. As Thomas B. Catlett noted in the *Minor* will dispute, Jeremiah Minor had been a "man of good conduct" and "industry" who "managed his concerns well."[77] Edmund Talbot had been a doctor, county surveyor and had bought and sold slaves in Henderson County, where he had lived for more than fifteen years before his death.[78] In 1845 Henderson County claimed only 1509 white men over twenty-one years old. [79] It is probable that some jurors knew Talbot.

Historians have pointed to the culture of "personalism" as influencing legal outcomes in local jury trials.[80] Within local communities, one's reputation, developed through years of close contact with neighbors and the community, could influence how

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[77] "Testimony of Thomas B. Catlett," *Thomas & c. of color v. Jeremiah Minor's Heirs & c.* (1849), Scott County Court Order Book #21, 103, Scott County Court Clerk Records, KDLA.

[78] Transcript, *Talbott, Thos. D. and others vs. Hardwick, B.F. and others*, (April 1847), Case 7749, Henderson County Circuit Court Case Files, KDLA.

[79] "Reports Communicated to Both Branches of the Legislature of Kentucky at the December Session, 1845 (Auditor's Report), Legislative Document No. 10," (Frankfort, Ky., A.G. Hodges, 1845), 105.

[80] Historian Kent Anderson Leslie points to the culture of personalism as part of her explanation for a jury decision upholding David Dickson's will. Dickson a respected planter and businessman, left his estate to his illegitimate mulatto daughter. See Kent Anderson Leslie, *Woman of Color, Daughter of Privilege: Amanda America Dickson, 1849 – 1893* (Athens, GA: University of Georgia Press, 1995).

juries made decisions in individual cases. Personal and business relationships over many years may explain the jury's willingness to overlook Talbot's and Minor's transgressions. Until the onset of their alleged mental declines these men had fulfilled many of the gendered expectations for propertied male community members and heads-of-households. Men on the juries refused to infringe on the property rights and final wishes of testators, perhaps realizing that their behavior might stand the same legal scrutiny.

In *Sarah v. Miller* (1864), in which the testator was female, two juries rejected Jane Miller's will, although numerous witnesses testified to her sanity and intelligence. Even so, Miller deviated from typical behavior appropriate to her sex and class. Unlike Jeremiah Minor and Edmund Talbot, Jane Miller had never been a typical master or adhered to gender conventions in Trigg County. She was a single female who never married and retained legal rights to her property. Community members determined the standard of sanity through comparisons to other women's conduct. Miller's neighbor, William Martin testified to her mental unsoundness, noting that "her conduct all the time was very strange and different from any other woman I ever knew."[81] Similarly, in testifying to Miller's sanity, Reverend James Hawthorn observed that Miller was a "judicious lady with rather more ordinary shrewdness . . . than is often found in ladies in the same circumstances."[82] By comparing Miller to the other women who the witnesses believed were similarly situated, her deviations from ordinary female behavior became apparent. Even Hawthorn's testimony noted that she had "more ordinary shrewdness" than other women, highlighting how Miller differed from her local female counterparts.

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[81] *Sarah v. Miller*, (1864) Transcript, 146, KCAR, KDLA.

[82] Ibid., 68.

After her death, Jane Miller denied her brothers control of her wealth and slaves through her testamentary emancipations. Although many witnesses testified to her sanity, the trial emphasized Miller's behavior as diverging from that of other women. As an unmarried woman who lived in seclusion, rejected social rituals, and avoided contact with men, Jane Miller's behavior pointed to mental incapacity. The jury refused to sanction her independence.

In the *Minor* and *Talbot* cases, the local juries' decisions to uphold the wills may have reflected their apprehensions about overturning the property rights of two men who had adhered to gendered norms for much of their lives. Overturning male testamentary freedom potentially eroded the freedoms and privileges associated with masculinity, perhaps making an all-male jury more hesitant to interfere with the property rights of other local men. By overturning Jane Miller's testamentary freedom, however, jurors restored her property and mastery over her slaves to proper its place: under male control of her brother Isaac, the heir-at-law.

Once *Minor's Heirs v. Talbot* and *Denton v. Franklin* reached the appellate level, the Court of Appeals refused to overlook Edmund Talbot or Jeremiah Minor's transgressions. Their focus turned toward not only the testator and the beneficiaries, but also the heirs-at-law that had been disinherited in the process. In *Denton v. Franklin* the Court directed its displeasure at Edmund Talbot and Hannah, noting that "the gratification of the wishes of this colored woman, seems to be its [the will's] leading object. The natural duty of providing for his own children, whose condition and circumstances in life, required the exercise of his bounty in their favor, was entirely

forgotten or disregarded."[83] The Court made distinctions about the legitimacy and morality of relationships within the Talbot household and these judgments determined property rights.

To the Court, Hannah was an interloper depriving the Talbot children of their rightful inheritance. Referring to Hannah as "this colored woman" separated her from "his own children" to whom as a father, Talbot "had a natural duty." Indeed, the Court thought that Talbot was "required" to devise to them, because they lacked material resources. The Court believed that Talbot had a legal and moral duty to materially reproduce a white household rather than exercise testamentary freedom by devising to his beneficiaries. Had Hannah and Talbot been able to legally legitimate their relationship through marriage, his devises to her probably would have been shielded from allegations of undue influence.

In the dispute over Jeremiah Minor's will, the Court reaffirmed its contention that testators would not devise outside of their racial or kin group without outside provocation. The Court ruled that Minor's "children were obedient and affectionate . . . which excluded the inference that his slaves were preferred to them as subjects of his bounty on account of ungrateful or improper conduct."[84] Minor had referred to his slaves in his will as his "black family" suggesting that in his mind, his relationship with his slaves was affectionate. Minor's will suggested that he saw himself in a masculine role, as a paternal figure to his slaves. The Court's rejection of the interracial devises indicated that paternalism, when expressed through inheritance would be confined to

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[83] *Denton v. Franklin*, 48 Ky. 28 (1848).

[84] *Minor's Heirs v Thomas,* 51 Ky. 106 (1851).

white beneficiaries. The lines determined by race and blood prevented Minor's slaves from reaping the benefits of his interracial vision of family. Of course, Minor's cryptic reference does not preclude that he demanded subordination from his slaves. For the Court however, a reaffirmation of legally legitimate, racially homogenous families determined the disposition of property and freedom.

Once *Sarah v. Miller* (1864) reached the Court of Appeals, the justices strongly supported the will. They opined that "on the subject of capacity the testimony is, both numerically and morally, overwhelming in favor or a disposing mind."[85] The Court indicated that based on the evidence, the lower courts' decisions would not pass statutory requirements for an insanity finding. Although Miller deviated from Trigg County gender roles, she did not pose the threat of sexual disorder and racial chaos brought about by the interracial liaisons described in the *Minor* and *Denton* cases. Although Miller never married, her emancipations did not reward slave behavior that impinged on white mastery and masculine authority. Miller also banished her freed slaves to Liberia, whereas Talbot's and Minor's emancipations left free African-American property-owners in local communities. Two local juries refused to forgive Jane Miller's eccentric behavior; unlike the *Minor* and *Denton* cases, the Court of Appeals found little legal evidence upon which they could endorse local disapproval.

Kentucky will disputes reveal a different set of social relations from the harmonious vision articulated by elite slaveholder Mildred Bullitt in an 1846 letter to her

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[85] *Sarah v. Miller*, 62 Ky. 259.

son. Bullitt closed with "your father, the children & servants unite in love to you."[86] Bullitt listed the household members in order of authority; at the same time, she described them as "unite[d] in love," suggesting that they shared common bonds and affections. When this letter was written, Mildred Bullitt's son Joshua was litigating *Howard v. Coke* (1846), a high profile contentious will dispute contesting the distribution of slaves from his recently deceased cousin Polly's estate. Mildred Bullitt's letter indicated that the slaves "united in love" as her son fought a case to reaffirm their slave status. In this worldview, slaves were property through which white familial relations were defined.

The central issue in manumission disputes is not whether Edmund Talbot, Jeremiah Minor, or Jane Miller were insane by historical legal standards or by contemporary standards. These cases are about how Kentucky courts and communities talked about the relationships between family, post-mortem wealth distribution, and insanity when wills involved manumissions or devises across racial lines. These cases reveal how people experienced family and recognized relationships in configurations different from those sanctioned by law and dominant social ideals. These trials suggest that economic obligations that inhere in private relationships sometimes threatened organic race and gender hierarchies that structured southern society.

This seemingly neutral body of jurisprudence was deeply invested on the local and appellate level with maintaining material and affectionate bonds between generations of white families. *Denton v. Franklin, Minor's Heir's v. Thomas,* and *Sarah v. Miller* also reveal the limits to which the Court of Appeals would sanction the gender and racial

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[86] Oxmoor, Mrs. William C. Bullitt to John Bullitt, 28 Apr 1846 FL 152, Bullitt Family Papers, FHS.

politics of local communities. By overturning the Jeremiah Minor's and Edmund Talbot's wills, the Court of Appeals had delineated the boundaries of testamentary freedom and familial obligations. In the Talbot and Minor cases the Court refused to let community judgments prevail against images of masters emasculated by the deprivation of reason and authority. Racial disorder, sexual chaos, and the specter of free, property-owning African Americans jeopardized the orderly transmission of wealth and the maintenance the slave economy. The Court indicated that legally unsanctioned interracial sexual relationships would not be rewarded with material benefits conferred by legal legitimacy, whiteness, and social acceptance. The racially determined laws of marriage, miscegenation, and legitimacy merged seamlessly with the ostensibly neutral laws of inheritance.

The reasons behind the resolution of Jane Miller's will dispute are more complex. Jane Miller's local trials suggest that juries were much more likely to closely regulate women's property decisions. Writing a will represented masculine authority and honor by maintaining family through wealth distribution. Female testators challenged that model by asserting independence over property and creating an alternative model in which women controlled wealth distribution. In spite of numerous witness testimonies affirming her sanity and even her exceptional intelligence, local juries overturned her will. As witness testimony revealed, several community members resented Jane Miller, her independence, and her preference for solitude away from male company. The Court of Appeals however, strongly endorsed her will as reflecting a "self-poised mind,

unbiased by any extraneous influence."[87] Ruling in 1864 perhaps the Court recognized slavery's imminent demise. They maintained the juridical neutrality required for scrutiny by a broader audience of their peers.

Local communities were willing to uphold Jeremiah Minor's and Edmund Talbot's wills, in spite of the condemnation of numerous sexual transgressions. In doing so, they reaffirmed male authority and sexual license. Local juries punished Jane Miller's independence and eccentricity, suggesting that sanity for women depended far more on female adherence to marriage and gender conventions.

These cases created a window of opportunity for a few African Americans emancipated by wills. Although in the Minor and Talbot will disputes they ultimately lost, Franklin, Thomas, and the other African-American litigants claimed a legal voice through which they expressed their rejection of their status as property. Sarah and Jane Miller's other slaves ultimately gained their legal freedom. Slaves that brought these emancipation suits actively participated in a legal system that overwhelmingly fused skin color to status as property. Ironically, they struggled to uphold white privilege by upholding their masters' wills, but in the process, their trials revealed alternative visions of sexual desire, family, and perhaps affection. In the cases that resulted from these relationships and devises, some communities suggested that only an unsound mind would choose such beneficiaries. Heirs-at-law bringing suit, witness testimony, and courts overturning wills preserved the illusion of testamentary freedom as a right that inhered in

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[87] *Sarah v. Miller*, 62 Ky. 259.

sane and rational men and women. Sanity and rationality however, were defined by racial and sexual ideologies that orchestrated the operation of probate law.

CHAPTER III
ARBITERS OF SANITY: MEDICAL EXPERTS, JURISTS, AND JURIES

In May 1891, Owen County Circuit Court spectators watched a heated disagreement between of two of Kentucky's most distinguished medical experts. At issue was Joseph F. William's sanity the moment he wrote his will, leaving most of his property to the Baptist Church.[1] Five physicians testified, including Dr. F.H. Clark, superintendent of Lexington's nationally known Eastern State Lunatic Asylum and Dr. David W. Yandell, a Louisville Medical School professor, author, and past president of the American Medical Association. Both physicians claimed to possess diagnostic expertise as experienced practitioners and from theoretical knowledge taken from learned authorities. Yet their testimonies diametrically opposed each other. Clark asserted that, "I think he was sane, capable of knowing his property and knowing his relatives." Yandell declared that "He was of unsound mind & could not make a will."[2] Although willing to diagnose with certainty, neither Yandell nor Clark had ever met Williams.[3]

The disagreement between Yandell and Clark illustrates changes that began in testamentary capacity trials by mid-century. Medical experts exposed juries and local

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[1] "Will of Joseph F. Williams," Transcript of *Williams v. Williams* (1893), Case 22461,Box 982, KCAR, KDLA.

[2] "Testimony of FH Clark," and "Testimony of David W. Yandall," Transcript of *Williams v. Williams* (1893), Case 22461, Box 983, KCAR, KDLA. The spelling of Yandell's last name varies. Several transcripts record it as Yandall, while book publishers and contemporary archivists spell it as Yandell.

[3] I use the word "medical expert" as I believe it was understood in the late nineteenth century: as a physician who brought specialized knowledge gleaned from occupational practice or education. Experts participated in regional and national dialogues through medical societies, publication, and affiliations.

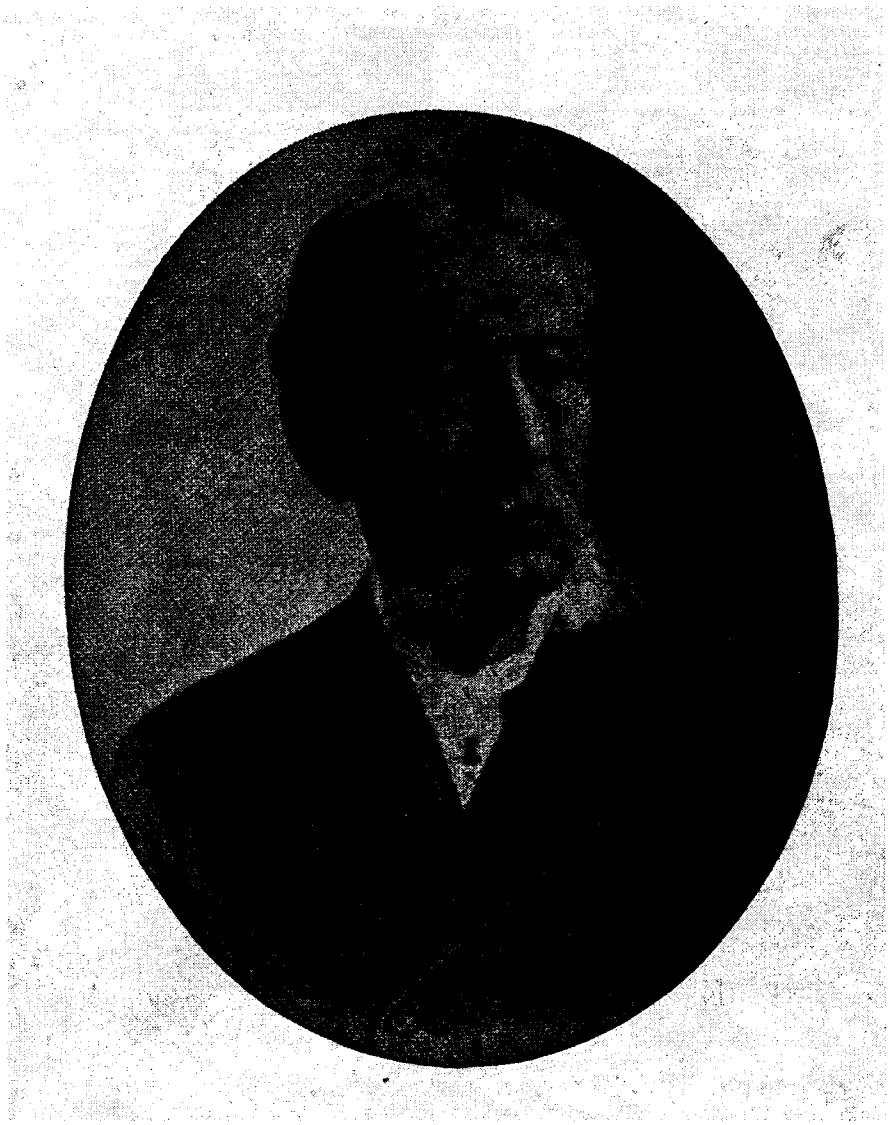

Figure 2. David Yandell, Kentucky physician and President of the American Medical Association in 1872. Yandell testified at several testamentary capacity trials in mid to late nineteenth century Kentucky.

Source: Filson Historical Society, Manuscripts and Photographs Division, Louisville, Kentucky.

people to new discursive constructions of insanity bringing the latest medical theories into county courtrooms. Local doctor Joe Dupuy, who treated Williams during his final illness, testified that constructions of insanity. In Kentucky courtrooms, mirroring nationwide trends, medical experts superceded local doctors as medical authorities. Willliams was "insane on the subject of religion." On cross-examination, the lawyer asked Dupuy about his qualifications to diagnose insanity. Dupuy admitted that "I am only a general practitioner and have never made the subject of insanity a subject of special study." [4] Although Dupuy knew and treated Williams, his interrogation was perfunctory compared to the elaborate exchanges between Yandell, Clark, and the litigants' attorneys. Expert testimony represented a significant change in how juries received evidence of a testator's insanity.

During the late eighteenth and nineteenth centuries, research and observation led experts to expand the range of insanity diagnoses. Different forms of insanity explained everything from religious fervor to moral deviance and disrupted familial relationships. In Kentucky, the Civil War and the abolition of slavery raised the specter of disordered economic and social relations. Experts sought to use medical knowledge to stabilize a moral order that appeared increasingly under assault by the chaotic forces of progress and social upheaval. They brought new forms of knowledge into testamentary capacity trials through scientific nomenclature and claims to authority based on the truths of medical science. A lexicon based on a constructed ideal of naturalness provided a moral

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[4] "Testimony of Dr. Joe Dupuy," Transcript of *Williams v. Williams* (1893), Case 22461,Box 982, KCAR, KDLA.

vocabulary through which experts normalized definitions of sane behavior based on gender and class appropriate behavior.

Courtrooms serve as a unique site of historical inquiry in which power relations between experts and laypeople were reconfigured. Experts provided opinions and diagnoses, but the power of confirming insanity through a verdict and assigning attendant legal consequences rested with judges and juries rather than with experts. In trials, community and elite medical views of insanity intersected through face-to-face encounters. The courtroom lacked the physical coerciveness of the asylum, a site of encounter where community members were subject to the authority of insanity experts. By concluding in a verdict, trials forced medical experts, juries and local witnesses to negotiate what kinds of behavior constituted insanity. At the same time, Kentucky jurists resisted giving diagnostic authority to experts –or for that matter, juries - reserving for themselves the final interpretation of fact. Kentucky jurists remained wary of the latest scientific theories, continuing to affirm a vision of social relations that they explained as immutable and natural even as testators reconfigured family through property transmissions.

Although claiming scientific objectivity, medical experts, like local witnesses, made judgments about insanity within prevailing cultural cosmologies. Medical experts contested or reinforced ideas about family, justice, and rationality. Medical experts expanded the reach of medical authority as they sought to influence just property transmission and sane and deviant familial relations. This chapter explores how knowledge about insanity was produced and became authoritative as communities negotiated the shifting boundaries between sane and insane. As a signifier of deviancy,

publicly labeling an individual insane carried economic and social repercussions, including the loss of freedom, property and community credibility. I do not mean to suggest that insanity exists only as a discursive social construct. Clearly, individuals suffered from mental illness rooted in psychological and physiological function. These conditions had consequences for individuals, their families and the state authorities. Like other signifiers of deviance - say homosexuality for example, the meaning and defining of the deviant behavior changed across time from concepts like nineteenth century idea of "inversion" to twentieth century conceptions of modern "homosexuality."[5] Although the behavior may have been the same, the label and its social significance changed as the behavior was re-interpreted during social and cultural change. By analyzing insanity out of the institution, the broader social and legal implications wrought by the legal discourses of capacity become evident.

Many experts saw courtroom testimony as crucial to controlling broader public debates over insanity by directing uneducated juries toward truth and justice. Others in the medical community were more circumspect, mixing optimism and opportunism with concerns about how the partisan practices of litigation would destroy their reputations as lawyers discredited their findings. Court of Appeals justices, however, viewed with profound ambivalence medical experts' ability to pass judgment accurately on the sanity of testators. Justices oscillated between a distrust of experts and a greater distrust of local juries, who they perceived as unschooled and vulnerable to infusing verdicts with their

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[5] Carroll Smith-Rosenberg, "Discourses of Sexuality and Subjectivity: The New Woman, 1870-1936," in *Hidden From History: Reclaiming the Gay and Lesbian Past,* edited by Martin Bauml Duberman, Martha Vicinus, and George Chauncey Jr., 264-280 (NAL Books: New York, 1989); George Chauncey, *Gay New York: Gender, Urban Culture and the Making of the Gay Male World, 1890-1940.* (Basic Books: New York, 1994).

own opinions of a testator's choices. Certainly, medical experts gave reason for the suspicion evinced by jurists; they disagreed vehemently, leading to confusing testimony such as that heard in the Williams case.

Much of the historiography on insanity and medical experts in the nineteenth century focuses on the treatments doctors provided in insane asylums. Michel Foucault has shaped much of this historiography by arguing that during the Enlightenment, culturally constructed opposing discourses of reason and unreason developed in tandem with the modern state. The modern asylum was created in a matrix of economic and moral ideologies in which reason's opposite, unreason dictated that unproductive, behaviorally deviant people required institutionalization.[6] Subsequent historians have debated the history of the asylum as a means of social control, of expanding physician expertise, or as emanating from a humanitarian impulse to treat those suffering from mental diseases.[7] These histories offer insight into how institutions and treatments developed, as well as the legislative, economic, and social policy issues surrounding them. Historians who approach medical experts through asylums define insanity through the historical processes of institutional development. The insane individual is located at the asylum, or just prior to commitment.

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[6] Michel Foucault, *Madness and Civilization: A History of Insanity in the Age of Reason*, trans. Richard Howard (Vintage Books, New York, 1965), 107.

[7] A proponent of the argument that institutions were a means of social control is David Rothman, *The Discovery of the Asylum: Social Order and Disorder in the New Republic* (Boston and Toronto: Little, Brown and Co., 1971). Gerald Grob contends that the development of institutions was tied to an ameliorative impulse. See Gerald Grob, *Mental Illness and American Society, 1875 – 1940* (Princeton: Princeton University Press, 1983). For a perspective on a southern asylum, see Peter McCandless, *Moonlight, Magnolias and Madness: Insanity in South Carolina from the Colonial Period to the Progressive Era* (Chapel Hill: University of North Carolina Press, 1996).

Historian Peter McCandless has written that few historians have explored the position of insane people in their community other than as a way to understand institutional developments.[8] As McCandless rightly notes, historians have focused on how social, economic and cultural influences affected the commitment process, therapies and so forth. In Kentucky, as McCandless finds in South Carolina, asylum patients represented only a fraction of the insane population. Throughout most of the nineteenth century, the only people institutionalized were those considered ill or dangerous enough to require removal from the community. Asylum superintendents at Lexington's Eastern State Lunatic Asylum (ESLA) consistently lamented that they received only patients whose "attendance [in the community] has become hopeless and disagreeable."[9] With good reason many Kentuckians viewed ESLA as the last resort for mentally unsound family members. Despite superintendents' best efforts, chronic underfunding resulted in abysmal sanitary conditions and frequent disease outbreaks.[10]

Part of the historical focus on asylums comes from the development of mental health policies and the evolution of the nascent psychiatric discipline. Historical sociologist Andrew Scull describes a transformation from examining and treating "madness" within institutions to concern with broader conceptions of "mental illness."[11]

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[8] McCandless, *Moonlight, Magnolias and Madness*, 8.

[9] "Dr. Perrin's Report" in Document No. 10, Report from Eastern Lunatic Asylum, Auditor's Report to the Legislature of Kentucky, (Frankfort: A.G. Hodges, 1856), 10 (hereafter these Legislative Reports are cited as "Auditor's Report.")

[10] Ronald F. White, "A Dialogue on Madness: Eastern State Lunatic Asylum and Mental Health Policies in Kentucky, 1824-1883," Ph.D. Dissertation, University of Kentucky, Lexington, 1984.

[11] Andrew Scull, *Social Order/Mental Disorder: Anglo-American Psychiatry in Historical Perspective* (Berkeley: University of California Press, 1989).

Experts' concerns shifted from confining deviancy in society's most deranged individuals to regulating normalcy within a much broader range of mental illnesses that afflicted more people. Scull believes that psychiatrists, or "mad-doctors" developed "monopolistic power to define and treat lunatics," as part of a trend led by society's elites, toward "the social control of deviance." Scull identifies an important re-focusing by medical elites that also occurred in Kentucky. Individuals on the margins of sanity became the subjects of scrutiny.

Scull rarely approaches insanity as an exchange between the subject, the community, and the medical expert within a non-medical environment such as a courtroom or a community. Many people considered insane remained in their communities or spent brief periods institutionalized, but these people are largely invisible in the historical record. Throughout much of the nineteenth century, the Kentucky legislature provided compensation for the support of "peaceable lunatics" in the community.[12] Focusing on physician diagnosis in testamentary capacity trials disengages discourses of capacity from the asylum and places insanity in a communal, rather than institutional context.

The few studies that examine people considered insane within their communities tend to portray them as passive patients requiring care. These studies overlook the agency of people like testator Joseph Williams, who some doctors and neighbors considered mentally unsound, yet lived and worked for decades in his community. Williams had been institutionalized at ESLA for seven months in 1859, diagnosed as

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[12] Ronald F. White, "A Dialogue on Madness, 78.

suffering from "religious mania."[13] Afterward, he returned to Owen County and managed a successful farm. His religious fervor and continuing talk of divinely inspired visions led local physicians and some neighbors to consider him mentally unsound. Williams probably would have been invisible to the historical record had his heirs-at-law not challenged his will. He may have shown up in ESLA records, but without the will dispute, historians would have no knowledge of how the label of "insane" shaped his subsequent life. The years after institutionalization and before his 1887 death reveal a more complete picture of how medical experts and local people understood sanity as a range, breaking down bright line distinctions between sane and insane. Moving the site of analysis to the community uncovers previously unexplored ways in which insanity structured property transmission and power relations.

Legal historians have analyzed how medical authorities have defined insanity in legal environments. In the nineteenth century criminal trials involving an insanity defense though uncommon, received more attention than did testamentary capacity trials. As medical expert Alfred L. Carroll observed in 1877, "the aspect of insanity most interesting to the public is that which relates to criminal actions."[14] These trials also have received more attention from historians.[15] Historian John S. Hughes' study of

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[13] Transcript, *Williams v. Williams* (1893), Case 22461,Box 982, KCAR, KDLA.

[14] Alfred L. Carroll, "The Plea of Insanity," in *Papers Read Before the Medico-Legal Society of New York.* Third series, 1875 – 1878. Revised edition. (New York: The Medico-Legal Journal Association, 1886), 385.

[15] Andrew W. Arpey, *The William Freeman Murder Trial: Insanity, Politics and Race* (Syracuse: Syracuse University Press, 2003); Hendrick Hartog, "Lawyering, Husbands' Rights and the 'Unwritten Law' in Nineteenth Century America," *Journal of American History* 84 no 1 (1997): 67-96; Janet Colaizzi, *Homicidal Insanity, 1800-1985* (Tuscaloosa: University of Alabama Press, 1989); Robert M. Ireland, "Insanity and the Unwritten Law," *American Journal of Legal History* 32 no. 2 (1988): 157-172.

medical jurisprudence treatise writer and physician Isaac Ray focuses almost exclusively on Ray's influence on criminal insanity.[16] The trial over the alleged insanity of President James Garfield's assassin Charles Guiteau suggests that these trials incited public emotion much differently than trials involving civil insanity.[17] As historian James Mohr notes, the Guiteau trial "reflected a sense of national trauma and outrage" that even the most high profile testamentary capacity trials never inspired.[18] Other trials, including the famous Sickle-Keyes trial, have been analyzed by then contemporary court watchers, journalists, and subsequently, by historians.

Criminal insanity trials offered courtroom spectacle and an element of physical danger absent in civil insanity cases. The accused represented a violent threat, whether he or she was insane or knowingly acted immorally. Criminal insanity was more threatening; the inscrutable mind of the criminally insane made their actions disturbingly capricious. Dead testators even if insane, presented no threat to life and limb. Unsound testators however, presented a threat perhaps more pernicious. As the inheritance system affected almost everyone and stabilized social and economic relations, determining the testamentary capacity standard had far-reaching implications. Through civil and criminal cases, medical experts expanded their influence directly into communities, rather than by indirectly affecting communities through the diffusion of medical theories.

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[16] John S. Hughes, *In the Law's Darkness: Isaac Ray and the Medical Jurisprudence of Insanity in Nineteenth Century America* (New York: Oceana Publications, 1986).

[17] Charles E. Rosenberg, *The Trial of Assassin Guiteau: Psychiatry and Law in the Gilded Age* (Chicago: University of Chicago Press, 1968, Reprint 1995).

[18] James Mohr, *Doctors and the Law: Medical Jurisprudence in Nineteenth Century America* (New York: Oxford University Press, 1993), 178.

Kentucky's elite doctors like David Yandell participated in the national medical community, both shaping experts' dialogues on insanity and bringing received knowledge into local courtrooms.[19] Expert testimony in testamentary capacity cases must be understood in the context of local and national medical cultures.[20] Kentucky's medical community was centered in Lexington around ESLA and Transylvania University's medical school, and in Louisville, around the Louisville Medical Institute (later Louisville University). The national medical community held conferences, conducted research and published the results in texts cited by lawyers and physicians.

Medical experts approached the legal system as an instrument through which they could pursue social agendas enlightened through medicine. Many experts believed that they could create a healthy civic body through patient treatment and by shaping social and legal policies that fostered public health. They pressed legislatures to build and fund asylums, and called upon courts to use medical knowledge to determine mental capacity standards in litigation and lunatic inquest procedures.[21] Isaac Ray, a nationally eminent medical expert believed that experts had a unique public obligation to bring scientific truth to law. He observed that "public seems to have a claim upon their [experts]

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[19] For example, William Chipley was superintendent at ESLA from 1855-1869. Chipley also had a national reputation as an expert on moral insanity and "sitomania" (uncontrollable urge to drink) and testified in several cases involving insanity issues. Chipley was influential in the Association of Medical Superintendents of American Institutions for the Insane (AMSAII) and published frequently in their journal *The American Journal of Insanity*.

[20] The national medical community here is limited to those considered "regular physicians." Regulars were practitioners who followed orthodox treatments and were part of the emerging, professionalized medical establishment.

[21] Throughout the last half of the nineteenth century, some experts called for state commissions of experts who would investigate criminal and civil trials involving insanity issues. For example, see William H. Stokes, "On a Court of Medical Experts in Cases of Insanity," *The American Journal of Insanity* 10 no. 2 (Oct 1853), 112 – 122.

services over and above that which arises from the ordinary relations of citizens."[22] Moreover, experts saw a particularly important connection between an orderly society and property. As Ray commented, "humanity" demands that property be removed from the control of those deemed insane; indeed, "the peace and safety of society demand it and the ultimate good of all parties are promoted by it."[23] This impulse toward using law to create a healthy polity manifested itself in the field of medical jurisprudence, which integrated scientific truth into law.

Benjamin Rush, an early proponent of medical jurisprudence thought that doctors could ensure a fair orderly inheritance system and economic stability in the new Republic by bringing the latest theories of insanity to courtrooms. Rush's student Charles Caldwell carried west to Lexington's Transylvania University his mentor's enthusiasm for melding science to law through medical jurisprudence.[24] By 1837, Caldwell left Transylvania University and signed on as a charter member of the Louisville Medical Institute, along with David Yandell's father, Lunsford Yandell.[25] Indeed, Kentucky was far from a medical backwater; during nineteenth century it claimed nationally respected experts such as Caldwell, Edward Jarvis, Daniel Drake, William Chipley and the Yandells, all who published prodigiously, shaped national dialogues on insanity, and influenced Kentucky's social and judicial institutions.

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[22] Isaac Ray, "Hints to the Medical Witness in Questions of Insanity," *American Journal of Insanity* 8 no. 1 (July 1851), 53.

[23] Isaac Ray, "American Legislation on Lunacy," *American Journal of Insanity* 21 no. 1 (1864), 21.

[24] White, "A Dialogue on Madness", 33-37.

[25] Nancy Disher Baird, *David Wendel Yandell: Physician of Old Louisville* (Lexington: University Press of Kentucky, 1978), 4-5.

Following the work of eighteenth century French doctors Esquirol and Phillippe Pinel, experts divided forms of insanity into categories including melancholia, epilepsy, monomania, mania, dementia, and idiocy.[26] In the first third of the nineteenth century, experts expanded those categories, asserting new theories of insanity. These theories included the existence of partial insanity, monomania (insanity on one subject), temporary insanity, and moral insanity or moral mania.[27] Until the rise of neurology and psychology in the late nineteenth century, most physicians located insanity in a theory of biological materialism, distinguishing the physical brain from the mind. Most experts understood the mind as a creation of God and incapable of defects.[28] Insanity resulted from a brain "lesion" which affected the mind, causing delusions and deviant behavior. As one author in *The American Journal of Insanity* asserted, "the immaterial and immortal mind is, of itself, incapable of disease and decay . . . The brain is the instrument which the mind uses in this life . . . and like all other parts of our bodies, is liable to disease."[29] As long as the mind was housed in a healthy brain, it dictated reasonable moral behavior. Experts situated adherence to a specific moral order as an outcome of a

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[26] These categories were delineated by eighteenth century French physicians Phillipe Pinel and Jean Etienne Esquirol. For examples of American experts applying these categories see William A Hammond, M.D., "Opinion Relative to the Testamentary Capacity of the Late James C. Johnston, of Chowan County, North Carolina," in *Insanity in its Medico-Legal Relations* (New York, Voorhis and Co, second edition, 1875. Original date, 1867), 8 and Edward Patterson, "Monomania as Affecting Testamentary Capacity," in *Papers Read Before the Medico-Legal Society of New York.* Third series, 1875 – 1878. Revised edition. (New York: The Medico-Legal Journal Association, 1886), 20.

[27] See Roy Porter, *Madness: A Brief History* (Oxford: Oxford University Press, 2000), especially Chapter Six, "The Rise of Psychiatry."

[28] Gerald N. Grob, "Presidential Address: Psychiatry's Holy Grail: The Search for the Mechanisms of Mental Diseases," *Bulletin of the History of Medicine* 72 no. 2 (1998): 192.

[29] No Author, "Definition of Insanity – Nature of Disease," *The American Journal of Insanity* 1 no. 2 (1844), 99.

disease-free brain. By equating the mind with the mandates of a divinely inspired order, experts medicalized a natural social and familial order.

Like local witnesses in testamentary capacity trials, experts explained insane behavior as a deviation from a constructed social order that they identified as "natural." In paper read before the New York Medico-Legal Society, Dr. Charles Lee referred to "natural feelings, affections and habits." Lee unquestionably accepted that sane testators transferred property along bloodlines when he called suspicious "a *civil act, as a will*, depriving a parent, brother, sister, or other relative, of an inheritance which would naturally, rightfully, and legally fall to them."[30] Lee saw inheritance as a public legal act, or as he put it, "*a civil act*" and as a private act reaffirming the naturalness of inter-familial property transmission. In one Kentucky trial, Yandell described testator Bannister Taylor's "unnatural actions," emphasizing that Taylor lacked the immutable feelings of "natural love and unnatural hate" between a father and daughter. Indeed, experts used the rhetoric of naturalness as way to distinguish behavior that deviated from a specific worldview. Although they explained this worldview using scientific nomenclature and rooted it in observable physiology, it rested upon an unquestioned, divinely-ordered cosmology.[31] These premises fused moral imperatives to scientific authority. Science supported religion by making "natural" specific models of social and

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[30] Charles A. Lee, MD., "A Medico-Legal Opinion Relative to the Sanity of Carlton Gates, in *Papers Read Before the Medico-Legal Society of New York.* Pgs. 204-234. First series. Third Edition. (New York: The Medico-Legal Journal Association, 1889), 208. Read before the Society Sept 8, 1870.

[31] See Gary S. Belkin, "Moral Insanity, Science and Religion in Nineteenth Century America: The Gray-Ray Debate," *History of Psychiatry* 7 (1996): 591 – 613, for a discussion of how theological views permeated scientific discourse, even between medical experts that disagreed on insanity etiologies.

familial organization. Indeed for many experts, legal mental capacity was a moral and legal issue.

To southern doctors in particular, racial ideology influenced how they understood the links between mental health, households, and social stability.[32] In an 1837 speech, physician Charles Caldwell promised that students at the newly opened Louisville Medical Institute would receive "*no sinister and perverting impressions respecting any of the domestic institutions of the south* [italics his]."[33] The Louisville Medical Institute would educate good doctors who, steeped in southern cultural sensibilities, affirmed the naturalness of slavery and southern social structure. This worldview countered anti-slavery advocates who argued that slavery created a pathological environment leading to social decay.[34] In 1855, the *New York Times* (quoting the *Chicago Tribune)* bluntly made the correlation between insanity and slavery, equating "acts of insanity" with introducing slavery into Kansas.[35] An individual's place within a balanced social order,

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[32] The notoriously flawed 1840 census suggested that few insane blacks lived in the south. In Maine however, every fourteenth African American was insane, leading southern pro-slavery politicians and some experts to suggest that freedom caused insanity in African Americans. Gerald N. Grob, *Edward Jarvis and the Medical World of Nineteenth-Century America* (Knoxville: University of Tennessee Press, 1978), 70-74. For analysis of the census see No Author, "Startling Facts from the Census," *The American Journal of Insanity* 8 no. 2 (Oct 1852): 153 – 155. Jarvis however, reviewed the statistical methodology finding it "groundless" and a "stumbling block" to pursing truth through science. Edward Jarvis, "Insanity Among the Colored Population of the Free States," *The American Journal of Insanity* 8 no. 3 (Jan 1852): 268 – 282.

[33] Charles M. Caldwell, "A Succinct View of the Influence of Mental Cultivation on the Destinies of Louisville, An Introductory Lecture Delivered at the Opening of the Louisville Medical Institute," 1837.

[34] See Harold D. Tallant, *Evil Necessity: Slavery and Political Culture in Antebellum Kentucky* (Lexington: University Press of Kentucky, 2003).

[35] *New York Daily Times*, August 14, 1855.

influenced by race, sex, class, age or occupation conditioned how doctors diagnosed insanity in individuals.

By 1840, experts expressed fears that insanity was becoming more prevalent. Immoral environments created by the vicissitudes of evolving civilization, they argued, propelled the increase. As Jarvis noted (quoting French physician Esquirol), "insanity is a disease of civilization and the number of the insane is in direct proportion to its progress." Removed from tradition-bound, static social orders, individuals engaged in behavior inconsonant with natural laws. In his article titled "On the Supposed Increase of Insanity," Louisville expert Edward Jarvis feared that the "neglect of the natural laws of self-government" would lead to "more dissipation."[36] To Jarvis, adhering to "natural laws," prevented mental unsoundness. White people were especially vulnerable to the deleterious effects of rapidly developing civilization, underscoring the degree to which conceptions of sanity turned on racial ideology. Jarvis observed that among people of color, insanity rarely existed because they lacked the capacity for progress. Citing Native American and African civilizations as evidence, he concluded that insanity "is seldom found in the savage state, while it is well known to be frequent in the civilized state."[37] The idea that African Americans were mentally inferior superimposed black barbarity against white civility, making apparent the need for racial regulation after slavery.

By offering medicalized definitions of rationality and insanity, experts supported notions of civilization that were crucial to maintaining and justifying a race and class

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[36] Edward Jarvis, "On the Supposed Increase of Insanity," *The American Journal of Insanity* 8 no. 4 (Apr 1852), 362.

[37] Ibid., 350.

stratified social hierarchy. In 1852, Jarvis called attention to how unchecked social mobility threatened mental health.[38] He noted that in caste-based societies, where children pursue their fathers occupation "undue mental excitements and struggles do not happen, and men's brains are not confused with new plans. . . as education prevails, and emancipates the new generations . . . and the manifold ways of life are open to all . . . men may . . . become insane."[39] Clearly, Jarvis feared disorder brought about by rapid social mobility. Many southern doctors argued that African Americans were prone to drapetomania, a form of insanity caused by an obsession with freedom.[40] They also contended that freedom made African Americans more susceptible to madness, because their simplistic thought processes precluded adjusting to the stresses of self-sovereignty.[41]

ESLA Superintendent William Chipley, prominent in national medico-legal societies, feared that the social upheaval caused by the Civil War would have profound effects on Kentuckians. Chipley contrasted the "virtuous, quiet, humble life of the past," against concerns about the effects of rapid social reorganization brought by political and social changes in Kentucky. Chipley believed that an "increase of mental diseases is one of the unhappy results of the unhallowed efforts of wicked men to revolutionize

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[38] Grob, *Edward Jarvis and the Medical World of Nineteenth-Century America*, 45. Jarvis opposed the institution of slavery, but believed in the inherent inferiority of African Americans.

[39] Edward Jarvis, "On the Supposed Increase of Insanity," *The American Journal of Insanity* 8 no. 4 (Apr 1852), 361.

[40] Samuel A. Cartwright, "Report on the Diseases and Physical Particularities of the Negro," *The New Orleans Medical and Surgical Journal* 7 (1851), 707-708.

[41] John S. Hughes, "Labeling and Treating Black Mental Illness in Alabama, 1861-1910," *The Journal of Southern History* 58 (August 1993), 435- 460.

established government by violence."[42] By the late nineteenth century, this line of reasoning developed into a full-fledged critique that the environmental influences of a rapidly changing civilization posed dire public mental health threats. The connection between progress and insanity required that experts use their knowledge to preserve social order against the intransigent forces of chaos that accompanied change.

Like politicians, jurists, and community members, many experts saw disrupted familial relations and insanity as mutually causative. Jarvis contended that "a large portion of the cases of lunacy arise directly from the trials, difficulties and misunderstandings of home."[43] Insane people living in communities presented a "burden upon their families, a terror on society."[44] Kentucky experts concurred. In his 1879 "Report to the Legislature," ESLA Superintendent R.C. Chenault listed religious excitement, domestic trouble, separation from husband, wife, or parents, and loss of property as "alleged causes" of insanity among Kentuckians confined there. Experts noted with trepidation that while physical causes of insanity remained constant or even decreased, the "moral" causes of insanity increased alarmingly.[45] Insane individuals

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[42] "Reports of American Insanity," *The American Journal of Insanity* 21 no. 4 (April 1865), 567-8.

[43] Edward Jarvis, "What Shall Do With Our Insane?" *The Western Journal of Medicine and Science,* 5 no. 2 (Feb 1842), 81. Jarvis spent a few years in Louisville before moving to Massachusetts, where he wrote the 1855 *Massachusetts Report on Insanity and Idiocy,* which his peers considered the most comprehensive examination of insanity in the nineteenth century.

[44] Edward Jarvis, "What Shall Do With Our Insane?" *The Western Journal of Medicine and Science* 5 no. 2 (Feb 1842), 82.

[45] Edward Jarvis, "On the Supposed Increase of Insanity," *The American Journal of Insanity* 8 no. 4 (Apr 1852), 333-364.

within households epitomized broader fears of social and moral degeneration caused by seemingly irrational forces.

Mental incapacity at least theoretically, was determined by a diseased brain – without disease, insanity did not exist. The expert diagnoses that connected cerebral lesions with the behavior obscures how medical discourses of insanity were infused with prevailing ideas about the legitimacy of social and legal relations. Experts testifying in testamentary capacity cases were called to diagnose dead testators who they had never met. Although they believed the testator's brain was diseased, it was impossible to prove. Therefore, they had to rely on behavioral indicators, creating tautological declarations in their testimonies. A diseased brain indicated insanity, which was made obvious by aberrant behavior caused by a diseased brain. Doctors did turn to the body as an indicator of mental disease (discussed in Chapter Four), but generally, their testimonies were based on behavioral descriptions presented by attorney's interrogatories.

For example, in testamentary capacity cases, many experts reasoned that brain deterioration produced delusions that rendered a testator particularly susceptible to undue influence. Experts drew upon social tropes that identified beneficiaries considered disreputable and unworthy of inheritance. Property transmission outside of bloodlines became an outcome of disease rather than an expression of free will. While delivering a paper to the New York Medico-Legal association, Isaac Ray cautioned other experts that,

> When we consider the enfeebling effect on body and mind of a long last illness . . . and of the utter prostration of the will produced by pain and a sense of complete dependence, we can scarcely conceive of conditions better fitted for the exercise of undue influence. An old man marries a young woman, and within a year or two dies, leaving a will greatly in her favor, much to the

> disappointment of relatives who would otherwise have received the whole of the estate.[46]

Ray's example of undue influence reveals the kind of relationship he considered likely to threaten testamentary freedom. Ray deemed suspect the marital relationship between the testator and beneficiary, largely due to their age difference. Ray portrayed the influencer as a scheming, duplicitous wife using a sham marriage to acquire the testator's wealth. Ray medicalized the perils to legitimate heirs of late life marriages. Like local witnesses who excluded second wives from economic membership in families (see Ch. 1), Ray endorsed a system of property transmission based on bloodline heirs. Marriage occurred between young people and produced legitimate heirs who received their deceased father's estate. Ray medicalized as reflecting possible insanity marriage and property transmission that outside of those parameters.

David Yandell illustrated how deviation from prescribed social roles might indicate insanity during his testimony in *Taylor v. Minor* (1885). Testator Bannister Taylor disinherited his daughter who married against his wishes. Yandell testified that

> [I]nsanity of any kind is made manifest is in a departure from the ordinary methods of acting speaking or thinking. If we were to see a Bishop in his shirtsleaves [sic] moving around the haunts of the Irishman . . . if persisted in towards we would know that it was so far a departure . . . that we would be forced to the conclusion that the person was insane.[47]

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[46] Ray, "Testamentary Capacity," 434.

[47] "Testimony of DW Yandell" Transcript, *Taylor v. Minor* (1885), Case 16241, Box 671, KCAR, KDLA.

By comparing a bishop against the degenerate Irishman, often depicted as a non-white racial other, Yandell reinforced class and racial structure by binding consistent deviation from sanctioned behavior to insanity.[48] His comparison linking superiority and degeneracy to racial/ethnic identity represented medical truth in the courtroom. Yet Yandell's testimony did allow for some deviation from ascribed social roles. Yandell believed that this behavior indicated insanity only if it "persisted." Occasional lapses had little consequence, permitting testators to engage in socially deviant behavior on occasion, as long as such behavior did not appear coincident with their race and social position. These diagnoses influenced property transmission in testamentary capacity cases, and more broadly, publicly articulated acceptable behavior.

In testamentary capacity trials, the question for expert witnesses hinged on whether they believed that disease rendered testators unable to control the act of testation, or if by their own volition disregarded their heirs-at-law. Nationally prominent expert witness doctor William Hammond distinguished insanity as a disregard of heirs-at-law due to "general or partial derangement of one or more faculties of the mind, which, whilst not abolishing consciousness, prevents freedom of mind or action."[49] Newly promulgated theories of insanity allowed experts to exercise scientific and moral authority by distinguishing between immorality and insanity. In perhaps the most influential medical jurisprudence treatise of the nineteenth century, Isaac Ray popularized among experts the theory that only the brain's affective faculties could be diseased,

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[48] Matthew Frye Jacobsen, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge: Harvard University Press, 1999).

[49] Hammond, M.D., "Opinion Relative to the Testamentary Capacity of the Late James C. Johnson, of Chowan County, North Carolina," 9.

appearing to leave undisturbed the intellectual faculties.[50] Ray characterized this form as a "mental disease that is chiefly confined to the moral sentiments and affections, the intellectual *powers* evincing no appreciable derangement."[51] Termed moral insanity or moral mania, Ray contended it "furnishes good ground for invalidating civil acts, for notwithstanding the apparent integrity of the intellectual powers."[52] The idea that only moral faculties could be diseased allowed experts to diagnose certain social behaviors as reflecting a diseased brain rather than as indications of deliberate moral depravity.

Several expert witnesses brought Ray's morphology into Kentucky courtrooms, contending that the intellect could remain free from disease while insanity affected the emotive and affective faculties. By making these claims, they focused on the social or emotional aspects of the testator's conduct, allowing them to separate seemingly sane conduct in business or intellectual pursuits from emotional relationships. In *Pecancet v. Grayson* (1872) Eliza Atkinson bequeathed her estate inherited from her husband, to Colonel Grayson, whose family took care of her during her final illness. Atkinson disinherited her husband's son by his first marriage. Atkinson had deviated from prevailing gender expectations of a sober, sedate widow by enjoying a flamboyant widowhood characterized by, as the Court of Appeals noted, "passions for men and

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[50] Ray was not the first to develop a theory of faculty psychology which he attributed to Pinel.

[51] Ray, "Hints to Medical Witnesses; Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity* (Boston: Charles C. Little and James Brown, 1838). Ray's treatise went through several editions throughout the nineteenth century. Although moral insanity was discredited by 1900, Ray remained committed to it through the 1880's.

[52] Ray, *A Treatise on the Medical Jurisprudence of Insanity,* 258.

ardent spirits."[53] Physician J.L. Dismukes, Atkinson's personal physician, testified that Atkinson's "emotions and affections were perverted evidently while there was considerable vigor and activity of intellectual powers."[54] Dismukes supported his diagnosis of "partial insanity" by referring to her behavior as "strikingly unfeminine in several particulars" noting that the "exciting causes" of her insanity were "Nymphomania . . . with the vanity of fashion." Atkinson's heterodox behavior clashed with prevailing gender and age appropriate behavior. Insanity theories that separated intellectual from moral and affective behaviors were conducive to insanity diagnoses that focused narrowly on deviant behavior.

Experts also inscribed economic imperatives on the moral ideology of sanity. They used the rhetoric of naturalness to declare as medical truth the idea that familial affection would be expressed through property bequests, especially when deserving heirs at law appeared economically deprived. Dismukes testified that Atkinson had "an insane aversion and hatred for those of natural ties, that ought to be nearest and dearest. I would suspect the sanity of any-one, who without known and sufficient cause, had an aversion toward one or those who should be the object of ones bounty and affection."[55] In *Williams v. Williams* (1893), when asked if Williams could make a will considering his religious convictions, Yandell replied,

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[53] *Pecancet v. Grayson,* 6 Ky. Op. 80 (1872).

[54] "Testimony of Dr. JL Dismukes" Transcript of *Pecancet v. Grayson* (1872), Case 5727, Box 225, KCAR, KDLA. Dismukes was a graduate of the University of Pennsylvania medical school, where Benjamin Rush taught. He testified as an expert and was also Atkinson's personal physician, giving him the opportunity to comment directly on her conduct.

[55] Ibid.

> He was of unsound mind & could not make a will. . . There is nothing thicker than blood. If a man gives his property to the church and leaves out his kin. I don't think he is sane. It would be different if they were rich: but if they were poor, don't think he could do it under those circumstances.[56]

Yandell linked insanity to deviation from patterns of family wealth preservation in which fathers valued upward economic mobility for their children. By asserting that "there is nothing thicker than blood," Yandell equated sanity with wealth transmission within the racially-bounded institution of the family. William's religious fervor was the ostensible indication of insanity; yet his will would have gone unchallenged had he bequeathed wealth to his heirs-at-law.

As conduits of specialized knowledge, experts argued that their medical knowledge was required in courtrooms. If the testator was morally insane or a monomaniac, (insane on only one subject), experts contended, family members, beneficiaries or the testator could conceal the disease. As Dr. Caldwell (not Charles Caldwell), a local doctor testifying in *Taylor v. Minor* (1885), noted, "A person may be a monomaniac upon a given subject and it may not even be detected by his friends and near neighbors for many years."[57] Family members also deliberately concealed insanity in order to maintain authority, requiring experts to uncover these deceptions. Families would protect members to avoid the stigma and disadvantages associated with insanity by tolerating as one expert characterized it, "the outrageous conduct of one of their number

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56 "Testimony of David W. Yandall," Transcript of *Williams v. Williams* (1893), Case #22461, Box 983, KCAR, KDLA.

57 "Testimony of Dr. Caldwell" in Transcript, *Taylor v. Minor* (1885), Case 16241, Box 671, KCAR, KDLA.

uncomplainingly, while the outside world does not suspect a thing is wrong."[58] In *Williams v. Williams* (1893), ex-slave Cynthia Williams recalled, "I knew they kept his crazyness [sic] a secret from blacks."[59] That Cynthia Williams identified Joe Williams' behavior as "crazyness" indicates that, at least on the Williams farm, African-American slaves and whites shared recognition of mental incapacity and its effects on authority. The white Williamses may have concealed Joe Williams' deviant behavior in order to maintain his – and their – authority, reaffirming the link between masculinity, mental capacity, and household authority. In *Williams v. Williams* Yandell confirmed that insanity could be missed by laypeople, testifying that a man "may be all right on every thing else . . . but will show his insanity when he comes to that [in this case, religion]."[60] The potential for deceit by those afflicted or their families required a trained expert to diagnose mental afflictions.

The idea that testators or beneficiaries could conceal insanity allowed challengers to wills to press cases with scant or conflicting evidence. In *Spears v. Sales* (1867) for example, the contestants' attorneys made a case for the frequency of unrecognized insanity, citing the "able treties" [sic] of medical jurisprudence to claim that insanity "is seen in the domestic circle of the afflicted person and those composing that circle know its existance [sic] and feel its terrible power, when others cannot observe it. This affection is far more common in the ordinary walks of society than is generaly [sic]

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[58] Henry Smith Williams, "Social Relations of the Insane," *North American Review* 157 (Nov 1893), 613.

[59] "Testimony of Cynthia Williams," Transcript, *Williams v. Williams* (1893), Case 22461, Box 982, KCAR, KDLA.

[60] "Testimony of David W. Yandall," Transcript, *Williams v. Williams* (1893), Case #22461, Box 982, KCAR, KDLA.

imagined."[61] Such expansive definitions of insanity meant that diagnosing insanity required vigilance and expertise. The challengers advanced this argument as a strategy to counter conflicting testimony by, as the Court phrased it, "all the witnesses who testified in the case, except his wife, say he was competent to . . . manage his own affairs with as much skill and judgment as men of common sense."[62] By arguing for the frequent yet undetected occurrence of insanity in "ordinary walks of society," the attorneys characterized local witnesses easily deceived, making experts necessary. All testators were potentially insane.

Many medical experts and some jurists agreed that local juries lacked the sophistication and knowledge required to pass judgment on the deceased's mental condition. Decisions reached by juries, many experts contended, were likely to reflect local community prejudices, lack of medical knowledge, or simply replace the testator's judgment with their own. "The most erroneous verdicts," John Ordroneaux, the New York State Commissioner on Lunacy argued, "against facts, commonsense and evidence have been rendered by juries in civil and criminal issues of insanity."[63] Instead, Ordroneaux argued, "a panel of three upright judges" should pass judgment rather than "twelve unlearned laymen." Other experts called for independent panel of physicians to pass judgment on insanity issues. One author, critical of jury trials argued that "unscientific," and "probably illiterate men" composed juries, who were unable to

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61 "Appellee's Brief," in *Spears v. Sale* (1867), Case 1251, Box 45, KCAR, KDLA.

62 *Spears v. Sales,* 2 Ky.Op. 150 (1867).

63 John Ordoneaux, "The Proper Status of the Insane and Feebleminded," in *Papers Read Before the Medico-Legal Society of New York.* Third series, 1875 – 1878. Revised edition. (New York: The Medico-Legal Journal Association, 1886): 64.

"properly apply medical principles without medical education and experience."[64] As purveyors of specialized knowledge, their expertise uniquely positioned experts to make decisions that local juries could not. By making distinctions based on their "education and experience" experts engaged in a process of professionalization in which they claimed social and legal authority.

Ordroneaux argued that justice permitted depriving the insane of a jury trial, thereby clearing the way for decisions reached by a panel of judges or doctors. Juries were reserved for citizens, he contended, and a prerequisite of citizenship was that "all men are rational beings." While the insane were, as he put it, "civilly *in* the State, they are not civilly *of* the State."[65] This position made civil participation (including testamentary freedom) dependent on a disputed standard of rationality, and made experts the arbiters of that standard upon which citizenship rights were contingent. In this logic, medical diagnoses sanctioned by legal authority either opened or closed gateways to rights and "legal responsibilities," including testamentary freedoms. It created an integral role for experts in the adjudication of wealth transfers. Experts' hostility to juries, although ostensibly about medical and legal complexities, reflected the belief that some experts saw themselves as the appropriate judges of fairness, morality, and just property disposition, superceding testators, judges, and local juries.

Other experts challenged esoteric definitions of insanity and the inability of laypeople to discern insanity. In *Taylor v. Minor* (1885) Dr. Cleaver, the expert testifying

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[64] No Author, Review of *The Law of Wills* by Isaac Redfield, *The American Journal of Insanity* 21 no. 3 (January 1865), 406-7.

[65] Ordroneaux, "The Proper Status of the Insane and Feebleminded," 51.

for the proponents of the will and opposing Yandell, asserted that in its early stages, insanity "may be difficult to detect but it soon so far overpowers the mind as to disclose itself to common observation."[66] These experts argued that the brain was a holistic organ; insanity affected all aspects of brain function, including the intellectual and moral, which led to observable behavioral changes. This disagreement over the diagnosing insanity created a need for both litigants to present experts if funds permitted, or to risk having the opposing litigants' expert pronouncements go unanswered. Among experts however, the debate was genuine, stemming from disagreements over the cerebral structure of the brain.

After the Civil War medical experts imported from outside local communities took more prominent, if controversial roles in trials, including several highly publicized will disputes. One of New York's leading families, the Vanderbilts, became involved in a protracted, publicized will dispute that featured leading national experts who debated in detail the behavior and mental capacity of one of New York's most successful capitalists, Commodore Vanderbilt.[67] The will and conduct of President Millard Fillmore's wife was subjected to public scrutiny during two will disputes in which an expert characterized her as a chronic maniac, suffering from "hallucinations, delusions and illusions."[68] Indeed, trials involving insanity issues divested individuals of legal

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66 "Testimony of Dr. Cleaver," Transcript, *Taylor v. Minor* (1885), Case 16241, Box 671, KCAR, KDLA. Cleaver's credentials did not rival Yandell's as a medical expert. Cleaver had worked at Louisville University and "had taken considerable pains to acquaint myself with the subject of sanity and insanity."

67 "The Vanderbilt Will Case," *New York Times,* March 9, 1877; An Expert on Insanity, *New York Times*, February 27, 1879.

68 "The Fillmore Will Contest," *The New York Times*, November 21, 1883.

independence, social authority, and reputations of honor. High profile trials, whether lunatic inquests, criminal insanity trials, or will disputes brought expert testimony and mental capacity issues into public awareness.

As experts gained public visibility, controversy followed. Newspaper reports and word of mouth suggested that liberal use of new theories propounded by experts unjustly deprived citizens of liberty and encouraged disgruntled heirs-at-law to assail carefully planned wills.[69] As one *New York Times* journalist lamented, "Many a poor fellow has lost his reputation, property, and even liberty by the unskilled and purchased opinion of an expert."[70] In 1864, Elizabeth Packard led highly publicized campaign for legal protections against involuntary commitment after her husband, aided by an Illinois asylum superintendent, committed her to an asylum for three years. The campaign and subsequent state "Personal Liberty" laws highlighted collusion between experts and designing relatives seeking to use an insanity diagnosis to remove troublesome relatives.[71] The idea that experts conveyed flawed knowledge or deliberately conspired to deprive people of property rights and freedom tarnished experts' credibility and the questioned their diagnostic authority.

Medical experts had long understood that the confrontational arrangement of trial courts created a situation which led opposing lawyers to assail their credibility during grueling cross-examinations. W.J. Conklin, a professor of physiology, complained that it

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[69] James C. Mohr, "The Paradoxical Advance and Embattled Retreat of the "Unsound Mind": Evidence of Insanity and the Adjucation of Wills in Nineteenth Century America," *Historical Reflections* 24 no. 3 (1998): 415 – 435. See also Mohr, *Doctors and the Law*, esp. Chapters Eleven and Twelve.

[70] *New York Times,* "Medical Experts in Court," December 12, 1884.

[71] Mohr, *Doctors and the Law*, 165-168.

was "unfair" to fault experts with confusion caused by conflicting testimony, contending that it was counsel's task to "make the *evidence conflicting.*"[72] Even before expert testimony became widespread, lawyers capitalized upon the equivocation and theoretical disputes that characterized experts' theories of insanity. In *Johnson v. Moore* (1822), the beneficiaries' attorneys harshly criticized the value of expert testimony condemning

> the varying and conflicting systems of the schools, which profess to disclose the causes, characteristics, grades and effects of mental maladies. From the days of Hippocrates to those of Rush, what has been added, on this interesting and unlawful inquiry, to the stock of human knowledge but a succession of short-lived theories, founded on conjecture, and ending in the establishment of constructive madness.[73]

Isaac Ray, an ardent advocate of expert witnesses, warned in 1851 that if unprepared, experts were in danger of "*breaking down* on the witness stand [italics his]" under cross-examination.[74] James O'Dea told the Medico-Legal Society of New York in 1871 that "hostile criticism is usually to be expected from lawyers in the interests of their clients, but it is too often carried beyond the bounds of moderation."[75] O'Dea faulted judges as well, noting that the "heat engendered by a closely-contested case may palliate" lawyers' excesses, but "there is no such apology for the conduct of judges who allow scientific

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[72] W.J. Conklin, "The Medical Expert," *The Ohio Medical and Surgical Journal* (April 1878), 133.

[73] "Petition for Rehearing," in *Johnson v. Moore,* 11Ky. 371 (1822).

[74] Ray, "Hints to the Medical Witnesses, 54.

[75] James J. O'Dea, M.D., "The Sphere, Rights and Obligations of Medical Experts," 402 - 443 in in *Papers Read Before the Medico-Legal Society of New York.* First series, Third edition. (New York: The Medico-Legal Journal Association, 1889), 414.

testimony to be indecorously handled."[76] Indeed, medical and legal professionals saw the increase of expert witnesses as a part of a greater struggle over the authority to define insanity and its attendant legal consequences. As one expert wrote, "the profession of medicine can not prostrate itself to the procrustean bed of ancient legal prejudices."[77] Indeed, far from the cooperative impulses that propelled early medical jurists, by mid-century, many medical experts felt besieged as they tried to bring the truths of science to law.

Jurists and medical experts agreed that moral behavior reflected sanity. Many experts however, defined insanity capaciously, pronouncing mentally unsound testators whose bequests coincided with the juridical goal of maintaining a stable inheritance system.[78] In some cases, when experts did not testify, lawyers and local doctors cited new insanity theories to frame judgments about the justness of the will and the testator. Lacking the specialized training of insanity experts, these local physicians appropriated the grammar of insanity to leverage experts' medical and social authority. References to moral insanity, partial insanity, different forms of monomania and other terms associated with scientific nomenclature, became commonplace.

For a brief moment between 1865 and the early 1870's, the Court appeared ready to accept new medical ideas about the nature of the human mind and its relationship to independent volition. Ultimately however, the Court rejected medical experts' opinions as unreliable and undermining the respect for self-sovereignty embedded in the law.

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[76] O'Dea, M.D., "The Sphere, Rights and Obligations of Medical Experts," 415.

[77] Eugene Grissom, "True and False Experts," *The American Journal of Insanity* 35 (July 1878), 36.

[78] Mohr, "The Paradoxical Advance and Embattled Retreat of the "Unsound Mind," 415 – 435.

Kentucky Court of Appeals judges diminished the influence of the new controversial theories of insanity, in part by hardening a juridical distinction between the legal definition of "mental capacity" and medical definitions of "insanity." The Court concentrated on the immediate circumstances surrounding testators' testamentary decisions as well as the socio-economic outcome wrought by the property distribution. Until new psychological paradigms emerged in the late nineteenth and early twentieth century, Kentucky jurists minimized the discursive power of medical experts' diagnoses in testamentary capacity law.

From Kentucky's earliest cases, Court of Appeals judges viewed with ambivalence the credibility and usefulness of medical testimony. In *In re Cochran* (1814), Justice Logan cautioned against assigning too much value to a local physician's diagnosis of insanity. He dismissed the testimony, holding that

> The knowledge of the physician does not relate to the time the will was made . . . and it is therefore by inference only that his testimony is made to apply to that day. . . [I]ndulging in presumption of such dubious complexion, we cannot think a Court justifiable in arresting the will of a man.[79]

Logan rejected the contention that Cochran's incapacity continued after the physician observed him. By upholding "the will of a man," through a high evidentiary standard, Logan reinforced masculine prerogative to control property at a time when the almost all testators were men. The Court ruled similarly in 1840, disregarding a physician's diagnosis of chronic and progressive monomania.[80] As new theories emerged which

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[79] *In re Cochran's Will,* 6 Ky. 491 (1814).

[80] *In re Weir's Will,* 39 Ky. 434 (1840).

explained insanity as chronic and terminal without medical intervention, the court moved to preserve testators' self -sovereignty and property rights from medical determinism by reserving the right to review jury verdicts for "law and fact."

In 1829, Francis M'Daniel's slaves defended their testamentary manumissions against a mental incapacity challenge from M'Daniel's children. Three doctors testified, all reaching different opinions. The Court dismissed the physicians' opinion, contending that the mind was a subject "which the most experienced and erudite understand but very imperfectly."[81] The Court decided that "the opinions of witnesses are not entitled to much influence," holding that a disposing mind would be determined by the "facts of each case, than by any comprehensive definition."[82] The Court upheld the will, sanctioning the slave manumissions and overturning the local jury verdict.

Upholding Francis M'Daniel's bequests solidified the Court's position as the final arbiter of capacity against juries prejudiced by personal judgments and incursions by medical authorities. In *In re McDaniels*, the manumissions were congruent with the image of a benevolent master and husband. M'Daniel's wife had made a deathbed request that he manumit the slaves in his will. The will itself evinced no sexual or familial improprieties as M'Daniel had divided the remaining property between his children. The Court expressed little concern over M'Daniel's mental condition outside of the testamentary expressions of his familial obligations, holding that a will reflecting "rationality and equality . . . conclusive of sanity." The Court of Appeals propounded a narrow concern with capacity, linking it to the cultural messages transmitted in the

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[81] *In re McDaniels,* 25 Ky. 331 (1829).

[82] Ibid.

property distribution and the will's economic effect on the family. The will itself rather than physician opinion, local witness opinion, or jury verdict constituted important, but not conclusive, evidence in determining sanity.

In 1857 and again in 1874 after legislative revisions to the law of wills, the Court reviewed trial evidence in will disputes, interpreting the new statutory revisions to re-affirm itself as the final adjudicator of *"both law and fact"* [italics theirs].[83] In the 1857 case *Overton's Heirs v. Overton's Executors*, the Court accepted the "presumption of a lucid interval with a lunatic," as long as the will was "sensible, proper, and judicious." Many medical experts approached cautiously the existence of rationality during lucid intervals, believing that once the physical brain became diseased, insanity existed unless treatment restored a healthy brain.[84] Jurists however, sanctioned the doctrine of lucid intervals; their concern was not whether the brain was diseased, but whether testators treated justly their heirs-at-law. The Court carved out latitude to rule in light of contradictory evidence. When wills appeared fair, doctrines like lucid intervals served as judicial explanations for otherwise deviant conduct that may have indicated insanity.

Indeed, insanity as a medical diagnosis was both broader and narrower than judicial definitions of capacity. Medical insanity, as experts theorized it, required a deterministic relationship between disease and volitional unfreedom that exceeded most jurists' narrow concerns over promoting the integrity of the family through property distribution. For Court of Appeals justices "capacity" meant that testators *appeared* to

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[83] *Overton's Heirs v. Overton's Executors,* 57 Ky. 61 (1857); *Broaddus' Devisees v. Broaddus' Heirs,* 73 Ky. 299 (1874).

[84] See Hammond, M.D., "Opinion Relative to the Testamentary Capacity of the Late James C. Johnson, of Chowan County, North Carolina," 35.

exercise free will. Making culturally acceptable judgments about their heirs-at-law constituted strong evidence in favor of legal mental capacity. As Isaac Ray complained, courts hesitated to overturn wills appearing "correct and judicious, merely because a rigid scrutiny of the testator's life might detect some evidence of insanity."[85] Ray dismayed that jurists misunderstood the distinction between incapacity and insanity, telling the Medico-Legal Society of New York that in questions of mental unsoundness,

> at first blush this would seem to be strictly a medical question, and so regarding it, the physician considers it as a matter of health or disease, of normal or abnormal condition. The jurist, on the other hand, ignoring entirely the physical element implied in the question, considers it solely as a matter of mental capacity.[86]

Dissonance between juridical and medical definitions and expansive medical diagnoses prodded the Court to reaffirm its three-pronged capacity test, focusing on the testator's ability to recognize the "natural" objects of his bounty.

Mirroring national trends, local doctors, lawyers and the increasing appearance of experts as witnesses brought the new grammar of insanity into Kentucky courtrooms. The most frequent explicator of medical knowledge, local attending physicians with varying degrees of education almost always testified about any diseases for which they treated the testator and the possible effects of mental capacity. When local doctors knew the testator and the heirs-at-law, they drew upon their community prestige, local

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[85] Isaac Ray, "Review of Redfield's 'The Law of Wills,'" *The American Journal of Insanity* 21 no 4 (April 1865), 514.

[86] Isaac Ray, "Testamentary Capacity," in *Papers Read Before the Medico-Legal Society of New York,* Third series, 1875 – 1878. Revised edition. (New York: The Medico-Legal Journal Association, 1886), 421.

knowledge of social relations, and medical authority in a way that medical experts brought in from outside the community could not. As men who lived within local communities, local doctors were ideally poised to draw upon powerful community ideas about "natural" family relations. In such cases, the Court of Appeals closely reviewed the weight the trial judge gave to local physician opinion when instructing the jury on evidentiary standards.

In *Ross v. Weaver* (1881) Anne Cooke, a purported brothel-owner, disinherited her sister Jane Weaver and left most of her estate to her "paramour," James Ross. Not only did Cooke have reputation for prostitution, she openly and unrepentantly lived in an unmarried consensual sexual relationship. Local Dr. LC Porter testified that he thought Cooke "was intellectually sane and capable of making a will but she was morally insane." Porter's diagnosis suggested that Cooke did not willingly act immorally. She lacked free will and that explained her behavior and justified disregarding her will. In a statement rare for its candor, the court clerk quoted Porter as testifying that "if the will was made correctly or good he would say she was competent but if it was a bad will he should say she was incompetent."[87] Using the medicalized grammar of insanity, Porter sought to chasten Anne Cooke's flaunting of community values by marking her conduct as "morally insane" and impeding her ability to transmit property. By testifying that it was a "bad will," Porter condemned Cooke's choice of Ross as her beneficiary. Porter's diagnosis reflected his moral judgment of her conduct, derived from personal observation as a community member and as her attending physician.

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87 "Testimony of Dr. LC Porter," in Transcript, *Ross v. Weaver,* (1881), Case 13247, Box 527, KCAR, KDLA.

Rather than adhere to the narrow legal test for capacity, which he grudgingly admitted she passed, Porter employed several forms of authority in an effort to enforce his moral judgment. He presented his diagnosis as medical truth, connecting physical disease to her volitional ability. He contended that "Her disease was a . . . utarine affection [sic]. From her debilitated condition she was amenable to the influence of others but her mind was clear." The Court however, moved to protect Cooke's testamentary freedom from incursions derived from such a dubious diagnosis. Judge Pryor simultaneously confirmed Porter's censure of Cooke's conduct while abrogating Porter's medical authority. He held that Cooke's "depravity," rather than any medical reason induced Porter to testify to her moral insanity. He concluded that "although she may have been an abandoned woman she nevertheless had the right to dispose of her estate as she saw proper, and it was simply a question of her mental capacity." Pryor rejected medicalizing Cooke's moral egress as insanity. He disconnected Porter's judgment of the justice of the dispositions from his diagnosis of moral insanity.

Indeed, judges monitored closely local doctors' judgments when they presented them as medical truth. In *Bledsoe's Executrix v. Bledsoe* (1886), several local doctors testified that testator Samuel Bledsoe had Bright's disease, a degenerative kidney disease.[88] Drs. Connell and Brown pronounced Bledsoe insane, pointing out his "excentricities." As further proof, Dr. JW Connell quoted national medical expert Dr. WA Hammond, who "gives excentricity as an evidence of insanity."[89] (Although

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[88] See Chapter one for an extensive discussion of other aspects of *Bledsoe's Executrix v. Bledsoe,* 1 S.W. 10 (1886).

[89] "Testimony of Dr. JW Connell," in Transcript *Bledsoe's Executrix v. Bledsoe* (1886), Case 716, Box 17095, KCAR, KDLA.

Connell may not have known, several national medical experts recently had discredited Hammond as a mercenary witness willing to diagnose anyone insane.[90]) Dr. James A. Brown testified that Bright's disease "dulls the mental faculties" leading to insanity manifested in "prejudice of parent against a child without cause is considered as one of the highest evidences of insanity."[91] Connell and Brown medicalized Bledsoe's deviant behavior toward his children as a manifestation of kidney disease over which they had unique knowledge and authority. Each doctor infused their medical diagnosis with prevailing ideas about the naturalness of family.

Other local doctors, however, disagreed with the insanity etiologies put forth by Brown and Connell. Dr. JT Robinson, who knew Bledsoe for twenty years, agreed that Bledsoe suffered from Bright's disease. Robinson admitted that he believed that Bledsoe had "peculiarities," but did not associate them with the kidney aliment. Robinson contended that in Bright's patients, the "mind is not affected by the disease til it produces coma."[92] Another doctor testified that Bright's disease had no direct "effect on the brain til it produces convulsions."[93] These two doctors presented reading of the relationship between Bright's disease and insanity contrary to the local physicians called by the challengers. This sort of conflicting testimony illustrates multiple constructions of

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[90] Clearly, Connell was unaware of Hammond's reputation or figured the jury would not know. Grissom, "True and False Experts, 1-36; Mohr, *Doctors and the Law.*

[91] "Testimony of Dr. JW Connell," Transcript of *Bledsoe's Executrix v. Bledsoe* (1886), Case 716, Box 17095, KCAR, KDLA.

[92] "Testimony of Dr. JT Robinson," Transcript of *Bledsoe's Executrix v. Bledsoe* (1886), Case 716, Box 17095, KCAR, KDLA.

[93] Ibid.

insanity that physicians articulated in local courtrooms. All twelve jurymen were unequivocal; they returned a verdict overturning the will and restoring an equal distribution of property among Bledsoe's disinherited sons.

Reviewing the evidence, the Court of Appeals overturned the verdict, questioning the persuasiveness of the evidence to justify denying Bledsoe's his testamentary freedom. Judge Holt's decision conveyed his skepticism of the trial evidence and stopped the lower court from creating an informal higher standard of capacity contingent on local opinions of Bledsoe's character or bequests. Although Holt admitted that the evidence was "quite conflicting," he chastised the lower court for instructing the jury on a higher test of sanity than that sanctioned by the Court. The lower court judge instructed that there must be "strong, *convincing* evidence" of a "rational mind" when a testator devised unequally among his children. Holt insisted that trial judges cannot "mislead the minds of the jury from the real issue of capacity or undue influence. These are the only questions upon which the jury should be instructed."[94] The Court struck a blow for testamentary freedom holding that if a testator has capacity, "he may make as unequal a disposition of it among his children as he pleases, or even disinherit them." The Court upheld testator's rights, and at the same time, reinforced the informal regulatory power over families by male heads-of-household who had testamentary rights.

Bledsoe and *Ross v. Weaver* should not be read as ringing endorsements of testatorial privilege to indiscriminately disinherit heirs-at-law. Nor should these cases be read as a complete rejection of the acceptability of local physician testimony. Local doctors continued to appear regularly, often without comment from the bench. In

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[94] *Bledsoe's Executrix v. Bledsoe,* 1 S.W. 10 (1886).

Bledsoe and *Weaver,* the Court made clear that it weighed carefully how local judges explained the standard of capacity to juries, particularly in instances when the jury or witnesses appeared to allow their own opinions of the testator or the justness of the will to influence testimony or verdicts. Although many people thought Samuel Bledsoe was a cantankerous man of "bitter prejudices," Bledsoe's devises reflected his paternal obligations to his daughter Manerva, who had spent years as his caretaker, and as an unmarried woman, had few prospects for financial security. In *Ross v. Weaver* the Court determined that Anne Cooke's heirs-at-law had not performed adequately their familial obligations to her. These cases show how the Court established consistently reviewed and assessed the sources of knowledge that influenced the jury. The court reined in local doctors who would use medical authority to expand their moral and social influence over juries. It reinforced a legal definition of capacity that was removed from overly deterministic conclusions.

By 1860, expert witnesses had become more pervasive nationally and in Kentucky. These experts came from prestigious institutions and claimed years of experience. New discourses of insanity regularly appeared in experts' testimonies and lawyers' briefs. The debates over medico-jurists' theories challenged state courts to develop legal doctrines that explained the nature of the human mind and independent volition. Courts wrestled with how to establish the line between individuals who had mental capacity but were morally depraved, and those who lacked mental capacity and therefore were not responsible legally for their actions. The Kentucky Court of Appeals approached cautiously the implications of recognizing new forms of insanity. In 1863, the Court hesitated to accept moral insanity as a criminal defense, calling it an "abstruse

and perplexing subject."[95] Accepting moral insanity as an explanation for immoral behavior, they feared, could "destroy social order as well as personal safety."[96] Although the tests for mental capacity differed for criminal and civil cases, both types of trials dealt with the same issue: free will. In criminal trials the legal test asked whether defendants had mental capacity to distinguish right from wrong, thereby assuming legal responsibility for their actions. Testamentary capacity cases asked a similar question: if the testator had the capacity to assume legal responsibility to distribute property. Both tests turned on how to measure the ability or "capacity" to exercise free will.

By 1864, the Court appeared to do an abrupt about-face from its previous skepticism, giving a detailed exposition of mental structure based on morphology put forth by moral insanity proponents. In *Smith v. Commonwealth* (1864), a murder trial in which a jury sentenced Robert Smith to hang, the Court overturned the verdict on the grounds that lower court judge's instructions to the jury excluded considering moral insanity. The Court's holding deserves quoting at length:

> Moral insanity is now as well understood by medico-jurists, and almost as well established by judicial recognition, as the intellectual form. Mentally, man is a dualism consisting of an intellectual and a moral nature. It is this peculiar nature that exalts him above the animal and makes him, legally and morally, a responsible being . . . [I]t would be as useless and cruel to hold him accountable, either criminally or morally, for an act done without a free, rational, and concurrent will.[97]

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[95] *Scott v. Commonwealth,* 61 Ky. 227 (1863).

[96] Ibid.

[97] Ibid..

The Court appeared to reverse its previous cautious approach to the insights of medical jurisprudence. The reference to "judicial recognition" of moral insanity was more than rhetorical flourish. Other state courts had begun to allow new insanity theories as criminal defenses and as grounds for testamentary challenges. Most famously, a moral insanity defense was used to defend Lincoln assassination conspirator Lewis Payne.[98] In the notorious 1859 trial of New York Congressman Daniel Sickles for the murder of Phillip Barton Key (son of Francis Scott Key), the defense successfully pleaded not guilty due to temporary emotional insanity.[99] The 1862 will dispute over New York millionaire Henry Parish's estate focused largely on expert testimony, as Parish was physically paralyzed and unable to speak when he wrote the will. Experts testified using the latest insanity theories of medical jurisprudence to speculate on Parish's mental condition.[100]

Indeed, the Court appeared to amend its skepticism, accepting to some extent the verisimilitude of new theories of insanity. In *Pecancet v. Grayson* (1872) Dr. Dismukes testified to a version of brain morphology that separated the intellectual from the moral faculties. Judge Pryor concluded that she was "a monomaniac" on the subject of men and the disposition of her property. He noted that "The testimony of her physicians indicates that this affection for men was the offspring of a passion produced for a disease peculiar

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[98] Robert Waldinger, "The Sleep of Reason: John P. Gray and the Challenge of Moral Insanity," *Journal of the History of Medicine* 34 no. 2 (April 1979), 163.

[99] *The United States v. Daniel E. Sickles,* 2 Hay. & Haz. 319 (1859). See also Hartog, "Lawyering, Husbands' Rights and the 'Unwritten Law,'; Mohr, *Doctors and the Law,* 150-153.

[100] *Delafield v. Parish,* 25 N.Y. 9 (1862). See Mohr, *Doctors and the Law,* 65.

to her sex."[101] The Court overturned the jury verdict and Atkinson's will. In doing so, they rejected the jury as the final arbiter of capacity, relying instead upon the physicians' reading of her behavior as a manifestation of "monomania." The same year, in *Moore v. Moore* (1872) the Court touted the value of medical expert's testimony in cases with conflicting evidence. Judge Lindsay referred to the opinions of three doctors as "scientific gentlemen," contending that "the failure of these educated physicians to discover insanity . . . disposes of the vagaries" of four witnesses who testified to R.C. Moore's insanity.[102] The Court appeared to place more confidence in the words of doctors as opposed to the recollections of local witnesses to discern mental capacity.

Not all medical experts welcomed the new turn in the expansive judicial recognition of insanity. A vitriolic debate raged between the proponents of moral insanity and single faculty insanity and those who believed, as insanity expert George Cook put it, that "the mind is a unit . . . we do not believe that it is made up of isolated faculties, one or more of which may be impaired of destroyed, leaving the remainder."[103] The debate continued for several decades in the *American Journal of Insanity* as well as at the annual meetings of the Medico-Legal Association of New York. In 1866, the annual meeting of the Association of Medical Superintendents of American Institutions for the Insane (AMSAII) erupted into a heated controversy over moral insanity and its legal implications, which Dr. D.T. Brown characterized as a "bug-bear" of the

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[101] *Pecancet v. Grayson,* 6 Ky. Op. 80 (1872).

[102] *Moore v Moore,* 6 Ky. Op. 36 (1872).

[103] George Cook, MD, "Mental Hygiene," *The American Journal of Insanity* 15 no. 3 (January 1859), 274.

association.[104] Even Isaac Ray, a lifelong advocate of moral insanity conceded that lawyers would ask about the existence of moral insanity "for the purpose of attaching to him an unpopular doctrine."[105]

Kentucky's William Chipley, the Medical Superintendent of ESLA vehemently denied the existence of moral insanity or insanity that affected a single faculty. After testifying for the prosecution in *Smith v. Commonwealth* (1864) he wrote a lengthy rebuttal of the Court's opinion in *The American Journal of Insanity* (1866). Chipley reasoned that if medico-jurists "admit perfect soundness of the intellectual faculties, and there are no criteria by which you can distinguish the act from one . . . perpetrated by a wicked and abandoned man."[106] Chipley testified again in *Pecancet v. Grayson* (1872) against the existence of single faculty insanity, saying that in the thousands of cases of insanity that he had treated, he had seen "no case where I have found persons insane upon a single subject." Still, he did not doubt that Eliza Atkinson was insane. Her violation of gendered codes of conduct, her cavalier approach toward marriage and her estate were too egregious to reflect sane behavior. Instead of concurring with Dismukes' diagnosis of monomania, he attributed her insanity to her consumption of opiates and intoxicating drink, which resulted in a will reflecting "vacillation and weakness of intellect."[107] To

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[104] "Proceedings of the Association: Twentieth Annual Meeting of the Association of Medical Superintendents of American Institutions for the Insane," *The American Journal of Insanity* 23 no. 1 (July 1866): 75 – 145.

[105] Ray, "Hints to Witnesses in Questions of Insanity,", 63.

[106] William S. Chipley, "In the Court of Appeals, State of Kentucky: Smith vs. Commonwealth," *American Journal of Insanity* 23 no. 1 (July 1866), 35.

[107] "Testimony of William S. Chipley" Transcript, *Pecancet v. Grayson* (1872), Case 5727, Box 225, KCAR, KDLA.

Chipley, like others opposed to moral or single faculty insanity, these doctrines allowed challengers to wills and criminal defendants to erode the responsibility that accompanied the exercise of free will. Moral insanity and single faculty insanity allowed experts to explain away immoral acts as manifestations of disease.

Within a decade in the Court began to reconsider who conveyed legitimate knowledge and authority, backing away from privileging medical testimony. *Wise v. Foote*, an 1883 dispute over testator James G. Arnold's will, occurred as national controversies including the Vanderbilt and Fillmore will disputes, roiled national legal and medical communities. Whereas in *Moore v. Moore* (1872) the Court held that medical testimony "disposes of the vagaries" of the testimony of two non-expert witnesses, in *Wise v. Foote* the Court affirmed the worth of non-expert opinions or local witnesses opinions. Chief Justice Hargis positioned as authoritative those who knew Arnold. Unlike the decision in *Pecancet* in which the Court overturned the jury verdict, they guarded the jury's decision. In *Wise v. Foote,* the challengers had questioned the validity of the opinions of "witnesses who were not experts." The challenge was based on the assumption that non-experts could present only facts, and not infuse their testimonies with their assessments of the testator's capacity. Chief Justice Hargis ruled that non-expert witness opinions were "relevant," if the witnesses "knew the testator, and had any opportunity of observing him; the weight and value of such opinions being for the consideration of the jury."[108] *Wise v. Foote* signaled a return of juridical power in local trials to local people and juries, subject, of course, to appellate review.

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[108] *Wise v. Foote,* 81 Ky. 10 (1883).

By 1889, the Court completely reversed its previous embrace of "scientific gentlemen" and their new theories of insanity. Judge Lewis vilified experts' theoretical extrapolations, returning to the Court their commitment to rulings reinforcing the Court as the final arbiter of sanity, based on their interpretation of the "facts" of the case. In *Bush v. Lisle* (1889) Judge Lewis traduced the value of expert testimony as

> worse than useless, it is misleading, when given on a subject about which there is proof so convincing as to leave no reasonable ground for dispute. . . no conclusion reached by mere theorist, however learned, can be reasonably accepted and applied in any case without being founded on and consistent with the facts as they are proved to be.[109]

The Court believed that the "convincing" evidence presented was generated through direct observation by witnesses who were close to Lisle. Lewis noted that "those acquainted with him testified he possessed a clear, vigorous intellect and strong will. In this case however, the Court refused to sanction the jury's determination that Lisle, although suffering from tertiary stage syphilis, was mentally incapacitated. They explained the jury's decision as "their attention was diverted from facts proved to abstract theories of physicians."[110] Indeed, their holding simultaneously recognized that medical experts influenced juries, while at the same time negating their assumed authority by rejecting the verdict.

By the turn of the century, Kentucky courts like most other state courts, wholly rejected moral insanity or single faculty insanity as a viable explanation for deviant civil

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[109] *Bush v. Lisle,* 89 Ky. 393 (1889).

[110] Ibid.

or criminal behavior. Medical experts had overwhelmingly repudiated moral insanity as well, turning instead to theories based on the principles of social Darwinism propounded by Herbert Spencer, Francis Galton and the psychology of Sigmund Freud and Jean Charcot. In an 1899 dispute over Jeffery Power's will, the Court of Appeals held that American jurisprudence held that "any unsoundness of mind which appears not to affect the general faculties . . . is deemed not sufficient" to overturn a will. In a 1911 murder trial, the Court put to rest any imputation that it would accept moral insanity as a plausible defense, holding that "the doctrine of moral insanity as a protection against punishment has been repudiated by all courts as dangerous to the safety of society."[111]

The Court of Appeals protected its authority as the arbiters of sanity against incursions from the increasing visibility and prestige of medical experts and the community stature of local doctors. Even as the bench's composition changed, justices remained committed to a conservative inheritance system which favored "equality" and "benevolence" among families defined by blood and legal relation. The Court continued to encourage familial wealth transfers and protect the regulatory effect that testation had on heirs'-at-law conduct. On the other hand, justices consistently reaffirmed testamentary freedom as a property right that inhered in sane men. As the Court testily reiterated in 1890, "the testator has the legal right to dispose of his estate as he may wish, even to discard, *in toto*, the natural objects of his bounty, and give his estate to a stranger, without assigning or having any good reason for so doing, whatever. This is his perfect

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[111] *Banks v Commonwealth,* 145 Ky. 800 (1911).

right of alienation."[112] This "perfect right of alienation" inhered in male testators only. Nineteenth century Kentucky jurists never equated full testamentary freedom with women. Granting married women testamentary rights required statutory intervention. Justices would not overturn wills in which testators appeared to meet the requirements of the legal test for capacity, especially when testators bequeathed to worthy heirs or explanations existed for their testamentary behavior.

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[112] *Zimlich v. Zimlich,* 90 Ky. 657 (1893).

CHAPTER IV
PHYSICAL IMPAIRMENT, DEGENERATE BODIES AND MENTAL CAPACITY

In 1845, Polly Bullitt's half-siblings claimed that Polly was born an idiot, mentally incapable of meeting Kentucky's low standard of testamentary capacity. Tried twice in Louisville County Chancery Court before being heard by the Court of Appeals, *Howard v. Coke* (1846) was no ordinary will dispute. It involved the Bullitt family, a wealthy, socially prominent Louisville family. Unlike most will disputes, the *Louisville Courier* reported on the case, perhaps because Henry Clay, Kentucky's most famous orator came out of semi-retirement to argue against the will. Much of the testimony focused on describing Polly Bullitt's body and physical appearance. Lawyers asked witnesses to "State what was the appearance of her figure, and what was the expression of her countenance?"[1] One of Polly's childhood neighbors replied that "She stooped a little; and was slovenly in her dress . . . . She was cross eyed and twisted or distorted in her features when in conversation."[2] Physicians were asked to "State the relation which physical deformity of Idiots and Imbeciles usually bears to their mental capacity?" which followed a question about the relationship between idiocy and "cross-eyes; decayed teeth,

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[1] "Interrogatories for Plaintiffs No. 1" in Box 28, FL 251, *Howard v. Churchill*, Bullitt Family Papers, FHS. Hereafter BFP, FHS. When the case reached the Court of Appeals it was retitled as *Howard v. Coke*, 46 Ky. 655 (1847). The Bullitt Family papers are in the process of being catalogued. Folder and box numbers may be revised. The Bullitt Family Papers provide a rich trove for understanding how Polly Bullitt's mental and physical disabilities shaped her life. The Bullitt family acquired the Chancery Court trial transcript files of *Howard v. Coke* (1847) which are now in the family papers. The collection includes the personal and legal papers of William C. Bullitt, Polly's uncle, and a challenger to the will. Polly's cousin litigated the case, joined by Henry Clay. Many of the papers from the *Howard v. Coke* trial were transcribed from the original transcripts in the 1930's by Alexander Bullitt's secretary. In many instances the original deposition or letter was preserved with the transcription. In a few cases the original document was not in the file.

[2] "Testimony of Richard Phillips," *Howard v. Churchill*, Box 29, FL 264, BFP, FHS.

a hanging down of the lower jaw."[3] Indeed, a consistent theme throughout the case made Polly Bullitt's deviant appearance an outward representation of her mental incapacity.

This chapter explores how testators' bodies and physical impairments provided evidence about mental capacity. The body served as an external indicator – a text to be read – through which the state of the testators' sanity, intellect, and morality could be ascertained. Some testators were hearing or sight impaired or born with congenital physical disabilities. Others suffered from disease. Many testators experienced physical impairment as they aged. Loss of hearing, sight, and advanced age became generalized evidentiary tropes associated with diminished capacity. Often, physical impairment was linked to allegations of undue influence caused by physical and mental dependency on caregivers. The Court of Appeals' assessment in 1868 that testator Walter Thomas suffered from "infirmities of four score years, and the disease of the eyes, which deprived him of his sight, had brought the strong man down to comparative helplessness, and dependence upon others" typified the Court's deliberations.[4] Drawn from broader nineteenth century public discourses, physical impairment and aging created a dangerous dependency that precluded testators from making independent decisions about property distribution.[5]

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[3] Interrogatories for Plaintiffs No.8," *Howard v. Churchill*, Box 28, FL 251, BFP, FHS.

[4] *Thomas v. Thomas,* 2 Ky.Op. 338 (1868). Thomas had deeded property to his beneficiaries just before his death rather than write a will. Although the case was a capacity challenge to several deeds, the Court treated it like a testamentary capacity challenge by considering who were the natural objects of Thomas' bounty.

[5] As contemporary medical studies show, chronically ill and aging individuals can lose mental function due to dementia, Alzheimer's disease, stroke, and other diseases, yet these effects are not imminent. Many ill or aging individuals maintain mental and physical acuity.

Nineteenth century Kentucky cases reveal jurists and medical experts struggling to determine the level of mental capacity when testators wrote wills when they were very sick, sometimes near death, and often in excruciating pain. In *Bush v. Lisle* (1889) challengers portrayed testator Frank Lisle as a "physical wreck," a blind syphilitic morphine addict, who embodied literally "moral degradation" and "imbecility."[6] Current medical research confirms that during tertiary stage syphilis, most likely someone in Lisle's condition would have experienced significant neurological brain damage. Yet the Court of Appeals upheld Lisle's will after a jury rejected it, partly because Lisle named his sister's family as beneficiaries. They had nursed Lisle for years. In *Bush v. Lisle* (1889) and other cases, the Court sought to strike a balance between protecting testators' right to choose beneficiaries and defending sick and aged testators' families from unjust disinheritance. The Court sought to reaffirm a kin-based informal network of caregiving, articulated and strengthened through inheritance practices.

These cases occurred within a matrix of social values in which challengers used the negative connotations associated with physical and functional impairments to provide evidence of insanity. Beneficiaries argued against these narratives, affirming testators' free will and moral integrity despite physical impairment. Their arguments however, rarely challenged directly the assumption that an aged or impaired body represented an impaired mind. Rather, they argued for the exceptionalism of a particular testator, or that the physical impairments or disease were misdiagnosed, assigning the testator an inaccurate label of mental unsoundness. In *Bush v. Lisle,* the proponents' attorney argued

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6 "Brief for Appellees by Breckenridge and Shelby," in *Bush v. Lisle*, (1889), Case 19613, Box 839, KCAR, KDLA.

that contrary to the challengers' contention, Lisle "had full use of his arms, and suffered no pain, except from his knees down. It is attempted to be shown that he was paralized [sic], but Dr Allen shows that this is not true."[7] Although the attorneys conceded that Lisle was blind, they mitigated the extent to which he was physically incapacitated and dependent on the Bush family.

Disability studies scholar Lennard Davis argues that "disability presents itself to 'normal people' through two main modalities – function and appearance."[8] Invested with negative values, bodily difference and functional impairment (such as blindness or deafness) become imbricated in social relations as signifiers of inferiority. Ideas about physical differences were perceived as deviance and justified social and legal exclusions.[9] Recently, historian Douglas Baynton has argued that disability has been central to establishing the boundaries of citizenship. African Americans, immigrants and women have been denied full citizenship, justified partially through associations with defectiveness and disability.[10] As disabilities scholar Susan Wendell observes, defining disability implicates "social practices that involve the unequal exercise of power and have

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[7] "Brief for Appellants," *Bush v. Lisle*, (1889),Case 19613, Box 839, KCAR, KDLA.

[8] Lennard J. Davis, *Enforcing Normalcy: Disability, Deafness, and the Body* (New York: Verso Press, 1995), 11-12.

[9] Douglas C. Baynton, "Disability and the Justifications of Inequality in American History," in *The New Disability History: American Perspectives*, eds., Paul K. Longmore and Lauri Umanski (New York and London: New York University Press, 2001) and Rosemarie Garland Thomson, *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature* (New York: Columbia University Press, 1997).

[10] Baynton, "Disability and the Justifications of Inequality in American History," 33- 57.

major economic, social, and psychological consequences in some people's lives."[11] Indeed, the images and negative social values attached to disabled or different bodies were central to legal discourses as well.

Throughout Kentucky testamentary capacity trials, physical and functional deviance was identified, discussed, and categorized. Building on Irving Goffman's stigma theory, disability studies scholar Rosemarie Garland Thomson argues that "invested with social meanings that far outstrip their biological bases, figures such as the cripple, the quadroon, the queer, the outsider, the whore are taxonomical, ideological products marked by socially determined stigmata, defined through representation, and excluded from social power and status."[12] In courtrooms and medical communities, physical differences became powerful representations of mental capacity. Medical treatises written in the last half of the nineteenth century, based on evolutionary Darwinism, theories of atavism, and scientific racism focused on physiology and its relationship to mental capacity.[13] In the mid-century South, Dr. Samuel Cartwright argued that slaves' "physical organization" made them suited for slavery. If freed, they suffered "a disease that locks up understanding."[14] Cartwright's view emphasized that

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[11] Susan Wendell, *The Rejected Body: Feminist Philosophical Reflections on Disability* (New York: Routledge, 1996), 23.

[12] Thomson, *Extraordinary Bodies*, 8.

[13] See for example, Henry Maudsley, *Body and Will, Being an Essay Concerning Will in it Metaphysical, Physiological, and PathologicalAspects* (New York: D. Appleton and Co., 1884). For historians' discussions, see Cynthia Eagle Russett, *Sexual Science: The Victorian Construction of Womanhood* (Cambridge: Harvard University Press, 1989).

[14] Samuel Cartwright, "Report on the Diseases and Physical Particularities of the Negro Race," *New Orleans Medical and Surgical Journal* 8 (1851): 692 – 713. As historians have noted, Cartwright is controversial in terms of how much he represented mainstream thought. Although he had contemporary detractors, he also had southern supporters for his physiological theories.

bodies differing from the white male normative body, and distinguished by perceived racialized physiological differences were inferior and unfit for the exercise of free will that accompanied civil freedom. Simultaneously, earlier and longstanding powerful popular cultural views portrayed disabled people as afflicted, pathetic, and deserving of sentimentalized sympathy.[15] Both the scientific and sentimental images of the physically impaired person depicted dependency. The ability to think independently was linked to the ability to act independently, as expressed through a disciplined and controlled body.

The existence of these attitudes is not a new revelation in the current historical literature. My analysis of disability will add to understanding how these attitudes were central in defining the boundaries of sanity. Furthermore, my study examines how disability and physical appearance served as legal evidence in determining who had the right to distribute property. For example, nineteenth century treatise writer Isaac Redfield commented that it was "a settled rule of English law, until a comparatively recent period, that deaf and dumb persons were, prima facie, incapable of writing a will." Redfield noted that by 1866 testamentary rights extended to deaf and mute persons, but only after clearly showing that the testator made the will "understandingly."[16] The burden of proof here rested on showing capacity, not a lack of capacity. Jurists, physicians and witnesses rhetorically dissected physically and functionally different bodies to determine if the disability excluded the testator from the category of mental soundness, or, if in spite of the disability, the testator possessed the requisite sanity.

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[15] Mary Klages, *Woeful Afflictions: Disability and Sentimentality in Victorian America* (Philadelphia: University of Pennsylvania Press, 1999), 4.

[16] Redfield, *The Law of Wills,* 43-44.

In re Howard (1827) reveals how representations of disability structured discussions over property distribution in early nineteenth century Kentucky. *In re Howard* (1827) Samuel Howard challenged his sister Alsey Howard, claiming she was insane. Howard who was "deformed . . . since infancy," had left her property to her mother, Sarah Howard. After the Jessamine County court overturned the will, Sarah Howard appealed to the Court of Appeals. Samuel Howard's attorneys used Alsey Howard's physical deformities as evidence of her insanity. Chief Justice Bibb agreed that "owing to bodily deformity and decrepitude, she never was sent to school, that she avoided the company of strangers, and had fits at times."[17] In this case, however, the Court separated Howard's physical differences from her mental soundness. Chief Justice Bibb held that in spite of her physical disabilities, "her mind was not deformed, nor her affection benumbed, nor her intellect benighted."[18] Bibb's references to deformity, paralysis and an intellect shrouded in darkness – blindness – suggests that these physical impairments were encoded with meanings that often indicated mental incapacity.

Ironically, to the Court Howard's consciousness of her deformities indicated mental soundness. They held that "her consciousness of her deformity, and retreat from the approach of strangers, is a proof of sanity."[19] As disabilities scholar Lennard Davis notes, "strong feelings of revulsion" are central to the process of constructing disability

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[17] *In re Howard's Will*, 21 Ky. 199 (1827).

[18] Ibid.

[19] Ibid.

and implementing its imagery in social discourse.[20] Howard's self-imposed seclusion and her own recognition of the stigma attached to her body indicated a sound mind.

The Appeals Court upheld Alsey Howard's will and overturned the Jessamine County court's decision. For the Court, the local opinions of neighbors supplied the authoritative evidence about Howard's sanity. The Court noted that "those who knew her well and resided near her" agreed unequivocally upon her sanity. The Court invoked the reputation of an attesting witness to the will, contending that Colonel Joseph Crockett was a "man of integrity, of irreproachable character." Crockett's masculine honor and place of respect within the community mitigated Court suspicions generated by Howard's exceptional body. The intercession of an independent witness who explained Howard's physical differences and vouched for her sanity allowed the Court to see Howard as pitiable but not insane. Howard's brother, the challenger, had come from Tennessee to challenge the will, leading Bibb to view his motives "with great jealousy." Bibb accepted the consensus of the local community over that of community outsiders with ulterior motives.

The interpretation of the external body's appearance as a reflection of the internal mind comprised crucial evidence in the dispute over Polly Bullitt's will in *Howard v. Coke* (1847). It turned on whether Polly Bullitt, considered an "idiot" by many who knew her, had sufficient mental capacity to write a will. Some witnesses believed that although Bullitt was not "sprightly," she "had a knowledge of her property and was not

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[20] Davis, *Enforcing Normalcy*, 11-12.

an idiot."[21] Most people were familiar with the connotations implied by labeling someone an idiot or imbecile. For centuries, the terms had been part of legal, medical and colloquial language, used derogatorily to connote mental or moral failings. The question for both sides of the will was whether Polly Bullitt belonged in that category. In order to garner evidence, both sides focused on her body, her facial expressions and her ability to perform gendered tasks such as sewing, singing and socializing.

Bullitt came from a socially and politically prominent Kentucky family with ties to the Founders. Her grandmother Annie Henry was Patrick Henry's sister. Her father, Alexander Scott Bullitt, built Oxmoor, one of Kentucky's largest slaveholding plantations and served as the first lieutenant governor of Kentucky. Bullitt's mother and father died when she was young, leaving her with substantial property, including slaves.[22] After her parents' deaths, relatives sent Bullitt to the Catholic Sisters of Charity's Nazareth Female Academy, where she spent much of her life.[23] Shortly before her death, Bullitt dictated a will in which she left her estate to several charities and her relatives on her mother's side, disinheriting the Bullitts, her paternal descendants. They contested the will. Polly Bullitt's nephew Joshua Fry Bullitt, later joined by Henry Clay, litigated the case against the Guthries, who were the primary beneficiaries and her mother's descendants from a marriage prior to Alexander Scott Bullitt.

Exploring local and legal conceptions of idiocy reveals another borderland that shaped the legal landscape of testamentary capacity jurisprudence. Although few cases

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[21] "Deposition of Mrs. Sarah E. Clark," FL 256A, BFP, FHS.

[22] Untitled, BFP, FL 250, FHS.

[23] "Deposition of Mrs. Helen Martin," (Polly's ½ sister), Box 31, FL 280, BFP, FHS.

involved allegations of idiocy, these cases demonstrate the pre-occupation with how concepts of bodily control and physical integrity shaped rationality. In trials, testators were referred to as an "idiot" or "imbecile" when they allegedly experienced mental decline. These terms were also derogatory colloquialisms used in political and social discourse. Idiocy as a verifiable condition and as an idiom for mental deficiency carried powerful legal and social valences.

In legal and medical terms, idiocy or imbecility however, differed from insanity.[24] Insanity was perceived as a disease of the mind or the will that usually produced delusions which replaced rationality in an otherwise ordinary adult. In the early nineteenth century, idiocy was understood by medical jurists as an "obstacle to the development of the faculties, supervening in infancy," and resulted in perpetual childlike state. Insanity developed from a "lesion to the faculties subsequent to their development." [25] In 1824, the Kentucky legislature differentiated idiots from the insane, mandating that the Eastern State Lunatic Asylum distinguish between the "sick or

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[24] Although it is impossible to know, Polly Bullitt most likely had what is now called Down Syndrome, which is characterized by a distinct set of physical characteristics. I have no medical basis for this presumption other than the detailed physical descriptions in the transcripts and Bullitt Family Papers. During the nineteenth century, individuals with the genetic abnormality trisomy-21, which causes Down Syndrome were identified as "idiots" or "imbeciles." In 1867 John Langdon Down coined the term "Mongolism" diagnosing these individuals as atavistic "Mongoloids." During the late nineteenth and early twentieth centuries, the diagnosis of a "moral imbecile" emerged. Not until 1966 would the World Health Organization replace the term "mongoloid idiot" with Down Syndrome.

Many current disability scholars now use the term "mental disability" or "intellectual disability" to describe what has been referred to at different times as idiocy, Mongolism, or mental retardation Idiocy was the nomenclature used at the time. Today it is offensive. When referring to the historical conceptions, I use the term "idiot," to separate nineteenth century perceptions from current knowledge.

[25] Ray, *A Treatise on the Medical Jurisprudence of Insanity*, 71.

imbecile and those people "actually lunatic, or of unsound mind."[26] Only the latter were admitted. The statute permitted non-violent idiots to remain with their parents in local communities. These distinctions suggest that legislators considered idiots relatively harmless but unworthy of state asylum funds, probably because many physicians considered idiocy congenital and hopeless rather than curable through the moral therapy offered at ESLA.

In the late 1840's in popular literature and medical discourses, idiots were portrayed as a moral failures and objects of pity and disgust. Samuel G. Howe, an early advocate of educating idiots inveighed in 1848 that without training, idiots were a "spectacle of human beings reduced to a state of brutishness, and given up to the indulgences of animal appetites and passions."[27] Howe believed that through institutionalized education, some idiots could learn language, basic manners and rudimentary social skills. By 1860, the Kentucky legislature opened a separate institution for "feeble-minded children" in Frankfort, following Massachusetts, Connecticut, and New York.[28] Like most institutions for the feeble-minded, Kentucky's school attempted teach "some kind of useful labor," to prevent idiots from becoming "idle and vicious."[29]

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[26] 1824 Ky. Acts, Title 95, § 2.

[27] Samuel Gridley Howe, "A Selection from 'Report Made to the Legislature of Massachusetts (1848)' in Noll and Trent Jr., eds. *Mental Retardation in America: A Historical Reader* (New York: New York University Press, 2004), 24.

[28] *Private Institution For The Education Of Feeble-Minded Youth Twenty-Fifth Biennial Report*, (Barre, MA: Charles Rogers, 1898), http://www.disabilitymuseum.org/lib/docs/1707.htm?page=3. Last checked on 5-21-06.

[29] J.Q.A. Stewart, "The Industrial Department of the Kentucky Institution for the Education and Training of Feebleminded Children," *Proceedings of the Association of Medical Officers of American Institutions for Idiotic and Feeble-Minded Persons* (1882): 236 – 239.

Medical and legal experts categorized intellectually disability according to the perceived degree of mental development. At the time of the Bullitt will dispute, the most common division was between "idiocy" and "imbecility."[30] Medico-jurists agreed that at lowest classification, idiots lacked all mental capacity, but imbeciles might have some reasoning capabilities. Isaac Ray contended in his 1838 medical jurisprudence treatise "In reasoning power, idiots are below the brute," but that imbeciles "possess some intellectual capacity."[31] He also believed accurately distinguishing between degrees of idiocy or imbecility was difficult to quantify in a legal test. Instead, Ray identified idiots through their bodies rather than mental functions, as "the lips are thick, and the mouth kept open, the saliva suffered to escape . . . and defective teeth are displayed; the limbs are crooked." Ray interpreted their bodies as repellent, describing their visages as "dull or glaring eyes, gaping mouth, their wild and hideous laugh, their inarticulate sounds . . . and utter unconsciousness of social and domestic relations."[32] Ray described the nonconforming and uncontrolled body as transgressing the boundaries of humanness: a "wild and hideous" laughing monster in human form.

Similar to defining insanity, legal experts struggled with the rules for determining the boundaries of idiocy, finding medical classifications inadequate for legal application. Citing Ray, jurist Isaac Redfield agreed in *The Law of Wills* (1866), that among people

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[30] As the nineteenth century progressed, these categories gained in complexity and degree. See for example, H.B. Wilbur, "The Classifications of Idiocy," *Proceedings of the Association of Medical Officers of American Institutions for Idiotic and Feeble-minded Persons* (1877): 29-35.

[31] Isaac Ray, *A Treatise on the Medical Jurisprudence of Insanity*, 72-95.

[32] Ray, *Treatise on the Medical Jurisprudence of Insanity,* 73-74.

"denominated idiots . . . there is no capacity to contract, or execute a valid testament."[33] Redfield conceded that determining who was a legal idiot was "incapable of strict definition," making it a question "triable by jury."[34] Like insanity issues, determining idiocy occurred within a range of behaviors and appearances outside behavioral norms. As historian James Trent points out, it is important to understand "mental retardation as a "'thing,' the object of scientific understanding and intervention."[35] Although taxonomies grouping mental disabled individuals appeared stable, the difficulty lay in determining individuals' abilities. By the last quarter of the nineteenth century, the idea of a "moral idiot" gained currency; idiocy became conflated with uncontrollable immoral behavior, a subtext that had existed for previous decades. If people had varying degrees of intellectual disability, at what point was the boundary of capacity established?

Throughout the nineteenth century, cognitively disabled people were part of local communities. Their conduct revealed a wide range of ability and dependency, ranging from requiring complete care to participating in economic and social networks. One Kentucky land dispute demonstrates how one man eventually declared a legal idiot worked and traded for years in his local community.[36] In 1845, John Boyd's guardian later tried to nullify a contract in which Boyd had traded land for slaves on the grounds of Boyd's idiocy. The contract had been negotiated years before Boyd was declared a legal

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[33] Redfield, *The Law of Wills,* 51.

[34] Redfield, *The Law of Wills,* 50.

[35] Trent, *Inventing the Feeble Mind,* 6.

[36] Penny L. Richards, "'Beside her Sat her Idiot Child': Families and Developmental Disability in Mid-Nineteenth Century America,"65-79, in Steven Noll and James w. Trent Jr., eds. *Mental Retardation in America: A Historical Reader* (New York: New York University Press, 2004), 65.

idiot. By upholding the contract the Court recognized an act of free will premised on rational self-interest. In much of the time between the trade and the contract dispute, Boyd held property and profited from working the land with his father.[37] The community recognized Boyd as mentally impaired; however, his perceived developmental disabilities did not prevent him from participating in legal and economic interaction in his own name.

Indeed, idiocy was a fluid category informed by communal knowledge, economic considerations, and medical perspectives. During the first half of the nineteenth century, the Kentucky legislature left it to the community to determine who was legally an idiot for the purposes of exercising legal independence. The legislature suspected that people declared non-disabled family members idiots in order to receive state treasury support for their maintenance, noting in a statutory preamble that "undue and illegal execution of the existing laws in relation to lunatics and idiots, many persons, who are not idiots, are supported out of the public treasury."[38] Of course, the legislature, chronically lacking resources, may have been trying to conserve funds. An 1831 statute called for a writ of *de idiola inquirendo* in which twelve local men were summoned to determine idiocy or lunacy; if they found that the person was an idiot or lunatic, his or her family could receive treasury funds and the court appointed a guardian.[39] Such laws made the local community the judges of mental soundness. It also reveals how local individuals might work to legally define someone as mentally incompetent due to a limited ability to

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[37] *Hopson v. Boyd,* 45 Ky. 296 (1845).

[38] 1831 Ky. Acts, Title 95, § 2, "An Act to Amend the law in Relation to Idiots and Lunatics."

[39] Ibid.

support him or herself. Communal knowledge generated through everyday living set the parameters for definitions of mental capacity, which then was inflected into legal doctrine determining rights and disabilities.

The trial occurred during a time when public displays of extraordinary bodies, billed as freak shows, dime museums, and ostensibly "scientific exhibits" had began touring regularly throughout the United States.[40] In 1833, Chang and Eng, the famous Siamese twins, appeared in Cincinnati just across the Ohio River from Kentucky.[41] In another "freak" show contemporary to the Bullitt trial, two mentally disabled microcephalic siblings were dressed in stylized garb and presented as "Wild Australian Children."[42] The popular press reported regularly on physical disfigurements, presenting them as scientific curiosity. In 1884, *The South Kentuckian* reported on the "Two-Headed Girls," considered "far more wonderful than the Siamese twins."[43] In 1884, the hugely popular "Buffalo Bill's Wild West" which included the savage Indians' "attack on Settler cabin" stopped in Louisville to great fanfare.[44] Such displays, disabilities scholar Thomson explains, "structured a cultural ritual that seized upon any deviation from the typical, embellishing and intensifying it to produce a human spectacle whose every

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[40] Robert Bogdan, *Freak Show: Presenting Human Oddities for Amusement and Profit* (Chicago: The University of Chicago Press, 1988).

[41] "The Siamese Twins – Chang and Eng," *Cincinnati Mirror and Western Gazette of Literature, Science and the Arts,* February 2, 1833.

[42] Bogdan, *Freak Show*, 120.

[43] "Two Headed Girls, *The South Kentuckian* (Hopkinsville, Ky.), May 20, 1879.

[44] "Buffalo Bill's" *The Times: Louisville,* November 6, 1884.

somatic feature was laden with significance before the gaping spectator."[45] Residents of Louisville and urban areas were regularly exposed to performances which highlighted difference. Often, as in the cases of the Wild Bill show and the "Wild Australian Children," these shows used racial or physical difference to emphasize inferiority. These spectacles were not confined to museums, scientific displays and traveling exhibitions.

Polly Bullitt's will case, *Howard v. Coke* (1847) illustrates how challengers' lawyers used vivid descriptions of Bullitt's body to create courtroom spectacle depicting deformity and brutishness. According to the Bullitt family's personal correspondence, the trial was well-attended, presenting a voyeuristic peek at the social disorder caused by Bullitt's deviant body. The *Louisville Daily Journal* described the audience "so great . . . that hundreds of others were unable to get into the court room."[46] As the Bullitt will case shows, courtrooms were sites in which these spectacles were presented. They involved people known to the community whose property and personal reputations at stake as opposed to a day's entertainment at a dime museum. Trials shared with freak shows and scientific exhibits the creation of narratives which emphasized difference. Lawyers, local witnesses, medical experts presented recollections of events infused with cultural images that gave meaning to those differences. During the telling of these stories, courtrooms were much more than sites for the disinterested application of law and justice. Trials were theatrical performances in which justice was negotiated and

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[45] Thomson, "From Wonder to Error," 4.

[46] *Louisville Daily Journal,* May 8, 1849.

decided.[47] As testators were never present, witnesses and lawyers re-created the testator through descriptions, images and the stories they told. As opposed to "scientific exhibits," or "dime museums," in which displays were orchestrated to emphasize difference, during trials competing narratives emerged. In cases like *Howard v. Coke* these portrayals relied on competing descriptions of Polly Bullitt's body as a proxy for her mental state.

In *Howard v. Coke,* the challengers' lawyers seized upon the meanings assigned to deviant bodies by asking for descriptions of Bullitt's physical "countenance." Witnesses went into great detail, adding commentary as to how they interpreted her outward physical appearance. Martha Pope, who lived near Bullitt during her childhood described Bullitt's body as "low and fleshy, and her countenance was dull, stupid and idiotic. She hung her head down and looked up under her brows. She had a large mouth and was very homely."[48] Another witness who saw Bullitt shortly before her death called her "a mass of deformity."[49] Witnesses described Polly Bullitt's voracious eating habits, crying fits, and high temper. Estelle Blancagniel, a student Nazareth, remembered Bullitt as "very easily excited and cried whenever anything was done to her. She was in the habit of crying out just like a child & would never wipe the tears from her eyes but permitted them to run over her face." Blancagniel described Polly's "appetite as

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[47] For a discussion of courtrooms as sites of cultural spectacle, see Ariela J. Gross, *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom* (Princeton: Princeton University Press, 2000); Katherine Fisher Taylor, *In the Theatre of Criminal Justice: The Palais de Justice in Second Empire Paris* (Princeton: Princeton University Press, 1993).

[48] "Deposition of Mrs. Martha Pope," *Howard v. Churchill* (1845-1846) Box 29 FL 264, BFP, FHS.

[49] "Deposition of Mrs. Catherine Dailey," *Howard v. Churchill* (1845-1846), Box 30, FL 268, BFP, FHS.

ravenous & like a child was always craving something and when eating was filthy."[50] These courtroom descriptions reflected and conveyed the witnesses' disgust and revulsion at Bullitt's disorderly body. Referring to Bullitt as a child reinforced the perception of Bullitt's dependency. Her inability to control her body symbolized Bullitt as animalistic, atavistic, and incapable of higher emotion or mental function.

Witnesses describing Bullitt incorporated deeply gendered ideas about her appearance and ability to engage domestic tasks and social events. Women affirmed gender identity through performing particular kinds of labor. Parents and teachers trained women to execute tasks considered reflective of etiquette and genteel manners, depending on class position. The challengers' lawyers asked witnesses whether Polly could "perform on any musical instrument, or sew and knit," and at what age girls usually learned these tasks.[51] The ability to perform these tasks gracefully projected a seemingly natural image of elite white womanhood. The ideals of gender and class appropriate behavior, expressed through controlled and regulated physical movements informed how people perceived mental capacity and identified abnormality.

Polly Bullitt's appearance affected her participation in rituals of courtship and socializing that formed social and economic networks and re-affirmed gender relations. Witnesses were asked if they had met with Bullitt "in Society, at any Ball, or at any party?" The challengers contended that Bullitt's physical differences and repugnant

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[50] "Deposition of Miss Estelle Blancagniel," *Howard v. Churchill* (1845-1846), Box 30 FL 269, BFP, FHS.

[51] "Interrogatories for Plaintiffs No. 1," *Howard v. Churchill &c* (7 Nov. 1845), Box 28, FL 251, BFP, FHS.

behavior excluded her from society events.[52] Bullitt's half-sister Helen Martin acknowledged that Polly's inability to perform according to social manners further served to isolate her from her peers. Martin did not "think Polly the worst kind of idiot," but conceded that she "considered her entirely unfit for society, and that it would only be exposing her to ridicule."[53] Martin's comment reveals a complex method of social regulation based on adhering to agreed-upon manners and performing elaborate gendered behavioral rituals. Polly Bullitt's physical differences and her lack of bodily control excluded her from the boundaries of acceptable behavior, making her an object of derision. By portraying Bullitt as incapable of class appropriate feminine behavior, they argued that she lacked mental capacity to distribute her property.

The Guthrie's attorneys who defended the will argued that Polly Bullitt's physical and mental impairments were exaggerated. As evidence, they elicited descriptions of her body and ability to meet social expectations. By depicting Polly as having an ordinary body and performing tasks associated with feminine behavior, they argued that she was no more or less capable than any other woman. Ann Rudd remembered that Polly Bullitt "behaved with as much propriety as any young lady could" and "she was neat in her dress and personal appearance as much so as any young lady."[54] Rudd compared Polly to her peers, finding her within the range of acceptable appearance for women. Bullitt was capable of discriminating among her kin and close friends, and her feelings of gratitude

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[52] "Interrogatories for Plaintiffs No. 1", *Howard v. Churchill &c* (7 Nov. 1845), Box 28, FL 251, BFP, FHS.

[53] Deposition of Mrs. Helen Martin, *Howard v. Churchill* (1845-1846), Box 31 FL 280, BFP, FHS.

[54] "Deposition of Ann H. Rudd" *Howard v. Churchill* (1845-1846), No Box, FL 256A, BFP, FHS.

and affection led her to just distribution of her property. Expectations for women's ability to participate in economic property-related transactions, as discussed in the next chapter, were considerably lower than those for men.

Polly's inability to physically perform the gendered role of a wealthy, unmarried southern woman infused Henry Clay's closing arguments. In a letter to John C. Bullitt, his sister Susan described accounts of Henry Clay's final speech to the jury. Susan Bullitt did not attend the trial herself as she believed her appearance "would not look very well" to the broader community.[55] According to Bullitt, Clay repeatedly called attention to Polly's wealth and class standing against which he superimposed evidence that she had not ever been courted. Clay implied that her physical unattractiveness and disgusting comportment prevented a suitable marriage. Susan Bullitt recounted the oration as Clay noting that he had

> Never heard of Polly Bullitt's having a beau. He supposed there were fortune hunters in Louisville as in every place he had ever seen. And yet a young lady of fortune, of family, in whose veins flowed some of the best blood in Kentucky (and his opponents said of most exquisite form) had never been courted![56]

The parenthetical commentary noting the opponents' argument that Polly had an "exquisite form" ridiculed Clay's legal adversaries by calling attention to Polly Bullitt's body. For Henry Clay and Susan Bullitt, Polly's physical differences provided reason to render her unmarriageable in spite of wealth and family reputation.

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[55] Susan Peachy Bullitt to John C. Bullitt, May 1849, No Box, FL 162, BFP, FHS.

[56] Ibid.

The high-profile of *Howard v. Coke* reveals another aspect of how inheritance litigation was enmeshed in the social relations of the surrounding community. In spite of the many witnesses, medical experts and time and expense on both sides, the outcome of *Howard v. Coke* reminds legal historians of the difficulties in interpreting jury verdicts. The jury hung supposedly with nine men voting against the will, and three men for the will. Henry Clay's closing arguments and the newspaper coverage suggest that factors other than the strength of the testimony influenced each juror. According to Susan Bullitt, during his closing remarks, Henry Clay suggested that the trial was nothing but a performance; the trial's outcome had already been decided, through back channels of local politics. Bullitt described Clay as saying that it was "rumored in the street that this would be a hung jury . . . but I believe you all to be honorable and honest men." Clay implied that a hung jury (which would leave the will standing) would "leave a stain on your fair proud city."[57] Clay implored the jury to decide according to the evidence.

The hung jury verdict and accompanying insinuations that it had been fixed created a minor scandal in Louisville and in the *Louisville Daily Journal.* The *Journal*'s night editor printed the names of the nine jurors against the will and the three jurors favoring it, noting that "it is understood that one of the latter would have gone with the majority if the two others had done so."[58] A day later the editor apologized, saying that such a practice was "wrong in principle."[59] This public disclosure brought to light the kinds of manipulations and intrigues that went far beyond legal rules and courtroom

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[57] Ibid.

[58] *Louisville Daily Journal,* May 9, 1849.

[59] *Louisville Daily Journal,* May 10, 1849.

testimony in determining jury verdicts. It points to the operation of a "legal culture" in which the shape of legal institutions and deliberations were influenced by and embedded in socio-political relations.[60] The honor of the jurymen, first impinged upon by Clay, was then made public record by the local paper. John A. Miller who voted in favor of the will asked the paper to print that he was not the juror "willing to go with the majority" if the others also did so.[61] We will never know why the jury voted as it did. Clearly though, the broader community understood and participated in a legal culture that was grounded in the conceptions of masculine honor and public reputation. Clay used these appeals as did the juror John Miller.

As the nineteenth century progressed, challengers continued a strategy of describing physical impairment to discredit testators. In *Bush v. Lisle* (1889) the challengers to the will conflated images of physical monstrosity with moral turpitude and mental insanity.[62] Frank (F.M.) Lisle died in 1879 and left his substantial wealth almost entirely to his sister, Minerva Bush and her family. According to the transcript, Lisle had acquired his wealth through gambling, running a faro bank (card game), and through business dealings. During the last decade of his life, Lisle suffered from last stage (tertiary) syphilis which caused paralysis and blindness. Lisle lived with Bush while she nursed him until his death. John Brax (J.B.) Lisle, F.M.'s brother, contested the will on the grounds of F. M. Lisle's mental unsoundness and undue influence exerted by Minerva

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[60] For a discussion of "legal culture," see Lawrence Friedman, "Legal Culture and Social Development," *Law and Society* 4 no. 1 (Aug 1969): 29-44.

[61] *Louisville Daily Journal,* May 9, 1849.

[62] *Bush v. Lisle,* 89 Ky. 393 (1889).

Bush. The county case ended in three hung juries before a fourth Clark county jury overturned the will. Minerva Bush appealed to the Court of Appeals and Justice C.J. Lewis upheld the validity of the will and ordered it to probate on the basis of lack of evidence of insanity or undue influence.

Graphic physical descriptions linked to allegations of Lisle's wickedness and immorality were central to the challengers' case. Lisle had contracted syphilis during the Mexican War and during his last years the disease had horribly disfigured him. The contestant's lawyers dramatically described Lisle's physical condition. They described a

> photograph of his life, physical condition and surroundings and habits. [The] loathsome disease had so permeated his system as to cause the loss of hair and whiskers; the loss of his teeth; the loss of eyesight; the loss of control of locomotion. . . it had also drawn his mouth to one side; and had so affected the muscles of his throat as to cause a foul saliva to constantly flow from mouth, which he could not expectorate . . . in addition he was pale and bloodless.[63]

Describing a "photograph" of Lisle's life emphasized the visual appearance of his body to the jury. The brief described Lisle in terms of the physical abilities that he had lost. Taken together, they represented the loss of humanness.

The brief then described "his constant companion in such solitude, was a crippled and horribly distorted young man."[64] Using images of physical monstrosity and degeneracy, the lawyers linked F.M. Lisle to moral abasement, pointing out that his

> Constant and daily practice was . . . calling Christ a 'damned old bald-headed Son of a bitch'. He taught his poor crippled and distorted companion to swear likewise; he [Lisle] would . . . amuse

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[63] "Brief for Appellees," *Bush v. Lisle* (1889), , Case 19613, Box 839, KCAR, KDLA.

[64] Ibid.

> himself by calling upon him, with his stuttering tongue, to curse and blaspheme the only source from which had their been any 'light of reason' left, he could have expected any relief.[65] (underlining theirs)

These descriptions portrayed a pathetic, repulsive man, morally and physically debased, who threatened to spread his moral contagion to another susceptible disabled person. Lisle could neither control his "stuttering tongue," his body or his irrational conduct. The figure of Lisle became a courtroom spectacle, designed to create revulsion and moral outrage in the jury. By linking his physical disabilities to allegations of Lisle's overall immorality, the challengers created an image of a dependent, uncontrollable body that mirrored an uncontrollable, morally insane mind. Lisle's body and conduct threatened an orderly society based on self-government. Implicit in the challengers' arguments was that to sanction Lisle's will was to advocate such immorality and to accept Lisle as a citizen who had the requisite self-determination to transmit property.

Alsey Howard and Polly Bullitt suffered from congenital physical impairment. Frank Lisle had contracted syphilis while in his twenties. All three testators were under age sixty when they died. In the majority of cases in which the plaintiffs alleged that physical infirmities reflected mental infirmities, the testators were considered very old. Testator's references to their "infirm bodies" but strong minds were widespread. Archibald Casey wrote his will on April 15, 1825, declaring that he was "weak in body and nearly ready to drop into the grave but retaining my usual vigor of mind."[66] Casey's will was probated three months later, in July 1825. This testamentary ritual of

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[65] Ibid.

[66] "Will of Archibald Casey," Harrison County Will Book B (1818-1832), Harrison County Court Records, KDLA.

describing their bodies continued through the end of the nineteenth century. In 1890, testator Samuel Murrell described himself as ninety eight years old and "very infirm. I have not been able to stand alone for several years or walk a step." Murrell died within two months of writing his will.[67] These references were more than rhetorical flourish or formulaic legal language; many testators thought death was imminent, and the proximity of the will's creation to the probate date suggests that often they were right.

As historians remind us, in the nineteenth century, people understood the human life cycle much differently.[68] Although in contemporary views, sixty years old is considered part of middle-age and continued vitality, in the early nineteenth century few people survived past their sixth decade. According to census data, in 1870, about 3% of the population was sixty-five years old or older.[69] People succumbed to chronic diseases like tuberculosis. Kentuckians regularly experienced outbreaks of fevers, small pox, cholera, and influenza, diseases which caused more deaths among the oldest and youngest populations. Accidents, poor nutrition, ineffective, unavailable, or even harmful medical care added to high mortality rates. Not until the first decades of the twentieth century did the number of people surviving past age sixty-five significantly

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[67] "Will of Samuel Murrell," Warren County Will Book #5 (1890-1906), Warren County Court Clerk Records, KDLA.

[68] David Hackett Fischer, *Growing Old in America* (New York: Oxford University Press, 1977); Thomas R. Cole, *The Journey of Life: A Cultural History of Aging in America* (New York: Cambridge University Press, 1992).

[69] Andrew Achenbaum, "The Obsolescence of Old Age in America, 1865 – 1940," *The Journal of Social History* 8 no. 1 (Fall 1974), 52.

increase. In 1840, 23.8% of the population survived past age seventy; by 1900, it had increased to only 41%.[70]

Perceptions of aging changed throughout the nineteenth century. Through the eighteenth century to the first decades of the nineteenth century, prosperous white men in their old age received veneration in church governance and in local and national politics. At the General Convention of the Protestant Episcopal Church in 1826, one participant described the presiding Bishop as a "venerable figure. . . now on the verge of fourscore years, as the light fell upon his mild but aged features."[71] Images in popular literature associated old age generally with wisdom and respect. Depending on sex, race and socio-economic status, aging did not always inspire the same gravitas. Old women and aging poor people often experienced contempt, ridicule and isolation.[72] Elderly slaves unable to work were sometimes denied basic shelter and food when no longer able to perform productive labor.

By 1820, old age began to lose its positive associations replaced with what historian David Hackett Fischer has called, a "cult of youth."[73] Aging and bodily degeneration began to be portrayed as contemptible and subject to ridicule. Although elderly people may have been treated with solicitousness especially when they controlled financial resources, often they were objects of patronizing condescension by their

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70, "Appendix – Table V, "Length of Life in America, 1652 – 1960, Survival form Birth to Old Age' in Fischer, *Growing Old in America.*

71 N.A., "General Convention," *Gospel Messenger and Southern Episcopal Register,* 3 no. 36 (Dec 1826), 374.

72 Fischer, *Growing Old in America.*

73 Ibid.

younger counterparts. In a letter to the editor of the *Southern Literary Messenger,* one writer lamented that "among the changes . . . in society, there is nothing, Mr. Editor, which strikes an old man more forcibly than the diminished deference which is paid to age. . . . Even the most humble. . . found always in their scanty locks, and tottering frame, the best assurances of kindness and sympathy."[74] Popular depictions continued to portray old men and women living out their last years quietly sitting next to a fireplace in their children's homes. These images often emphasized youth as the time of social authority and old age as a time of isolation and inactivity. One author advised that men "in health and vigor" should strive to "the worthiest actions, either in their public or private stations, so they may have something agreeable to feed on when they are old."[75] A woman writing in 1861 as elderly "Aunt Alice" in *The Saturday Evening Post* asked, "Must we now fold our hands and sit in silence in the old rooms where, of so many years we were so constantly required?"[76] She rejected the idea, but her question demonstrates the fears and realities of isolation for elderly people.

Historical evidence indicates that since the first New England settlements, some parents have retained property until their death. Other parents have allowed their children (usually sons) to live or farm land while retaining title. Occasionally, fathers deeded land or wealth to their daughters on their marriage or after reaching adulthood. Adult children may have resented parents who retained their wealth and property,

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[74] "Letter to Editor," *Southern Literary Messenger* 3 (Dec 1837), 743.

[75] William Temple, "Thoughts on Old Age," *Virginia Historical Register and Literary Companion* 5 no. 1 (1852), 49.

[76] Aunt Alice, "Old Age is Honorable," *Saturday Evening Post,* March 23, 1861.

particularly in societies with a scarcity of land. Children and grandchildren perceived land retention among older generations as an obstacle to their own marital and financial independence. In Puritan New England, accused witches were often older, female and held land coveted by younger generations.[77] Some Kentucky testators appeared aware of the difficulties their children faced in establishing independence, especially after land was no longer widely available except through purchase. Probated wills reveal that testators mentioned land or wealth previously lent or deeded to children as part of their overall estate distribution.[78] Testator Dumas Jones directed his executor to divide his estate to account for the "improvements" made by his son "who by my consent has settled on the North east corner of my farm."[79] Jones, like many testators kept a careful accounting of advancements he had made to all his children. Testator Nancy Devin recorded that she had "advanced to my daughter Nancy C. French (now deceased) and to her children, more than it is possible for me to bequeath to my other heirs." Devin then left her estate to her remaining children, disinheriting her daughter Nancy's children, as an act of "justice to my other children and heirs."[80] These kinds of inter-familial property transfers allowed younger generations to survive or begin their own families by leaving the parental household and striking out with some property.

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[77] Karlsen, *Devil in the Shape of a Woman.*

[78] Glendyne Wergland discusses similar testamentary patterns in Massachusetts. See Wergland, "Men, Women, Property, and Inheritance: Gendered Testamentary Customs in Western Massachusetts, 1800-1860."

[79] "Will of Dumas Jones," Harrison County Will Book B (1818-1832), Harrison County Court Records, KDLA.

[80] "Will of Nancy Devin," Warren County Will Book #5 (1890-1906), Warren County Court Clerk Records, KDLA.

In some testamentary capacity cases, the bitterness and vitriol resonated in the courtroom from heirs-at-law who believed they were slighted from long awaited inheritances that might propel them to financial independence or social mobility. For example, in 1865 at age sixty-five, Edmund Munday's persistent kidney disease rendered him increasingly impaired. Munday rented his farm to his son Rueben who had just returned from the Union army. Rueben and Munday often quarreled over horses and farming arrangements. A year later in 1866, Munday disinherited Reuben, leaving his estate to three other children. Reuben's lawyers described Munday's will as an "unjust disposition in an old and decayed man" who was "extremely irratable [sic] and morose."[81] Arguing that Munday had legitimate reasons for disinheriting Rueben, the beneficiaries' lawyers referred to Munday as "old and venerable," reminding the Court that children "despise your advice and when you make a will and discriminate against them they will come into court and declare an insane aversion towards them."[82] Both arguments accounted for aging and physical decline. In one, the process was worthy of veneration and deference; in the other, it produced irritability and insanity.

Early in the century, Kentucky judges protected testamentary rights from zealous family members who, believing themselves slighted, argued that advanced age brought physical and mental decline. In 1815, the Court of Appeals rebuffed a challenge by testator William Harper's son-in-law, holding that too high a standard of capacity would exclude testators "who had passed the meridian of life; whose faculty of memory and

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[81] "Brief for Appellees," *Spears v. Sales,* (1867), Case 1251, Box 45, KCAR, KDLA.

[82] "Brief for Appellants submitted by HC McLeod," *Spears v. Sales,* (1867), Case 1251, Box 45, KCAR, KDLA.

vigor of mind had begun, with the decline of personal strength and activity, to lose some of their more vivid energies."[83] The Court admitted difficulty in determining when physical impairment due to age- related decline resulted in enough mental impairment sufficient to destroy free will. Testator Frances M'Daniel suffered a stroke when he was about sixty years old, leading the challengers to argue that "his mind appeared to be as much affected by paralysis, as his body . . that his tongue and limbs were very much paralyzed, but his greatest suffering was in his head."[84] The Court acknowledged the possibility of devastating cerebral and physical effects, but wavered on establishing a direct link between paralyzed, infirm bodies and mental impairment. "How, or to what extent a paralysis of the corporeal, operates on the intellectual man," the Court hedged, "no speculation can ever explain."[85] Judge Robertson's decision upholding the will consolidated the Court's authority by allowing future judges greater latitude in interpreting the facts of the case.

Judges and local trial participants inevitably balanced special obligations incurred by disabled testators against the more general claims of the "natural objects" of testators' beneficence. Male and female testators often by supplied financial resources to facilitate care when their disabled descendants likely would outlive them. In 1851, Trigg County Augustin Cook willed that his executor purchase one slave to take care of his "crippled"

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[83] *In re Harper's Will,* 4 Bibb 244 (1815).

[84] *In re M'Daniel's Will,* 25 Ky. 331 (1829).

[85] Ibid.

daughter.[86] Testator Frances Lennox Hill devised her entire estate to her brother for "services rendered me, secondly on account of Physical afflictions of his."[87] The probate system reinforced networks of care-giving for relatives disabled by age or congenital physical impairment. These sorts of inheritance practices, in which care-taking for disabled family members were rewarded through testamentary gifts and court protection, exposed the public and economic dimensions of disability.

Children who remained with elderly parents, often through grueling years of home caregiving, argued that they were entitled to the testator's wealth after sacrificing time and money through emotionally difficult caregiving.[88] Returning to Alsey Howard's case, *In re Howard* (1827), Judge Logan mentioned that although deformed, Alsey Howard's affections were not "benumbed." He referred to Howard's testamentary recognition of her mother, who had "nursed her from infancy to old age." Howard's brother, the challenger, resided in Tennessee and appeared only after his sister's death. In a rural state with few formal institutions devoted to social welfare, families and local communities formed essential care-giving networks for elderly, insane and disabled kin and neighbors. Bibb believed that Howard's sentiments toward her mother's efforts was "proof . . . of memory, of reason and of social affections and moral sense." Bibb iterated

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86 "Will of Augustin Cook," Trigg County Will Book D, 110, (1851-1855) Trigg County Court Clerk Records, KDLA.

87 "Will of Frances Lennox Hill," Harrison County Will Book I, 271, (1864-1870), Harrison County Court Clerk Records, KDLA.

88 For a discussion of the emotional toll women experienced as they cared for family members see Emily K. Abel, "Family Caregiving in the Nineteenth Century: Emily Hawley Gillespie and Sarah Gillespie, 1858 – 1888," *Bulletin of the History of Medicine,* 68 no. 4 (1994): 573 – 599.

a customary social network based on familial obligation by equating property bequests to her care-giving mother with "social affections and moral sense."

The Court looked favorably on children who cared for aged testators. Rachel Higdon died at eighty-five years old with a small estate valued at three hundred dollars. She devised most of it to her son, Thomas, "for the love and natural affection I have for my son Thomas Higdon & his attention & services which he has rendered me."[89] Ruling on a challenge brought by her disinherited children, Nelson County Court judge ruled that Higdon was "incompetent."[90] Thomas Higdon appealed. Agreeing with the lower court judge that Higdon was "impaired," with "perceptibly decayed" faculties the Court of Appeals turned to the worthiness of the heirs. Chief Justice Robertson upheld the will, noting that Higdon lived with Thomas and that he was "more kind and attentive to her, than any of the other children." Blood relations, affection, and financial resources defined the economy of care-giving. Expectations of testamentary recognition flowed naturally from this sacrifice.

In another case, no one else appeared willing or able to take care of disabled relatives. In *Bush v.* Lisle (1889), although the Appeals Court upheld Frank Lisle's will in spite of advanced syphilis and a reputation for immorality, they did so partially because they saw his devises as a "just and equitable disposition of his property."[91] Lisle had made offers to his brother Brax and cousin Rufus Lisle to exchange his estate for

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89 "Will of Rachel Higdon," Nelson County Will Book G (1831-1835), Nelson County Court Records, KDLA.

90 Nelson County Order Book A (1830-1834), Nelson County Court Records, KDLA.

91 *Bush v. Lisle*, 12 S.W. 762, (1889), 764.

care. Eventually, he moved in with Minerva Bush. As his condition advanced, no one else seemed willing or able to care for Lisle. H. Taylor, a family friend testified, "I wouldn't keep anyone at all in that fix unless he was a relation to me."[92] Minerva Bush and her family were morally deserving. After describing Lisle as "totally blind, unable to walk" with "offensive matter" escaping from his mouth, the Court commended Minerva's care for him as "the most assiduous, careful and affectionate nursing and attention."[93] Judges encoded into decisions the morality and saneness of testamentary gifts as recompense for taking care of disabled relations.

Like other social relations, the economy of care-giving was embedded in Kentucky gender and race relations. Throughout much of the nineteenth century, disabled and aged people received care from family members, usually from women whose unpaid household labor was considered part of their marital duties and consonant with their natural predisposition. In 1889, Minerva Bush testified that she took care of her brother Frank Lisle by making "his bed and did knitting and sewing for him. I made his bed because he said that when I made it he did not fall out."[94] In *Ridgway v. Hall* (1871), Samuel Ridgway disinherited the "orphan children" of his deceased son in favor of his daughter, Malinda Hall, who had nursed him worked on his farm and ministered to his sick slaves. The contestants argued that Ridgway's weak mental state allowed Hall to unduly influence him to disinherit his grandchildren. The argued that Hall's control over

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92 "Testimony of H. Taylor," Transcript, *Bush v. Lisle*, 89 Ky. 393, (1889), Box 839, Case 19613, KCAR, KDLA.

93 *Bush v. Lisle*, 12 S.W. 762, (1889).

94 "Testimony of Minerva Bush," Transcript, *Bush v. Lisle*, 89 Ky. 393, (1889), Box 839, Case 19613, KCAR, KDLA.

his care and her exercise of authority over his slaves revealed Ridgway's dependency and her improper influence. Although Hall assumed a familiar female role as a caregiver, she also assumed a masculine role as the household authority.

Testimony in *Ridgeway v. Hall* also revealed how race relations influenced caregiving and testation. When white people nursed African Americans or vice-versa, these relationships acquired different cultural and economic valences. The proponents of the will argued that Hall had been an obedient daughter and particularly worthy beneficiary. She had gone beyond expected duties by taking care of Ridgway's sick slaves, a task described as a particularly odious burden. Ridgway's neighbor, Lucy Ann Magruder testified that Hall "waited on him & his wife & the negroes when sick," declaring that Hall's nursing slaves was a "disagreeable" task. In Hall's place, Magruder would not "do what she [Hall] had to do for the farm and Negroes."[95] Magruder never commented on the whether Hall's nursing duties to her mother and father also were offensive. Her silence could be read to imply that, although a sacrifice, it was expected that daughters would take care of aging parents and disabled family members. Another witness, FS Sewell concurred that when the slaves became sick in 1862, "I would not have waited on them as she did for the Negroes . . . at that particular time."[96] When asked about his reference to a "particular time," Sewell answered, "I believe the Negroes would be free." Sewell assessed the value of nursing dispensed by a white person in terms of retaining the slaves' economic value and labor. If the slaves would be freed, Sewell saw no reason for heroic care, as Malinda Hall would lose part of her inheritance

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[95] "Testimony of Lucy Ann Magruder," Transcript, *Ridgway v. Hall,* (1871) Case 4387, KCAR, KDLA.

[96] "Testimony of FS Sewell," Transcript, *Ridgway v. Hall,* (1871) Case 4387, KCAR, KDLA.

once the slaves were freed. In Sewell and Magruder's view, the obligation to take care of household members was determined according to race and grounded in the economic relations of slavery.

When African-Americans nursed white people, no reciprocal expectations of bequests existed. The exchange of money for care did exist, reflecting how economic relations and affection structured care-giving practices. For those who could afford it, testators or their families sometimes hired African Americans to assist in nursing duties. Their tasks were no less onerous than those that were performed by white family members, and these relationships sometimes lasted for years. In *Bush v. Lisle* (1889), Orrin Bates, described as "a colored boy" testified that he "I cooked, worked on the farm and waited on Mr. Lisle" for five years. Bates slept in the room, and was at Lisle's beck and call to supply morphine, food, or read the newspapers to Lisle.

White testators rarely devised to African American beneficiaries after 1866. After the Thirteenth Amendment abolished slavery, devises across color lines, which had appeared as manumissions, almost disappear from the record. Master and slave no longer fell under the binary legal relation in property law. The relationships of husband/wife and parent/child and master/apprentice remained, but formerly enslaved African American laborers were no longer part of the legal entity of the household. African Americans still worked in white male-headed households, but black men had become household heads in their own right, and had responsibility for their own dependents. African Americans working in white households did so as "free labor," redefining the legal responsibilities and often the living arrangements that had previously existed under slavery.

White caregivers staked a claim of financial reward based on their compassion and the socially understood, but not statutorily encoded obligations of testators. Black caregivers received only the meager wages they were paid by testators and their families. In Warren County, of 99 wills sampled from 1827 to 1862, 7 involved manumissions (about 7%). After 1862 that percentage fell by almost two-thirds; of 143 wills sampled between 1862 and 1898, 4 wills clearly involved interracial devises, (about 2.7%). When postwar devises across color lines do appear, they frequently mentioned caregiving. Testator James Young devised a one-fourteenth share of his estate to Mary, a "col girl" for her "services rendered me in my old age."[97] Overwhelmingly though, the disputes between care-giving beneficiaries and heirs-at-law occurred within the boundaries of whiteness.

The 1881 dispute between Anne Cooke's "paramour" Jimmie Ross and her sister, Jane Weaver turned on the tensions between the obligations to blood relations and the obligations to caregivers. Testimony made clear that while suffering from her final illness, Jimmie Ross and Minerva Cox, "a woman of color" took care of Anne Cooke. Weaver had spent little time visiting or nursing Cooke. Summarizing the evidence, a brief supporting the will stated that "Ross patiently tenderly and constantly nursed her. There was no other person except the woman Minerva Cox to render her assistance."[98] Anne Cooke and Court of Appeals recognized the claims of Ross; Cooke had devised most of her estate to him and the Court upheld the will. Neither had a blood relation to

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[97] "Will of James Young," Warren County Will Book #4 (1862-1889), Warren County Court Clerk Records, KDLA.

[98] "Brief for Appellant," *Ross v. Weaver,* (1881), Box 527, Case 13247, KCAR, KDLA.

her, although Ross probably had a sexual relationship with her. Sexual relations certainly defined testamentary obligations, but interracial care-giving relations did not. The notion of leaving a bequest to an African American caregiver rarely occurred to testators or anyone involved in will disputes. No one claimed that Minerva Cox was unreasonably ignored in the testamentary distribution.

Caregiving was one of many factors that influenced patterns of property distribution. These patterns became more racially homogenous, and defined the reciprocal obligations of caregiving as an obligation that attached only to white, (often related) caregivers. The idea that African Americans served white bodies without acknowledgement remained firmly fixed in inheritance practices. Overwhelming, while nursing services to ailing whites could be performed by either race, only white family were expected to receive the public recognition and reward through a will.

Cases in which beneficiaries took care of disabled testators presented Janus-faced challenges to beneficiaries and heirs-at-law alike. Described one way, caregivers made great emotional and financial sacrifices to care for ailing and disabled relatives. Described another, caretakers controlled the food, medicine and survival of impaired testators, making them physically and psychologically dependent. They lost free will. Heirs-at-law challenged wills by contradicting beneficiaries' images of themselves selfless, noble caregivers. Challengers portrayed caregiving as an oppressive relationship that fostered physical and mental dependency, and was ideally suited to exercising undue influence.

In *Bush v. Lisle*, the challengers' attorneys argued that Minerva and her husband Robert Bush's control over Lisle's body inhibited Lisle from distributing his estate

according to his free will. Testimony focused on Lisle's dependency on Minerva Bush for care and pain relief. The Bush family dispensed morphine to alleviate the agonizing neurological effects caused by Bush's affliction. The challengers translated the dependency created by the drug into a dependency on the family who administered the drug. Although he never met Lisle, Samuel Willis, a local doctor said that

> syphilis itself degraded the moral sense. Was a frequent cause of insanity and in his judgement the loss of hair, drawing of the mouth, impairment of taste, loss of use of lower limbs is conclusive evidence. . . . And that to a person so affected you add the habitual use of morphine the will power would be utterly destroyed and the person would be like a child in the hands of the family with whom he lived and from or through whom he received his morphine.[99]

Again, the trope of disease and physical impairment was linked to moral debasement, this time compounded by multiple dependencies on morphine and the caregivers. Although the Bush family took care of Lisle, the challengers presented the issue as one of protecting testamentary freedom. The image of a "child," used by Willis occurred frequently throughout the trial to emphasize irrationality and dependency. Depicting Lisle as a "blind; paralyzed; habitual morphine eater, who was thus confined, as helpless as a child," CF Ronston, the contestants' lawyer, vividly portrayed the creation of Lisle's final public declaration – his will – as an act representative of years of physical, psychological and mental coercion. To illustrate, they emphasized Robert Bush's physical control of the testator's body at the moment of signing the will. Ronston described how Robert Bush held "the paper for him to sign but as well holding the body

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[99] "Testimony of Samuel Willis," Transcript, *Bush v. Lisle*, 89 Ky. 393, (1889), Case 19613, Box 839, KCAR, KDLA.

of the testator and hand to sign."[100] This degree of physical dependency presented legal problems; courts and jurists sought to guard disabled and dependent testators from being coerced mentally and physically into signing wills. Challengers recognized the power of the imagery, and attempted to invoke it to their advantage.

Bush v. Lisle is one of several cases in which the challengers drew attention to the testator's inability to physically attest to the will. Signing the will was a symbolic moment in which the physical act gave meaning to the expression of free will represented in the testator's final public words. In an 1860 Floyd County case (concluded at the county level) the heirs-at-law quizzed Moses Wells, a witness of the will about testator William Webb's physical ability to attest to the will. Asked whether he had to hold the old man up to make his mark, Wells replied 'He held the top of the pen and I made the mark. . . . He had not good use of himself.'[101] Wells was not a beneficiary, but the challengers attempted to demonstrate undue influence or impure motives by creating courtroom images in which someone controlled the testator's body.

This act of physical assistance happened with some regularity. Jurist Isaac Redfield confirmed the validity of wills when a testator, "unable from illness and has his hand guided in making his mark, it is a sufficient signature."[102] Still, the courtroom imagery was powerful. To imagine another person holding the body of the testator or guiding his or her hand suggested that this moment was compromised. Challengers

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[100] "Testimony of CF Ronston," Transcript, *Bush v. Lisle*, 89 Ky. 393, (1889), Case 19613, Box 839, KCAR, KDLA.

[101] *William Webb's Heirs vs. William Webb's Devisee,* (1860), Case 827, Box 5, Floyd County Circuit Court Civil Case Files, KDLA.

[102] Redfield, *The Law of* Wills, 175.

argued that though the means of obtaining the signature may have been valid, the free will of the testator was in doubt, as the long history of past physical dependency revealed. The Court of Appeals was less likely than juries to use the potential correlation between physical impairment and mental unsoundness if they believed that the devises were appropriate. It certainly mattered at the local level, as juries often overturned wills in which such discussions were central. Furthermore, the lawyers' briefs submitted to the Court of Appeals often focused on claims using images of deformity and disability.

In Kentucky testamentary capacity cases, images of monstrosity, functional impairment and physical deviance suffused testimonies and opinions. Bequests of material wealth publicly reinforced and institutionalized this system in which physically disabled people were dependent on kin networks and informal social contracts for care. Witnesses, contestant's lawyers and judges emphasized what they characterized as physical difference as indicative of mental unsoundness. Disability and impairment were forms of evidence presented in trials, drawn from a wider social discourse that devalued disabled bodies. This connection however, was not firmly fixed. The point of contention in these cases was particularity; whether this particular testator's physical body housed an unsound mind. By calling attention and analyzing the body through witness interrogation and then through briefs, each litigant metaphorically dissected the testator's body to make judgments about the mind within.

Polly Bullitt body, in her appearance and gestures, differed from the other students at Nazareth, where she had spent much of her life. We will never know what Bullitt's intellectual capabilities were; what we can explore are how historical actors stigmatized Bullitt's physically uncontrollable body as a signifier of mental incapacity.

What the challengers lawyers chose to focus on in their interrogatories – combination of her physical appearance and functional abilities deeply informed by gender ideologies – reveals that the challengers chose a strategy in which they disregarded the rhetoric of natural obligations to her bloodline relatives, arguing instead that Bullitt appeared monstrous and sub-human, incapable of legally disposing of her property. Rather than making an affirmative argument for themselves as worthy heirs, they excluded Bullitt as uncontrollable and brutish.

In *Bush v. Lisle,* the challengers used Lisle's venereal disease and its visible effects to represent an immoral, profligate character whose devises were unworthy of legal sanction. In other cases, the testator's advanced age or functional impairments signaled dependency and mental unsoundness. Often, in a concurrent line of legal reasoning, the one or both parties of litigants articulated special claims on testators' estates, as they had sacrificed time and money to nurse often vexatious relatives who required exhausting care. Those that had special claims however, were defined first by race, and then by blood. Nursing, especially when testators were physically immobile, also opened caregivers to allegations of undue influence. By controlling testators' bodies, they controlled their minds. At a time when social services did not exist, the Court of Appeals strove to balance the claims of disinherited bloodline relatives – thus upholding the broader legal doctrine of favoring the "natural objects" of the testator's bounty.

CHAPTER V
"A SPECIAL POWER": WOMEN'S TESTAMENTARY CAPACITY

In 1879 Robert Johnson asked his wife Mildred to relinquish her dower interest in a portion of the land on which he wished to build a whiskey distillery.[1] Mildred feared distillery venture would be "disastrous and wreck his fortune, leaving her and her then infant children without support."[2] In exchange for consenting to the distillery deal, Mildred insisted that Robert deed to her a sizable lot in Lexington, Kentucky. As Mildred predicted, Robert eventually lost the distillery investment but she retained the Lexington lot. Over the next thirteen years at Mildred's instigation, Robert conveyed almost his entire estate to her. Before Mildred died in 1894, she wrote a will disinheriting Robert and leaving her estate to their children, entreating them to "never let your father want at any time of life." Robert sued to overturn the will, claiming his wife was "dead to all sense of justice . . . [and] ignorant of all moral obligation."[3] Robert contended that for years Mildred deviously manipulated him to renounce his property rights, which he did for the sake of domestic peace. As Mildred's "disordered brain" weakened from disease, their daughters unduly influenced Mildred to disinherit him.

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[1] Kentucky law required that a wife assent to any sale her husband made concerning dower land, as this land was intended to support widows.

[2] "Brief For Appellants," in *Johnson's Admr., & c, v. Robert F. Johnson*, Box 1159, Case 26822, KCAR, KDLA.

[3] "Brief For Appellee," in *Johnson's Admr., & c, v. Robert F. Johnson*, Box 1159, Case 26822, KCAR, KDLA.

After her death, their children ejected Robert from his former estate, turning him "penniless and homeless into the street."[4]

After a mistrial, a second local jury overturned the will. The Court of Appeals concurred, reproving the daughters whose "offensive impertinence" led Mildred to "aggravate and embitter her mind against her husband." Noting Robert's "unexampled generosity," the Court expressed repugnance at Mildred's "unflagging pertinacity." As the Court saw it, Robert was the henpecked husband who "asked in return only those evidences of affection which the wife owes the husband."[5] They believed Robert was a weak household head with "little or no firmness of purpose." Still, by overturning the will, the Court returned Robert's financial independence and punished his daughters' "unfilial conduct." This decision probably came as little surprise to anyone following the Court's jurisprudence on women's testamentary capacity; the Court consistently reinforced a doctrine of marital unity in which husbands controlled their families' economic fortunes. Behind this doctrine was a broader, yet often unarticulated principle in which the Court curbed all women's testamentary freedom in an effort to protect nuclear households with male governance. From mid-nineteenth century to the turn of the twentieth century, testamentary capacity cases served as a site for the struggle over assertions of female legal authority and the countervailing attempt to preserve male authority.

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[4] "Brief For Appellee," in *Johnson's Admr., & c, v. Robert F. Johnson*, Box 1159, Case 26822, KCAR, KDLA.

[5] *Johnson's Admr, v. Johnson,* 20 Ky. L. Rptr. 138 (1898).

Throughout most of the nineteenth century, Kentucky law left wives vulnerable to the repercussions of their husbands' economic decisions. When husbands made poor financial decisions, they left little for their families or intended beneficiaries. Some women, seeking more control over inheritance decisions and wealth management, engaged formal legal structures through informal elusions. Mildred Johnson importuned her husband to grant her legal titles at which point she removed her husband as mediator of the family's economic future. In another case, testator Johanna Umphenbach attempted to secure her earnings as a seamstress in a separate account free from her husband's control so she could devise to her niece.[6] In these cases and others, the Court upheld male authority by reproving female testators' assertions of testamentary independence.

The wills of unmarried or legally independent female testators also were subjected to challenges based on assumptions about women's innate capacities. Often, challengers linked female testators' sexual behavior to mental unsoundness. Little evidence suggests that female testators or their beneficiaries thought about their inheritance practices as part of broader debates over women's equality, although certainly Kentucky women's rights activists saw property rights as central in their struggle. Instead, transcripts suggest that they saw these disputes as deeply personal dramas over communal and familial justice and on another level, as high stakes economic battles.

In inheritance disputes, the language of capacity rather than the language of political rights conveyed women's claims to property management. Inherited property, with its symbolic and economic freight, makes testamentary capacity cases ideal sites to

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[6] *Wehle v. Umpfenbach,* 15 Ky.L.Rptr. 346 (1893).

explore simultaneously women's changing social and legal positions as household members and as independent economic actors. The Kentucky judiciary supported an inheritance system which applied the grammar of capacity to limit women's testamentary independence and deprive their beneficiaries of social recognition and wealth. It is true that women successfully wrote wills and deeded property throughout the nineteenth century. As more women sought testamentary freedom, the judiciary sought to preserve male authority in which optimally, men were constituted as husbands.[7] Testating women were inherently suspect to authorities who viewed the doctrine of marital unity as a social and legal vision of natural household relations. Those wills on the margins – challenged on capacity grounds - indicate that communities and judges scrutinized the wills of women who deviated from expectations of feminine behavior and wifely docility throughout the nineteenth century.

Until 1894, Kentucky law prevented married women from writing wills without their husbands' consent or without creating a "separate estate." These laws meant that women were vulnerable to two kinds of testamentary capacity challenges: those based on female testators' marital status and those based on female testators' mental capacity. In the former, judges were concerned with establishing the legal capacity to write a will. In the latter, judges applied the same the same legal test to determine mental capacity for male testators. Female testators whose wills faced mental capacity challenges tended to be widows or women who had never married. On occasion, married women's wills faced a legal "double jeopardy" in which their cases were challenged on both mental and legal

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[7] Ariela A. Dubler, "In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State," *Yale Law Journal* 112 (2003), 1645-1651.

capacity issues.[8] Until statutory changes in 1894, the Kentucky courts' narrow interpretation of women's capacity had a two-fold effect: it limited married women's access to property, which consolidated wealth among white male property-holders, and it preserved the legal and social fiction of marital unity and male household authority.[9]

Historians have long studied how women's access to and control over property constituted an important front in the struggle for equal rights. Legal scholar Richard Chused argues that early married women's property acts did little to change prevailing ideas about women's social and domestic roles.[10] Instead, as other scholars also have argued, after devastating financial panics legislatures passed early married women's property acts to protect families by insulating married women's property from their husbands' creditors.[11] Historian Joan Hoff notes that inheritance laws changed more slowly than other property laws because "it is determined by changes in the economy and the status of women within the family and society. . . ."[12] Historians have found that Hoff's observation rings particularly true in Kentucky, noting that in terms of controlling property, married women found the "avenues for judicial relief narrower in Kentucky

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[8] *In re Yates Will,* 32 Ky. 215 (1834).

[9] On Kentucky's woman's rights movement, see Paul E. Fuller, *Laura Clay and the Woman's Rights Movement* (Lexington: University of Kentucky Press, 1975).

[10] Richard H. Chused, "Married Women's Property Law: 1800 – 1850," 1359 – 1425.

[11] Lebsock, *The Free Women of Petersburg.* As Lebsock argues, "separate estate was a means of keeping property in the family when times were hard and families stood to lose everything because of the husband's indebtedness," xvi.

[12] Joan Hoff, *Law, Gender, and Injustice: A Legal History of Women* (New York: New York University Press, 1991), 84.

than in other states, the disabilities more significant."[13] These analysis however, have been built upon the political and social contexts. The role of capacity in determining access to rights has yet to be interrogated. Analyzing will disputes reveal how complex personal relations and social values removed from overtly political dialogues shaped "law on the ground."

One advantage to studying inheritance is that probate books often survive. This archival trove has allowed historians to compare the increasing number of *feme soles* to *feme coverts* as a way to understand how coverture eventually eroded under multiple pressures from economic modernization and women's rights activists. Other studies analyze probated women's wills and compare them to male testamentary patterns. These studies have been tremendously useful in understanding how women's goals differed from men's. Still, these studies consider only women who have passed the capacity test due to their legal and mental capacity. As many of these studies are concerned with aggregate comparisons over decades, considering rejected wills remains outside their purview. Less understood, although a few noteworthy studies exist, is how *feme soles* (women who had legal independence over their property) and their beneficiaries experienced inheritance practices in the context of a society in which coverture was the norm. New studies explore how marriage and its attendant rights mediated women's

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[13] Martha Carson, "Kentucky Married Women's Property Act: An Early Appeal for Justice," *Border States: Journal of the Kentucky-Tennessee American Studies Association* 5 (1985), 23; Fuller, *Laura Clay and the Woman's Rights Movement*, 39.

relationship to the state and the citizenship.[14] The varied foci of these studies underscores how law and gender conventions defined the limits of inheritance practices.

The earliest Kentucky statute (1797) defined the capacity to write a will as anyone "being of sound mind and not a married woman."[15] The statute drew legal lines between legal capacity and mental capacity. " Not a married woman" marked legal capacity, while "sound mind" identified mental capacity. In the nineteenth century, when women willed property, these two requirements mutually defined a juridical and social context in which any woman's ability to rationally control property was inherently suspect. As Louisville Chancery Judge S.S. Nicholas told the jury in Polly Bullitt's 1846 will case, aside from questions of Bullitt's alleged idiocy, "the general aptitude of the sex [female] for the management of property is so small that it would not do to make that the criterion of capacity for making a will."[16] These attitudes prevailed throughout the nineteenth century. Although women had controlled and devised property since the Founding, judicial attitudes and social practice inherently questioned their ability to write a just and responsible will. These social doubts were expressed through the discourses of legal and mental capacity during litigation.

Few African American testators appear in the probate or litigation records throughout the nineteenth century. Those who do were men, with the exception of Jemima Clark, whose will dispute is discussed in Chapter Two. Although African-

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[14] Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000).

[15] 1797 Kentucky Acts, Ch. 180 § 1.

[16] Judge S.S. Nicholas, "Charge to the Jury, May 2, 1846," Box 28, FL 255, *Howard v. Churchill*, BFP, FHS.

American testators rarely appear in the record, testamentary capacity trials served as a site in the ongoing process of creating racial hierarchy through persevering white male legal authority. Jurists and community members linked race and gender as innate markers of capacity, although few did it as explicitly as Judge Nicholas. In Polly Bullitt's will dispute (1847), Nicholas began with an "illustration" designed to explain the mental capacity required to "judiciously manage" property. Nicholas recalled "the best house servant I ever knew." He located the slave in terms of innate racial capacities, describing "His mental inferiority to the other house servants who had been raised with the whites was obvious enough, but I do not know that it would have been apparent among slaves at a Negro quarter on a farm." After acknowledging that this man "had the mental capacity to dispose of it [property] by will – though no one could pretend that he was capable of trafficking with or judiciously managing it," Nicholas turned to women's ability to control property:

> The whole female part of our society – whatever may be your partiality for the sex, whatever degree of your chivalrous feeling . . .you must in candor admit that the capacity of most of our females for trafficking with & managing property, consists pretty much in the capacity to select an agent or friend to do it for them.[17]

Nicholas explained the standard of mental capacity to the jury composed of legal laymen, using women and African Americans as examples of groups inherently lacking the capacity of white men.

Concerns with gender and racial order structured will disputes, but not as explicit justifications for overturning wills. Instead, these concerns emerged within the lexicon of

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[17] Ibid.

capacity, as part of the definition of a sane testator. White supremacy in Kentucky rested upon many footings, including the professed desire to protect white women. Kentucky courts and legislatures were notoriously slow in granting married women's property rights, partially because the jurists feared that granting women rights would erode marital unity. And behind preserving marital unity, lay the desire to protect the authority of the husband.

Throughout most of the nineteenth century, Kentucky jurists saw the common law concept of marital unity as the determinative principle governing married women's property issues. For almost all purposes, under the legal concept of marital unity women lost the ability to control and distribute their property at marriage. As the dismayed Kentucky woman's rights activist Josephine K. Henry observed in 1889, women leave the marriage altar "not even the legal possessor of the clothes she has on her back. She cannot make a will, and if the husband dies one week after the marriage . . . the wife's money goes to his nearest male relative, unless he generously wills the defenseless wife her own estate."[18] Henry's comments reveal the tenacity with which Kentucky husbands and jurists resisted granting women testamentary control. Local and appellate case law bear out this conclusion.

Kentucky Court of Appeals Judge Boyle echoed eighteenth century English jurist William Blackstone in 1811 when he held that "In legal contemplation, the very existence of the wife is merged in that of the husband. So completely is she identified with him,

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[18] Josephine K. Henry, *Married Women's Property Rights Under Kentucky Laws: An Appeal for Justice* (Versailles, Ky., 1889), quoted in Martha Carson, "The Kentucky Married Women's Property Act, 21.

that for all civil purposes she is deemed to have no will of her own."[19] Eighty-two years later in 1893, after most states had recognized married women's separate estates and their power to write wills, the Court of Appeals still rebuked female testators who threatened husbands' "marital right" by writing a will.[20] Even as the legislature grudgingly expanded women's legal abilities, many Kentucky jurists remained committed to a narrow interpretation of married women's rights. As the Court held in *Daniel's Devisees v. Daniel* (1871), husbands should be excluded from their marital right only by "language unequivocally manifesting such a design."[21] Questionable language almost always was interpreted in favor of the husband, regardless of trial evidence presented to the contrary. Kentucky jurists supported marital unity as a principle that promoted stability in household governance and reaffirmed the domestic order.

Kentucky jurists recognized that common law rules governing married women's property control could be circumvented through equity rules. Separate estates could be created under equity principles, which had developed in seventeenth century England as exceptions to coverture. Separate estates granted women (through a trustee) the power to convey or devise property.[22] Two factors mitigated against the widespread use and effectiveness of separate estates for women. First, few women had the resources or access to legal knowledge required to execute a separate estate. For example, in 1831 the Court of Appeals rejected the claims of Ann Anderson's son, who petitioned to uphold

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[19] *Crostwaight v. Hutchinson,* 5 Ky. 407 (1811).

[20] *Wehle v. Umpfenbach,* 15 Ky. L. Rptr. 346 (1893).

[21] *Daniel's Devisees v. Daniel,* 5 Ky. Op. 670 (1871).

[22] Salmon, *Women and the Law of Property,* 81 –119; Lebsock, *The Free Women of Petersburg,* 55-66.

her will. Ann Anderson wrote a will after her first husband's death, devising the estate to her and her deceased husband's son. She then remarried, voiding under common law the will she had made as a widow. The Court of Appeals declared that "the will of a feme covert is void, unless executed in pursuance of a power conferred by some previous will or deed."[23] Ann Anderson had not created "separate estate" prior to her second marriage, which would have preserved her testamentary freedom.

Secondly, these agreements were subject ultimately to the interpretation of the Court of Appeals.[24] The Court consistently limited the effects of equity agreements, arguing the paramount need to maintain legal unity of the marital couple. In 1834 the Court refused to defer to county courts, calling them "illy qualified" to determine the validity of separate estates because equity principles constituted "some of the most abstruse and difficult learning of the law."[25] In 1830 Judge Robertson of the Court of Appeals noted that under common law the "legal unity of husband and wife" passed control of wives' property to their husbands, "yet modern adjudications in equity have established, to a limited extent, the doctrine of the civil law which recognizes the separate existence and proprietary rights of married women."[26] Still, the Court doubted the wisdom or expansiveness of married women's equity rights. Judge Robertson continued:

> But this, comparatively new, and constructive equity of married women, should be enforced against opposing rights, unless it can

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[23] *Anderson v. Miller,* 29 Ky. 568 (1831).

[24] Jefferson County which included Louisville was a notable exception with the Louisville Chancery Court.

[25] *In re Yates Will* 32 Ky. 215 (1834).

[26] *Long's Administrator v. White's Administrators and Heirs*, 28 Ky. 226 (1830).

> be made out clearly and satisfactorily. In the language of Lord Macclesfield, "as it (is) against *common right*, that the wife should have a separate property from the husband, (they being both in law, but as one person,) *so all reasonable intendments and presumptions (should be) admitted against the wife* [italics in original].[27]

Judges tested agreements for technical language rather than overall intent. In an 1834 dispute over Molly Yates' will, Judge Nicholas admitted that through "exceptions" a married woman such as Yates (who had created a separate estate) could make a will. Although the Court acceded that Yates may have had a testamentary right, they reiterated the restrictions imposed by coverture. Nicholas interpreted equity agreements as "limited."[28] Any acknowledgement of Yates testamentary right "should not extend to deprive her husband" over any portion of her estate not specifically included in the trust.[29] Kentucky law governing married women's estates presumed and protected the husbands' marital right.

Even in cases where it appeared the wife had a clear right to devise, the Court closely interrogated the legal authority from which married women derived their testamentary power. Under equity rules, a husband could consent to his wife's will. This principle did not challenge marital unity or the hierarchy of governance in the household. It firmly recognized husbands' authority and discretion. According to legal authorities, a husband could revoke his consent at any time during his wife's life, but once the will was

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[27] *Long's Administrator v. White's Administrators and Heirs*, 28 Ky. 226 (1830).

[28] *In re Yates Will* 32 Ky. 215 (1834).

[29] Ibid.

probated, he "was not at liberty to retract his assent."[30] Still, Kentucky jurists' strict construction and judicial attitudes wary of dissolving marital unity benefited husbands who had second thoughts. In 1850, with her husband John's consent, Mrs. Bussing (first name not in the record) wrote a will in which devised most of her estate to her husband. She manumitted an enslaved man George, at the time of her husband's death. A little less than a year after the will was probated, John Bussing found himself in debt and moved to overturn the will and revoke George's future manumission.

John Bussing was no stranger to the Garrard County courtroom. His name appeared several times in the Garrard County Court Order Books, in litigation twice in 1837, and in 1839, 1842 and 1853. In 1839, Bussing took John Cleaveland to court alleging that Cleaveland had slandered him by calling him "damned thief" thereby "intending to injure the plaintiffs good name and reputation."[31] He was called into court over a debt in 1853.[32] When John Bussing chose to challenge his wife's will in 1851, Garrard County court records suggest that as a white male property owner with a public legal and economic identity, John Bussing had had much experience with the local justice system. Even if he did not know the specific rules governing inheritance and married women's testation, John Bussing knew how to find a lawyer and bring a claim.

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[30] Edward Vaughn Williams, *A Treatise of the Law of Executors and Administrators,* Vol. 1 (Philadelphia: R.H. Small Law Bookseller, 1849).

[31] *John Bussing v. John Cleaveland,* (1839), Box 6, Bundle 23, Case 134, Garrard County Circuit Court Case Files, KDLA.

[32] *Chas K. McCoy's Adm. v. John Bussing,* (1853) Bundle 112, Case 3703, Garrard County Circuit Court Case Files, KDLA.

Mrs. Bussing's will had emancipated George at John Bussing's death. Perhaps John Bussing sought to overturn the manumission in order to make George saleable. According to the1850 Kentucky slave census, John Bussing's household held four slaves.[33] Two slaves were women aged sixty-five and thirty-seven. The other two slaves were men, ages fourteen and twenty-eight. The census does not list slave names, so it is difficult to know which description might have referred to George. If George was either male slave, he would have constituted a valuable asset to Bussing. Under the will, his freedom was imminent upon John Bussing's death, probably negating any saleable value.

John Bussing's lawyers argued that he never gave his written consent to his wife, only his oral consent. The Court of Appeals judge rhetorically asked to what extent a husbands' consent would validate a married woman's will. Citing several legal treatises, the Court decided that oral consent would authorize only married women's wills which transmitted personal property. Relying on Kentucky statutory code, the Court determined that slaves were real property rather than personal property for the purposes of last wills. Devising real property required "some appropriate instrument of writing."[34] Therefore, George's manumission was invalid, and he became the unencumbered property of John Bussing.

The decision in *George v. Bussing* (1855) had two effects. It made manumissions by married women more difficult by requiring a written legal document that created a separate estate or documented the husband's consent. It placed control over

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[33] 1850 Kentucky Slave Census for Garrard County, KDLA.

[34] *George v. Bussing*, 54 Ky. 558 (1855).

manumissions and slave transfers more firmly in white men's hands by negating one route through which married women could control devises. The Court of Appeals also more generally limited married women's ability to devise valuable real property (land) even with their husband's oral consent. The Court contended that oral consent to devise personal estate "is no more than her a waiver of his rights as her administrator." The Court did not see oral consent to devise personal estate as a direct eschewal of marital rights. Rather, they saw it as a waiver of right in the husband's legal role as the administrator of her estate. By positing Bussing as the estate administrator rather than a husband, the Court avoided eroding marital unity, instead linking oral consent to the legal position of administrator. As the Court noted, "that her will, made even with the husband's consent, only operates to pass such things as do not belong to the husband, but which he would have a right to after her death only as her administrator."[35] Even with their husband's consent, married women's wills that did not implement recondite equity agreements were vulnerable to challenges from the husband or his heirs.

Court judges continued to give husbands broad latitude to define consent, even after the Kentucky legislature granted married women limited statutory rights to write a will in 1852. In 1877, the Court heard *Bell v. Rogers*, a case in which on her deathbed, Lydia Bell wrote a note in which she forgave a debt which her mother, Elizabeth Rogers owed.[36] When Bell's husband John entered the room, Lydia Bell told him that she had cancelled the debt. John Bell said nothing. After Lydia Bell's death, John Bell sued to

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[35] *George v. Bussing* 54 Ky. 558 (1855).

[36] *Bell v. Rogers* 9 Ky. Op. 292 (1877).

claim Rogers' debt. The question before the Court turned on how oral consent was defined. The Court found that

> Common humanity forbade the husband to deny, in open and express terms, his consent to an act which she desired to consummate, however much he may have disapproved it . . . The law does not require a man to protect his legal rights by wounding the feelings and embittering the last moments of a dying wife. His silence under the circumstances was inconsistent with the supposed consent, and if it evidenced anything it was his disapproval of the gift.[37]

A specific vision of marital roles and gendered obligations informed the judicial reasoning in *Bell v. Rogers.* Bell knew his wife's intent and let her believe that the debt was forgiven. By construing Bell's silence as "disapproval of the gift" the Court allowed Bell to appear as a generous respectful husband in a companionate marriage. According to the Court's interpretation, Bell's authority as a husband required a positive unequivocal verbal assent. The Court's reasoning allowed Bell to appear in apparent compliance of his wife's dying wishes in front of other community members who were present. The privileges attached to marital unity gave him continued control over his wife's assets.

Kentucky's Revised Statutes of 1852 granted married women limited rights to will property without their husbands' express consent or complicated pre-nuptial agreements. The 1852 Statutory Code stated that "a married woman may by will dispose of any estate secured to her separate by deed or devise, or in the exercise of a special

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[37] Ibid. Statutory enactments in 1868 gave wives the ability to "alienate" their debts with their husbands' consent.

power to that effect."[38] This statute meant that married women had to own property in a legally recognized separate estate that explicitly granted the right to devise. Other states had more liberal laws; by 1849 New York granted married women the right to devise property as if they were unmarried.[39] The Kentucky statute did little more than codify pre-existing equity practices. It did however, legally validate the premise that married women might have divergent interests in distributing their estates.

After mid-century, testation increased by married women. Limited evidence makes it difficult to determine how much of this increase was based on social changes in inheritance practices or on eased statutory requirements. The Harrison County Decedents Index lists all estates (testate or intestate) probated between 1796 and 1905 in two books covering from 1795 to 1851 and 1852 to1905. The entries for each decedent do not indicate the year the estate was probated, making it difficult to subdivide the records into decades. The women who died intestate were women who had enough estate to pass through probate and require an administrator to distribute the estate.

The sex ratios in both time periods were skewed toward male decedents, probably because most married women did not hold estates valuable enough to probate. The intestate decedents in Table 1 suggest that the number of females dying with property increased in the last half of the nineteenth century. Of total estates probated, the number of women writing wills tripled during the last half of the century. The number of female

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[38] Revised Statutes of Kentucky of 1852, Ch. 106, § 4. In February 1846, the Kentucky lawmakers took hesitant steps toward granting married women property rights by making wives' slaves and lands exempt from husbands' debts. Acts, Ch. 368, §. 1-3 (1846).

[39] Property was often distinguished by whether it was realty, which included land, buildings, improvements and slaves, or personalty (personal property) referred to personal goods, household items, leases, cash and stocks. For a judicial ruling on the New York law, see *Waters v. Cullen*, 2 Bradf. Sur. 354.

Table 1. Decedents by Sex in Harrison County.

Years	Female Intestate	Male Intestate	Female Testate	Male Testate	Total # of Estates Sampled
1795-1851 # of estates probated	9	61	3	49	122
1795-1851 % of estates probated	7.3%	50%	2.4%	40.1%	
1852-1905 # of estates probated	39	113	23	63	238
1852-1905 % of estates probated	16.3%	47.4%	9.6%	26.4%	

Source: Harrison County Court Decedents Estate Index, 1795 – 1905, Harrison County Court Clerk Records, KDLA.

Note: The sample is n = 1/10. The Decedent Index does not include the years in which each estate was probated. Therefore it is difficult to know how many female wills were written after 1894 when restrictions on married women's legal capacity to testate were removed. Decedent's sex was determined by name or excluded from sample. Determination of testate or intestate was determined by whether the clerk indicated an administrator (intestate) to the estate or an executor (testate). I then randomly cross-referenced the testate estates against the will books to make sure that a recorded will existed and check the clerk's accuracy.

testators rose while the number of women dying intestate diminished after 1852. Table Two shows how sex ratios look when considered only among people who died with valid wills. The Warren County data reflects a roughly parallel with the Harrison County testation practices.

Table 2 (below) makes clear that the percentage of female testators more than doubled in the second half of the century. By the end of the century, the percentage of female testators tripled from its earliest levels. This increase suggests that Kentucky social changes – if not statutory changes - spurred female testation even as the judiciary tried to retain husbands' authority through preserving marital unity.

Testation patterns and the language of wills suggest that gradually over the nineteenth century more women and their families sought to grant female beneficiaries testamentary power, allowing them to devise inherited property. This finding coincides with other probate analyses.[40] In Kentucky however, judicial and legislative attitudes did not reflect or support these changes in testamentary behavior. Rather, the legislature waited another forty-one years (1894) after their original limited grant of power to broaden married women's testamentary rights. Thus, testamentary rights for women were most often dependent on a particular grant from a male testator rather than a general legal right.

Ford's Executor v. Ford (1866), the first case to reach the Court of Appeal under the 1852 statutory provisions, reveals the legal distinctions made by the courts that ultimately

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[40] Richard H. Chused, "Married Women's Property Law: 1800 – 1850." *Georgetown Law Review* 71 (1983), 1359 – 1425; Suzanne Lebsock, *The Free Women of Petersburg: Status and Culture in a Southern Town, 1784 – 1860* (New York: W.W. Norton & Co., 1984).

Table 2. Testation Patterns by Sex in Harrison County and Warren County.

	Warren County 1827-1862 Will Book D	Warren County 1862-1889 Will Book 4	Warren County 1890 - 1898 Will Book 5	Harrison County 1818-1853 Will Books B – F	Harrison County 1853 – 1882 Will Books G-K	Harrison County 1882-1897 Will Book L
Total Testate	89	96	47	104	81	62
Male Testate	79 (88.7%)	74 (77.1%)	30 (63.8%)	93 (89.5%)	60 (74.1%)	44 (71%)
Female Testate	10 (11.2%)	22 (22.9%)	17 (36.2%)	11 (10.5%)	21 (25.9%)	18 (29%)

Source: Warren County Will Books D, 4, and 5, (1827 – 1898), Warren County Court Clerk Records, KDLA, and Harrison County Court Decedents Estate Index, 1795 – 1905; Harrison County Will Books, B – L (1818 – 1897) Harrison County Court Clerk Records, KDLA.

Note: Taken from a 25% sample of legible wills, except for Harrison County Will Book B which is a 1 in 3 sample, making the overall testation number slightly higher. Sex determined by name or indication of a devise to a husband or wife.

served as a judicial brake on married women's testamentary freedoms.[41] Eliza Ford wrote a will leaving her slaves, personal property, and realty to her relatives and excluding her second husband, Charles Ford from her estate. Eliza Ford had acquired the property, slaves, and realty under an 1846 will from her first husband, Theophilus Walker. Specifically granting Eliza Ford the testamentary power to bequeath personalty and slaves, Walker's will noted that the realty would be passed to "her heirs." His will lacked a separate clause explicitly granting testamentary power over the realty. Her surviving second husband Charles Ford contested her will, arguing that Eliza Ford did not have the legal right to devise any property by virtue of her status as a married woman.

The case initially went before a Harrison County judge rather than a jury. The lower court judge did not pursue the issue of the extent of Eliza Ford's testamentary capacity as granted by Walker's will. Instead, he ruled to protect her second husband's potential property rights by holding that after nineteen years, it was impossible to know if Eliza Ford still possessed any of the same slaves or items from her first husband's estate.[42] Thus, Eliza Ford's will potentially could impinge on Charles Ford's marital property rights by allowing her to will property that was not specifically covered in Walker's will. Since no proof existed that she still had held the specific property mentioned in Walker's will, the issue of her capacity to devise that property was moot.

On appeal by Eliza Ford's family the Kentucky Appeals Court took up the question of her capacity to devise her property from Walker's estate. The Court's decision both protected and limited married women's testamentary power. The Appeals

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[41] *Ford's Executor v. Ford*, 63 Ky. 418 (1866).

[42] Transcript, *Ford's Executor v. Ford*, (1866), Box 9, Case 299, KCAR, KDLA.

Court overturned the lower court's ruling concerning the personalty and the slaves, noting that Theophilus Walker's will expressly conferred the power to devise personal property and slaves. That devise remained legitimate. The devise involving real estate gave the Appeals Court an opportunity to interpret the statutory clause that referred to married women's devises under the exercise of a "special power." The Court had the opportunity to enlarge married women's legal right by defining Walker's reference to "her heirs" as an exercise of the special power acknowledging her testamentary power over the realty. The Court chose instead to nullify that clause.[43] They defined the clause as merely reiterating the power already granted and conditional to the creation of a separate estate.

While granting some protection to explicit grants of power made by another male, the Court also weakened the power of the statute and strengthened the rights of husbands. In *Ford v. Ford* both the local and Appeals court judges moved to protect male prerogative and limit female property rights using different reasoning. The lower court judge acted to prevent the potential subversion of Charles Ford's property right, while the Appeals Court sought to prevent a wider subversion of husbands' customary common law rights in their wives' property.

In succeeding years after the Court of Appeals justices continued to guard husbands' claims against wives who had other ideas about inheritance practices. Judges generally assumed that husbands would circumscribe their wives' testamentary power unless explicit language indicated contrary intentions. In *Daniel's Devisees v. Daniel* (1871), the Court demanded "language unequivocally manifesting" Polly Daniel's first

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[43] *Ford's Executor v. Ford*, 63 Ky. 418 (1866).

husband's wishes that Daniel could devise property if she remarried. Otherwise, Judge Lindsay implied, if Daniel's first husband even had contemplated her remarriage, he certainly did not mean to continue her testamentary independence. Furthermore, Lindsay questioned the legal validity of Polly Daniel's attempted to secure her estate to herself prior to her second marriage. The 1852 statute granting women testamentary power over separate estates, did not "embrace" separate estates "created by the act of the *feme* herself" even if it occurred previous to the second marriage.[44] By not recognizing female legal independence between marriages, like in *Ford v. Ford* (1866), the female testators' ability devise property was determined according to how the Court interpreted the first husband's grant of power against the claims of the second husband to his marital right. Polly Daniel's intentions and her decisive action to protect her estate meant little. Subsequent Court decisions reflect a continuing concern for protecting husbands' authority over their wives property when married women attempted to circumvent these restrictive laws.

In the late 1880's, Johanna Umpfenbach, evidently aware of the restrictive laws governing married women's property dispositions, had several deeds and bank notes placed in her name by her debtors and employers in an effort to create a separate estate. She wrote a will leaving this property to her sister Augusta Heinz and other family. She disinherited her husband Christopher Umpfenbach. He challenged the will on the grounds that his wife's personalty vested in him under Johanna Umpfenbach's coverture, and that she had not created a separate estate. The Jefferson County Court of Common

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[44] *Daniel's Devisees v. Daniel,* 5 Ky. Op. 670 (1871).

Pleas judge Emmet Field held for Christopher Umpfenbach, and the heirs appealed.[45] The Court of Appeals affirmed Field's decision, ruling that a third person or her husband did not secure the separate estate to her. Instead, during the marriage Johanna Umpfenbach secured the deeds to herself, deliberately circumventing her husband's marital rights and subverting the legal order.

Johanna Umpfenbach's beneficiaries based their defense of the will on two assertions: that her estate consisted of wealth that she had earned through her work as a seamstress and that Johanna Umpfenbach did secure a separate estate. Heinz's attorneys called several witnesses that testified that Umfenbach had done sewing every week for twenty-one years, and continually invested her wages. Bankers and real estate agents then testified about her requests to have notes specifically made in her name.[46] Her attorney James S. Pirtle testified that she had consulted him on how to arrange her estate for "the purpose of enabling her to make a will."[47] In doing so, Umpfenbach both upheld and challenged late nineteenth century legal and social structures.

Johanna Umpfenbach upheld the cultural ideologies of middle-class Victorian America that historians frequently associate with women and femininity in several ways. Her husband testified that she "kept house" for him for twenty-five years, marking her as

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[45] *Umpfenbach v. Wehle,* (1891) Box 370, Case 32137, Jefferson County Court of Common Pleas Records, KDLA.

[46] Transcript, *Wehle v. Umpfenbach,* (1893), Box 982, Case 22454, KCAR, KDLA.

[47] "Testimony of James Pirtle," Transcript, *Wehle v. Umpfenbach,* (1893), Box 982, Case 22454, KCAR, KDLA.

performing work ideologically linked to wifely duty.[48] Although she earned wages, she sewed - labor traditionally associated with domesticity and labeled as women's work. She valued her family and wished to nurture their education. One provision in the will designated a devise "to my young friend and step-granddaughter Blanch Kahlert to be used in completing her musical education," demonstrating that although she had no children, she acted upon maternal feelings and valued educational duties associated with women.[49]

Her strategies for securing a separate estate demonstrate that Johanna Umpfenbach also rejected the social and legal ideologies that placed her wages under her husband's control. She attempted to create her own legal identity and express her wishes concerning her family through her will. Such action demonstrates both Johanna Umpfenbach's implicit acceptance of the legal structure by attempting to work within its statutes and her resistance to the customary marital authority vested in her husband. No indication in the record suggests that Johanna Umpfenbach had in mind launching an explicit political or legal challenge to male prerogative as did, for example, female suffragists of the time. Instead, it appears that she attempted to arrange for her side of the family, fearing that if her husband outlived her he would not. The Appeals Court interpreted her strategies much differently.

Justice Pryor of the Appeals Court expressed great indignation at Johanna Umpfenbach's legal maneuvering. The Court focused its ire, as Pryor put it, on

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48 "Testimony of Christopher Umpfenbach," Transcript, *Wehle v. Umpfenbach,* (1893), Box 982, Case 22454, KCAR, KDLA.

49 "Will of Johanna Umpfenbach," Transcript, *Wehle v. Umpfenbach,* (1893), Box 982, Case 22454, KCAR, KDLA.

Umpfenbach's attempt "to divest him [Charles Umpfenbach] of his marital right." The Court ignored the testimony concerning Johanna Umpfenbach's years of work as a wage-earning seamstress. As the Court would do seven years later with Robert Johnson's claim against Mildred Johnson's will, the judge portrayed the wife as scheming and intent on defrauding her unsuspecting husband. Pryor noted the "estate . . . created by his daily labor has been disposed of by her without his knowledge."[50] Pryor castigated Johanna Umpfenbach, holding that even if,

> the wife had accumulated this property during the existence of the marital relation, she had no right to convert it into a separate estate without the consent of the husband, so as to enable her to deprive him if his marital rights. Such was never contemplated by the framers of the statute empowering a married woman to make a will, and the facts of this case indicate very plainly the necessity for such a construction, and afford ample reason for restricting the exercise of such power by a feme covert.[51]

The Court directed its displeasure at Johanna Umpfenbach's attempt to subvert the customary social and familial structures that placed the male household head as the independent authority on financial matters. The challengers pointed to the will's threatening dispositions and the social disorder implicit in such an exercise of legal power. In this case, the threat was not to whom she bequeathed her property, but lay in her attempt to upset the natural and legal order by circumventing her husband's power and then excluding him from her estate.

In Kentucky, inheritance law defined women through their relationships to men, especially through marriage. Eliza Ford's and Polly Daniel's testamentary rights were

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[50] *Wehle v.Umpfenbach,* 15 Ky. L. Rptr. 346, (1893).

[51] Ibid.

negotiated through either their deceased first husbands' will or through their second husbands' claims to marital privileges. The Appeals Court protected Christopher Umpfenbach's marital privileges against his wife's deliberate attempted incursions. In these cases, in the face of contradictory evidence, the lower and Appeals courts reinforced the social and cultural ideologies that cast the husband as the engine of household wealth production and the wife as non-productive and ancillary. As these cases demonstrate, when married women asserted their wishes through testamentary dispositions, the courts generally refused to reconcile those claims with the centuries old legal doctrine of marital unity.

On March 15, 1894, Kentucky legislators granted married women testamentary freedom and other limited property rights.[52] From 1894 until 1942, married women still had to obtain their husbands' signature to sell or mortgage property, demonstrating the longevity of Kentucky lawmakers and jurists commitment to husbands' authority over wives. Kentucky's property law lagged behind other southern states partially because legislators did not create a new constitution during Reconstruction.[53] Technically, Kentucky's 1850 Constitution never abolished slavery, although Kentucky reluctantly ratified the Thirteenth Amendment in 1876 after initially rejecting it in 1865. The delegates at the 1891 Constitutional Convention refused to add Married Women's Property Rights to the Constitution. After women's rights activists pressured legislators

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[52] 1894 Ky. Acts, ch. 76, § 37.

[53] Fuller, *Laura Clay and the Woman's Rights Movement*, 40.

to pass a bill, the finally did so in 1894, an act which Josephine Henry proclaimed a "a victory over fossilized ignorance, selfishness and tyranny."[54]

Thus far I have explored how courts interpreted married women's legal capacity, arguing that judicial attitudes and rulings reveal a continuing commitment to protect men's property rights against incursions by wives asserting testamentary power. This jurisprudence defining legal capacity seems to deviate from the extended argument about how courts and communities perceived mental capacity. These two kinds of capacity were mutually constitutive however; for women, the architecture of legal capacity structured assumptions about mental capacity. Women's inferior legal status reflected a generalized perception of inferior mental capacity, particularly concerning women's abilities to understand the masculine world of business and the values and uses of property. As one journalist noted in a local Kentucky paper in 1879, "few men are inclined to grant women the credit of having any business tact or of doing business. . .".[55] Similar attitudes about women's business aptitude appeared consistently throughout will disputes. No one argued that all women were inherently incapable of managing property. Rather, their attitudes reflected a belief that most women lacked the necessary aptitude to responsibly control it. Few women could devise legally, so women who determined property distribution appeared rarely in probate courts or as subjects of discussion when they died. Statutory law and local courts consistently reaffirmed white men's right to devise and allegations of insanity had to be litigated. When women devised, their testamentary authority required verification that their husbands (whether

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[54]Josephine Henry, quoted in Fuller, *Laura Clay and the Woman's Rights Movement*, 47.

[55] "A Business Woman," *The South Kentuckian*, February 18, 1879.

dead or alive) did not have authority or control over the property. If the will was challenged, the proponents needed to prove that the female testator had the business acumen to responsibly devise property.

Jurists, local community members, and the popular press consistently expressed doubts about women's ability to control property or exercise political authority. Women's influence on voting was a suspect intrusion on male authority.[56] In an 1879 appeal against female suffrage the *South Kentuckian*'s editor vilified "God forbid that the day will ever come when our mothers, sisters, wives and daughters, will be found in the profane and vulgar rabble around the polls, elbowing their way through a crowd of greasy negroes, or white men as rude and filthy. . .".[57] The editor identified women only through their familial relationships with men. His appeal to male heads-of-households rested on the imagery of their female dependents' abasement by allowing them in the profane, mixed-race and often-dangerous world of public politics.

When male testators appeared to value women's political perspectives, those circumstances questioned male independence and mental capacity. The idea of women asserting political power as indicative male incapacity appeared in one will dispute. In *Wills v. Locknane* (1873), witness AL Haggard testified that he believed testator John Wills was incompetent to do business. To illustrate, Haggard described how as a local candidate, when he tried to solicit Wills' vote, Wills "referred me to his womans fold and

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[56] For a discussion of the relationship between women's familial roles and struggles for equal citizenship, see Reva B. Siegel, "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115 (February, 2002): 947 – 1046.

[57] "Miss Susan B. Anthony," *The South Kentuckian*, October 28, 1879.

said they could do me more good."[58] Whether Haggard believed Wills was mentally unsound because he valued women's political perspectives or because Wills gave up his household and political authority matters little. Haggard selected Wills delegation of political authority to women to claim that Wills lacked mental capacity.

Kentucky's most influential nineteenth century journalist, Henry Watterson, the politically powerful editor of the *Louisville Courier Journal* agreed that "Crazy Janes" did not belong at the polls. Watterson used an imputation of mental unsoundness – "crazy" – to describe female suffragists. Watterson saw the very exercise of public political power as a transgression of the prevailing gender regime, referring to "These he-women [who] are themselves essentially masculine."[59] "He-women" reflected Watterson's belief that anyone participating in politics was masculine. Therefore, politically conscious women sacrificed their femininity because the political world was not a feminine space.

These doubts were based on women's capacity as women; the assumption of rationality that attached to white men did not apply to women. In his popular novel *The Choir Invisible* (1898), Kentucky author James Lane Allen characterized "nothing stronger in the world than a man's will and purpose." As Allen's protagonist struggled with unrequited love, he contrasted men's "will" to the "little things" that composed "woman's life – the little tempers and inconsistencies and contradictions and falsities and

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[58] "Testimony of AL Haggard," *Wills v. Locknane* (1873), Box 229, Case 5843, KCAR, KDLA.

[59] "The Most Momentous Question of Modern Times," *Louisville Courier Journal*, August 24, 1913. Reprinted in Arthur Krock, ed. *The Editorials of Henry Watterson, Compiled with an Introduction and Notes by Arthur Krock,* (New York: George H. Doran Co., 1923).

hypocrisies. . .".[60] In Allen's portrayal, women were predisposed to irrational behavior. "Falsities and hypocrisies" suggest a mind incapable of a reasoned or fair evaluation of one's personal relations. Arguments based on women's inherent sentimental nature, inability to make rational business decisions, and natural propensity toward dependence reoccurred frequently in Kentucky inheritance disputes.

The duality that historians have identified in Victorian ideological perceptions of women as either chaste, obedient dependents or depraved temptresses saturated inheritance disputes. As historians have emphasized, this duality was ideological. Lived experience revealed much different perceptions and conduct. Still, these ideas were culturally powerful. Challengers often called attention to female testators' sexual behavior. Challengers used as evidence of mental incapacity women who did not participate in the sexual economy through marriage and child-rearing or women who expressed their sexuality unrestrained by marriage. For example, in his closing argument in Polly Bullitt's (1846) will case, Henry Clay's discussion of Bullitt's lack of a "beau" suggested that young women who did not participate in courtship rituals indicated deviance.[61] In *Sarah v. Miller* (1864) unmarried testator Jane Miller's behavior toward men came under scrutiny as well. When asked by the contestants' lawyers if she shunned the company of men, county Sheriff Daniel Landes replied that she "always tried to shun

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[60] James Lane Allen, *The Choir Invisible* (New York: Macmillian, 1898), 258, 260.

[61] Clay's speech recorded in a letter by Polly Bullitt's relative. Susan Peachy Bullitt to John C. Bullitt, May 1849, No Box, FL 162, BFP, FHS.

me" and referred to her as "very unsocial."[62] The language used to describe Miller's relationships with men emphasized her rejection of them.

Other trial participants either derided or felt it necessary to justify Miller's status as an unmarried woman and her apparent disinterest in local courtship and marriage patterns. By not marrying, Miller thwarted traditional arrangements in which men gained control of women's property through marriage. Her independent status needed to be explained. Attorney for Miller's beneficiaries CD Bradley justified disinheriting Miller's brother Isaac because years ago Isaac withheld money "at the very period girls like to dress." Bradley asked, "Who knows what prospects of marriage and requited love were wholly blighted" by Isaac's "mean selfishness?"[63] One witness believed that her unmarried status indicated derangement. HB Hunchson reasoned "that a woman that does not want to marry is deranged."[64] For the Trigg County community, Miller's unmarried status and her autonomy from the sexual economy at the very least needed justification; it also could serve as evidence of mental unsoundness. Indeed, in these trials, marriage signified women's social value and acceptance to the natural order of familial relations. In Polly Bullitt's case, her alleged idiocy disqualified her from marriage. In Jane Miller's case, her unmarried state needed to be explained. Otherwise, her choice to remain outside marriage potentially indicated insanity.

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62 "Testimony of Daniel Landes," *Sarah v. Miller* (1864) Box 3, Case 74, KCAR, KDLA.

63 "Brief for Appellants," *Sarah v. Miller* (1864) Box 3, Case 74, KCAR, KDLA.

64 "Testimony of HB Hunchson," quoted in "Brief for Appellants," *Sarah v. Miller* (1864) Box 3, Case # 74, KCAR, KDLA.

While remaining unmarried could signal deviance, female testators' alleged sexual licentiousness almost always indicated mental unsoundness. Testator Eliza Atkinson personified the traits which identified sexually aberrant female testators. After her husband's death, Atkinson refused to live the sedate life of a gentry widow within her husband's kin network. Instead, acquaintances characterized her as a hard-drinking, sexually active woman who dressed flamboyantly and acted outrageously. The Court of Appeals, following copious testimony, derided Atkinson as an "incompetent" woman who "upwards of sixty years of age, dressed in as fashionable and gaudy colors as any of the young ladies of the neighboring town, made love to the young men, and conducted herself in such an unbecoming, and frequently indecent manner."[65] Atkinson's disregard for sexual and behavioral conventions provided enough evidence to overturn her will, despite her conformity to other socially and legally favored testation practices.

Atkinson died in 1868, leaving her estate to William Grayson, who had provided her with nursing care during her last years. Atkinson had inherited a sizeable estate from her husband, Amos Atkinson who died in 1857. When Eliza Atkinson died she followed the familiar practice of devising to her caregivers. As one witness recalled, Atkinson stated that if Colonel Grayson's family would "have the trouble of taking care of her," she thought "it would be right for them to have the property."[66] Like testator Frank Lisle (*Bush v. Lisle* (1889)), Atkinson changed her will at least once as she moved from

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65 *Pecantet v. Grayson,* 6 Ky.Op. 80 (1872).

66 "Testimony of ES Adams," Transcript, *Pecantet v. Grayson* (1872) Box 225, Case 5727, KCAR, KDLA.

residence to residence to reward the family who provided for her as she became increasingly sick.

After Eliza Atkinson died, Amos Atkinson's son-in-law Frank Pecantet and his children (Amos' grandchildren) from Amos' first marriage contested the will.[67] The contestants had no blood or legal relation to Eliza Atkinson other than they were her deceased husband Amos Atkinson's heirs-at-law. At least two witnesses did not see Eliza Atkinson as a legitimate testator, opining that the property should go to Pecantet and his family. Family friend and physician JL Dismukes testified that he "could never see why she had such an insane aversion to Pecantet the Son-in-law to her husband and the natural heir to her estate. This alone would have told me that her affections and emotional nature were at fault. . .".[68] Even though Atkinson devised to her caregivers, another witness believed that she – and her estate - should have remained within her deceased husband's kin network. J. Campbell, former circuit court judge and lawyer for Amos Atkinson advised her "as she was a lonely woman there by herself and Pecantet had married the only child of Amos Atkinson, she had better make an arrangement for Pecantet and his family to come and live there and take care of her giving her decent, comfortable support."[69] Campbell recommended against Atkinson asserting social and legal independence, instead advocating that she remain a dependent in a male-headed, kin-based household. Campbell's counsel suggests the durability of the idea that the

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[67] Eliza Atkinson was Amos Atkinson's second wife. They had no children together.

[68] "Testimony of Dr. JL Dismukes," Transcript, *Pecantet v. Grayson* (1872) Box 225, Case 5727, KCAR, KDLA.

[69] "Testimony of J. Campbell," Transcript, *Pecantet v. Grayson* (1872) Box 225, Case 5727, KCAR, KDLA.

property was never really hers. Instead, it should descend through her husband's bloodline. Such reasoning reflected the persistence of patrilineal customs influencing inheritance practices. Even though Amos Atkinson was dead, Eliza Atkinson was expected to remain in continuing dependency under the paternal gaze of his son-in-law. Atkinson by accident of survival, merely held Amos' estate for her life much like dower property, which widows held for maintenance until it descended to their husband's heirs or beneficiaries.

The claim that Atkinson was mentally unsound received support from several witnesses from different backgrounds, indicating general agreement on behavioral standards that indicated female mental incapacity. The central issue in the trial was not whether these standards indicated unsoundness, but whether depictions of Atkinson were true. In other words, this was an appeal reviewing "fact," not "law." If Atkinson did engage in the deviant behaviors described, then the jury's verdict had ample support.

Physicians attributed behavior to an underlying mental condition caused by "a disease peculiar to her sex," as the Court put it.[70] As I noted in Chapter Three, in testamentary capacity challenges physicians medicalized aberrant gendered behavior by diagnosing such behavior as physiologically-based and quantifiable conditions. Dismukes admitted that he did not know "what was the idiopathic cause of her derangement, but I think some of the exciting causes were alcoholic stimuli, opium and Nymphomania."[71] The diagnosis of nymphomania medicalized Atkinson's sexual desire

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[70] *Pecantet v. Grayson,* 6 Ky. Op. 80 (1871).

[71] "Testimony of Dr. JL Dismukes," Transcript, *Pecantet v. Grayson* (1872) Box 225, Case 5727, KCAR, KDLA. Underlining in transcript.

as an uncontrollable manifestation of insanity. Trial transcripts indicated that other community members shared these judgments linking sexual behavior to insanity.

The challengers constructed a declension narrative in which after Amos Atkinson's death, Eliza Atkinson became morally dissipated and insane. During her marriage, witnesses described Atkinson as "genial, social and quite an intelligent woman," although she had a "strong disposition" toward intoxicants.[72] Still, while Amos Atkinson lived, neighbors believed that he "no doubt, operated as a restraint upon her." Once Amos Atkinson died, as James Husbands, a family friend testified, Eliza "threw off all the restrain and prudence that her husband had been able to exercise over her."[73] As another neighbor remembered, Atkinson

> began to dress more extravagantly, bought a new wig with long black gloss curls which she wore in girlish disarray, hanging and clustering about her neck and shoulders. Put on short sleeved and low necked dresses. Procured a full set of artificial teeth and purchased and wore a gold watch and chain and a large amount of gew-gaws and fancy jewelry. [74]

Several witnesses found Atkinson's clothing choices and adornment as evidence of insanity. Her changes in dress seemed particularly to incite their wrath and disparagement because neighbors perceived her as making these choices in order to attract sexual attention.

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[72] "Testimony of James B. Husbands," Transcript, *Pecantet v. Grayson* (1872) Box 225, Case 5727, KCAR, KDLA.

[73] "Testimony of James B. Husbands," Transcript, *Pecantet v. Grayson* (1872) Box 225, Case 5727, KCAR, KDLA.

[74] "Testimony of TC Albritton," Transcript, *Pecantet v. Grayson* (1872) Box 225, Case 5727, KCAR, KDLA.

The imputations of insanity brought by Atkinson's choice of apparel occurred in a context in which single women beyond young adulthood were expected to maintain modest propriety in speech, manner, and dress. The *Lexington Weekly Press* counseled that "old maids are modest. They think their youth is over and their beauty gone."[75] The article prescribed passive, "modest" behavior for independent women who were beyond their young adulthood, a time associated with frivolity and vanity. Witness JB Husbands expressed disgust at Atkinson for "los[ing] sight of those rules of modesty sacred to a lady."[76] Atkinson, adorned in "gew-gaws" with her hair in "girlish disarray" hardly conformed to the sentimentalized image of a "civilized" Victorian widow which historians have identified in self-help books and prescriptive literature.[77]

Atkinson's undisguised sexual desires and courtship patterns spurred local indignation. Albritton derided Atkinson because she "seemed to be exceedingly anxious to procure another husband."[78] Amos Atkinson's neighbor J. Campbell agreed that "on the subject of making a will, and getting a husband, she was a Monomaniac" but was unsure if Atkinson's insanity was caused by "ardent spirits" or "age." Campbell connected Atkinson's desire to remarry to alcoholism or age, even though Atkinson was about sixty years old at the time.

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[75] "Comfort for Old Maids," *Lexington Weekly Press*, January 19, 1881.

[76] "Testimony of James B. Husbands," Transcript, *Pecantet v. Grayson* (1872) Box 225, Case 5727, KCAR, KDLA.

[77] Thomas R. Cole, *The Journey of Life: A Cultural History of Aging in America* (New York: Cambridge University Press, 1992).

[78] "Testimony of TC Albritton," Transcript, *Pecantet v. Grayson* (1872) Box 225, Case 5727, KCAR, KDLA.

Such behavior in widowed male testators however, was understandable, and reaffirmed one male testator's virile masculinity. The challengers' lawyers in *Broaddus v. Broaddus* (1874) noted that shortly after his first wife's death, Broaddus remarried "a maid of 36 summers, stout, vigorous & luscious – full of muscle and blood. He was a man of strong passions & was doubtless hunting just such a woman."[79] Broaddus "passions" were not representative of mental unsoundness in this case; rather, it was the venality of his wife who unduly influenced him. The comparison of depictions of sexuality not only reveals the double standard long identified by historians, but links gendered standards of sexuality to sanity and property rights. Regulation of inheritance practices worked to contain female sexuality within a narrow range of virtuous standards.

Indeed, regulating sexuality extended beyond criminal law and vice enforcement. Local community's behavioral standards reticulated in a complimentary network enforced through civil as well as criminal law. In *Ross v. Weaver* (1881) Anne Cooke's reputation for personal sexual immorality and as a brothel-keeper supported claims to overturn her will. Cooke, who witnesses testified "kept a house of prostitution" bequeathed her estate to her sexual partner, Jimmie Ross, and disinherited her sister. Like Eliza Atkinson, Cooke's unmarried status figured prominently in the community members' understandings of sanity and naturalness. The challengers attacked Ross' and Cooke's character by describing several arguments between them. Using images of carnal sexuality and greed they portrayed Ross as "lazing around Ann Cooke's house to

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[79] "Brief for Heirs," *Broaddus' Devisees v. Broaddus' Heirs* (1874) Box 266, Case 6767, KCAR, KDLA.

gratify his lusts and get her property."[80] Had Cooke and Ross socially and legally legitimized their relationship through marriage, Weaver would have had much more difficulty in bringing suit against the will. Such a disposition by Cooke to her husband would have been considered natural. Without legal and moral legitimacy conferred by marriage, the challengers invoked discursive constructions of natural familial relations. Their attorneys argued,

> I care not how low and degraded a person may become when he or she comes to die their affections will turn to those of their own blood. . . and not unduly influenced, will leave to those of their own blood what property they may have, in preference to strangers of blood. It is unnatural to do otherwise.[81]

Although Ross and Cooke had lived together for five years, the brief referred to Ross "as an entire stranger . . . so far as blood is concerned . . . and her sister who under law is entitled to it is virtually left without anything."[82] This argument relied upon the discourse of naturalness to posit blood relatives as natural heirs, regardless of emotional proximity to the testator. To devise otherwise, particularly in favor of an unsanctioned sexual relationship was equated with unnaturalness, immorality, and violation of natural hierarchies.

Clearly, the challengers put the relationship between Cooke and Ross on trial as much as they did Cooke's sanity. Witness and local doctor LC Porter testified that she

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[80] "Appellees' Brief," *Ross v. Weaver* (1881), Box 527, Case 13247, KCAR, KDLA.

[81] Ibid.

[82] Ibid.

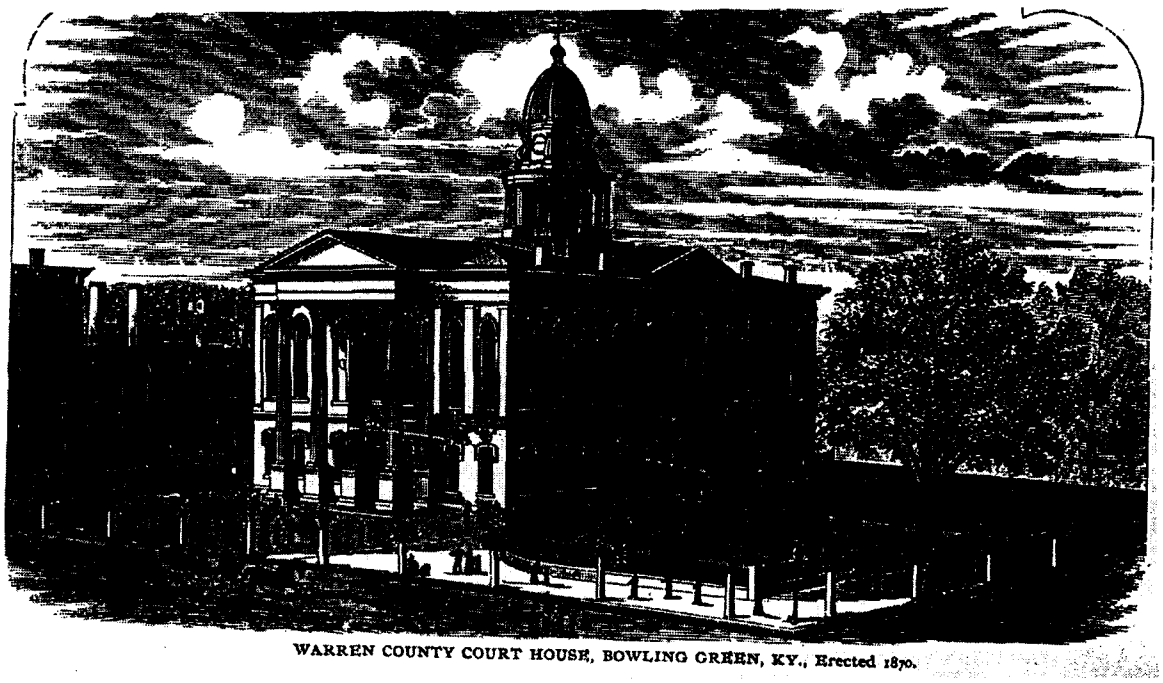

Figure 3. Warren County Courthouse in Bowling Green, Kentucky. This building housed the *Ross v. Weaver* (1881) trial over Anne Cooke's will.

Source: Lewis Collins, *Collins' Historical Sketches of Kentucky: A History of Kentucky*, Rev. and enl. ed.(Louisville: J.P. Morgan & Co., 1924).

was insane because he believed it was a "bad will."[83] Juryman Robert Heard was overheard saying that he believed that her estate "ought to go to her relations."[84] Weaver's attorneys used the language of moral indignation at Cooke's and Ross' conduct to insist upon an appropriate punishment by overturning the will and restoring the natural order. Such rhetoric punished Cooke for straying from traditional social and gender roles; not only did Cooke support herself and Ross through prostitution, but they rejected the legal and socially sanctioned institution of marriage. Furthermore, Cooke flaunted postbellum strictures the held sacrosanct white women's chastity and virtue.

To defend the will, Ross' attorneys invoked a different strand of the grammar of capacity by equating duty with entitlement. They argued that Cooke had a duty to Ross that trumped blood-line claims because Cooke's sister Weaver had not fulfilled her familial obligations. Ross dutifully and conscientiously nursed Cooke when her sister failed to visit or care for her. Ross' attorneys attacked Jane Weaver as callously ignoring her dying sister. They argued that Cooke believed that Weaver "cared no more for her than a dog."[85] By failing to fulfill her natural obligations to her sister, Weaver relinquished strong claims to Cooke's estate based on bloodline. On the other hand, Cooke owed Ross a social debt for his caregiving, a point Ross' attorney labeled an "appreciation of his services." Her will reflected her acknowledgement of her obligations, and therefore was the product of a sane and uninfluenced mind.

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83 "Testimony of Dr. LC Porter," Transcript of *Ross v. Weaver,* (1881), Box 527, Case 13247, KCAR, KDLA.

84 "Testimony of Robert Heard," Transcript, *Ross v. Weaver* (1881), Box 527, Case 13247, KCAR, KDLA.

85 "Testimony of Minerva Cox," Transcript, *Ross v. Weaver* (1881), Box 527, Case 13247, KCAR, KDLA.

Ross' lawyers' strategy did not work at the local level. By threatening the social order through her illicit sexual relationship, engaging in prostitution and rejecting blood-line family, the Warren County local witnesses and the jury chose to punish Ross and make an example of Cooke. They stripped her of her testamentary freedom and sent a strong message to the community that Ross would not be rewarded for his conduct. Although the Appeals Court overturned the decision, the local jury had firmly set the local boundaries of sane and appropriate behavior for unmarried women.

Within marriage too, litigants scrutinized the sexual behavior of female testators. In *Johnson v. Johnson* (1898), the case with which this chapter began, debated the sexual conduct of both Mildred and Robert Johnson within the gendered obligations attached to marriage. Like other testamentary capacity cases, the circumstances surrounding the dispute reveal a troubled and conflicted family. As the lawyers defending the will admitted, their marriage "had not been happy."[86] The proponents of the will argued that Mildred Johnson wrested control of her husband's property to "save for her children something from the wreck of the estate of her improvident husband."[87] This defense of Mildred Johnson's sanity depicted Johnson as a concerned mother seeking to provide for her children. Like testator Johanna Umfenbach who sought to provide for her niece's education, such concerns rested squarely within social expectations for married women.

Still, Mildred Johnson, by seizing control of the household finances, inverted the marital relationship. Other evidence suggested that Mildred Johnson failed to perform

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[86] "Brief for Appellants," *Johnson's Admr., & c, v. Robert F. Johnson*, Box 1159, Case 26822, KCAR, KDLA.

[87] Ibid.

her sexual obligations to her husband. Mildred had refused to occupy the marital bed on several occasions. Their daughter Blanche Daley testified that on her wedding day, her father (Robert) threatened to "disgrace all of you this day unless your mother comes to my bed." Daley recalled that her mother responded that to prevent "disgrace" on her daughter's wedding night, "Robert, I will be in your bed tonight."[88] Robert denied this incident in his cross-examination. While it appears that Daley recalled this incident to reveal her father's brutishness, other incidents surfaced which the court interpreted much differently than did Daley. After Mildred Johnson had acquired deeds to their Lexington home, she left Robert for her daughter's home in Detroit. Robert Johnson testified that after her return to Lexington, Mildred "never came back to my bed any more."[89] Two narratives emerged, one in which Mildred was the long-suffering wife at the hands of her brutish husband. In the other narrative, Robert in spite of his kindness and entreaties, was denied his marital right. According to this narrative, this was part of a broader pattern of behavior in which Mildred Johnson had refused to provide Robert with the affections and services expected of a wife.

Judge Burnham, who wrote for the Court of Appeals, chose to defend the marriage ideal against incursions such as those presented by Mildred Johnson.

> Having succeeded, by every species of artifice and persuasion, in devesting [sic] her husband of all his property . . . she gave open expression to her contempt and aversion for him, which had been . . . tempered by her selfishness and greed to get possession of his

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[88] "Testimony of Blanche Daley," Transcript, in *Johnson's Admr., & c, v. Robert F. Johnson*, Box 1159, Case 26822, KCAR, KDLA.

[89] "Testimony of Robert Johnson," Transcript, *Johnson's Admr., & c, v. Robert F. Johnson*, Box 1159, Case 26822, KCAR, KDLA.

> property. She refused any longer to recognize him as her husband, or to remain in the same house with him, and left his residence in the fall of 1892.[90]

Much of Burnham's narration of the Johnson's marriage focused on Mildred's misbehavior. Burnham depicted with abhorrence Mildred's "contempt" and "greed," although he admitted in the opinion that evidence proved that Robert was "deficient in will power." When the will's proponents suggested that Robert failed to live up to the obligations of marriage due to alleged infidelity, the Court treated these accusations much differently than Mildred's avoidance of her sexual obligations.

Blanche Daley (the Johnson's daughter) testified that a neighbor suggested that "your father is too intimate with Mrs. Grigsby."[91] Mr. Bickers, a business associate of Robert Johnson's remembered that another daughter, Moiselle Johnson threatened to "publish that diary of his" which detailed the infidelity, which would "drive her father out of town."[92] The Court treated Johnson's alleged infidelity as ancillary. In doing so, their thinking remained consistent with the thinking behind Kentucky divorce laws which until 1894 granted divorce for adultery only if the wife was the offender.[93] According to the Court's legal reasoning, Mildred Johnson had no reciprocal claim on the sexual integrity of her husband's body. Instead, the Court blamed the Johnson's disobedient and

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[90] *Johnson's Adm'r v. Johnson,* 20 Ky.L.Rptr. 138 (1898).

[91] "Testimony of Blanche Daley," Transcript, *Johnson's Admr., & c, v. Robert F. Johnson,* Box 1159, Case 26822, KCAR, KDLA.

[92] "Testimony of Mr. Bickers," Transcript, *Johnson's Admr., & c, v. Robert F. Johnson,* Box 1159, Case 26822, KCAR, KDLA.

[93] Lowell Harrison and James C. Klotter, *A New History of Kentucky* (Lexington: University Press of Kentucky, 1997), 287.

obstreperous daughters for the marital rift, noting that Moiselle Johnson took her father's diary

> seeing that it contained something that was calculated to exasperate and anger her mother towards him, immediately took it and showed it to her. Another daughter, having heard idle gossip to the effect that her father had been intimate with another woman, hastened to her mother to repeat this scandal, also. The only motive apparent for this unfilial conduct of these devisees in this constant abuse of their father, and the communication of these offensive and aggravating stories to their mother, was to poison their mother's mind against appellee to such an extent as would make forgiveness and reconciliation impossible, and destroy the last vestige of memory on her part of his generosity and kindness to her, and to unduly influence her to his prejudice in the disposition of her property.[94]

The Court refused to take seriously the possibility that Robert Johnson had violated his marital obligations. Instead, the Court expressed ire that the Johnson daughters would repeat the rumors to their mother. This pretermission implicitly sanctioned husbands' and fathers' prerogatives and reinforced submission from their dependents.

Clearly, the Johnson case – indeed, most testamentary disputes – placed local juries, community members and the Court of Appeals in the unenviable position of mediating messy and private family disputes. These cases brought into public discussion the most intimate details of day-to-day life. In this process, witnesses and lawyers chose which details they believed would most likely convince a local jury. In cases involving women's testamentary capacity, these details most often involved adherence to rigid standards of feminine dependency. Of course, these cases also reveal that this docility and dependency were not the lived experiences of these women. Female testators and

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[94] *Johnson's Adm'r v. Johnson,* 20 Ky.L.Rptr. 138 (1898).

female beneficiaries conducted business, engaged in sanctioned and unsanctioned sexual relationships, made and broke promises, and made decisions within a range of options. Still the ability to marshal evidence based on a standard of feminine behavior and sexual continence that became conflated with sanity reveals how power of the grammar of capacity.

Indeed, debates about women's innate capacities and roles saturated juridical and social dialogues about women's roles in inheritance practices. Writing a will, with its link to the material and symbolic reproduction of the family, remained a battleground in Kentucky's conflicts over the appropriate forms of household governance. The standard of capacity itself was based on an assumed masculine right to independent individualism and to conduct business. The meanings of sanity and insanity differed for men and women according to how people understood the gendered constellations of moral and appropriate behavior associated with each sex and race. Likewise, the same behavioral ideals shaped how the community perceived the worthiness of the chosen heir, particularly when disinherited bloodline family seemed worthy. To disinherit a deserving family member in favor of an heir considered by witnesses as debauched surely indicated insanity. Focusing on gender appropriate behavior allowed juries and testifying witnesses to condemn testators' or heirs' behavior by using ideals that while not practiced by everyone, were sanctioned through law and dominant social values. Such testimony established the parameters of sanity and reinforced gender appropriate behavior and proper family relationships within the crucial institution of the household.

EPILOGUE

Let's choose executors and talk of wills:
And yet not so, for what can we bequeath
Save our deposed bodies to the ground?
William Shakespeare, *Richard II*, Act Two, Scene Two.

"The right of the testator to make a will according to his own wishes is jealously guarded by the courts regardless of a court's view of the justice of a chosen disposition," pronounced Kentucky Court of Appeals Chief Judge Charles B. Lester in 1992.[1] Lester's comment appeared in *Wallace v. Scott* (1992), a testamentary capacity case over the validity of Ardeen Boston's will. Boston had willed the lifetime use of her estate to Bill Scott, with whom she had had lived for the past six years.[2] Boston's two children, her disinherited heirs-at-law, challenged the lower court's refusal to grant them a trial, arguing that Boston lacked mental capacity and was unduly influenced by Scott. The disinherited heirs-at-law invoked a grammar of capacity, some of which would have resonated with their nineteenth century counterparts. They cited Boston's medical problems and Valium use, which they argued left her mentally impaired. This charge echoes the debates over the effects of chronic disease and laudanum on nineteenth century testator Eliza Atkinson.[3] Boston's children claimed that the will was "unnatural" because Scott, lacking the legitimacy conferred by a legal relationship such as marriage, inherited rather than her bloodline kin.

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[1] *Wallace v. Scott,* 844 S.W. 2d 439 (1992).

[2] When Bill Scott died, the estate passed to the Methodist Home of Kentucky. Boston's children were completely disinherited.

[3] *Pecantet v. Grayson,* 6 Ky.Op. 80 (1872).

In *Wallace v. Scott* (1992) the Court applied a capacity test cited in an 1989 decision: "First, did the testator know the natural objects of his bounty, and his obligations to them. Second, could he make a rational survey of his estate. Third, did he dispose of that estate according to a fixed plan of his own."[4] Indeed, this concise test was strikingly similar in language to the one the Court applied in the dispute over Walter Shropshire's will more than a hundred and sixty years before in 1830. The Court noted that Shropshire "pretermitt[ed]" several heirs-at-law, and held that the law voided wills in which the testator had not "a sound memory, nor sufficient mind, or a mind in a proper state for disposing of his estate 'with reason,' or according to any fixed judgment, or settled purpose of his own."[5] These similarities remind us of the power of "capacity" and inheritance practices to shape the legal and social contours of property rights, obligation, and family relations. In spite of these linguistic similarities, Walter Shropshire's will dispute in 1830 occurred on a vastly different legal and social landscape from that of *Wallace v. Scott* (1992).

Throughout the nineteenth century, capacity was defined through a nexus of legal, social, and cultural modalities. The history of capacity contests presents an opportunity to rethink the complicated interplay between law and social norms. Conflict over the legal and social meanings of capacity drew upon and brought into courtrooms social and cultural narratives shot throughout the society. Medical experts vied for credibility and authority. Cultural narratives of disability, physical impairment, and aging infused trials.

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[4] The decision cited the test used in *Fischer v. Heckerman*, 772 S.W. 2d. 642 (1989) decided 3 years before *Wallace v. Scott* (1992).

[5] *Shropshire v. Reno*, 28 Ky. 91 (1830).

The history of capacity brings new insight into how Kentuckians experienced interracial relationships before and after the Civil War. Will disputes resulting in successful manumissions raised questions about the hegemonic power of the law to maintain a racial regime, while simultaneously reaffirming white testators' authority. Such contradictions defy easy categorization of law as a tool of the master class or as law as tool of social change in equality struggles. Capacity cases simultaneously reinforced and challenged white supremacy, patriarchal authority, and other hierarchies of power.

These contradictions stem partially from the multiple sites in which capacity gained its meanings. Community members gave meaning to capacity by observing and judging how testators behaved with their communities over long periods of time. State lawmakers and jurists interpreted statutory and case law, seeking to balance the interests of the state in stable, patriarchal households against the protecting testamentary freedom and property rights. Perhaps most contested by litigants, lawyers, and jurists were the words that defined family members' obligations to each other: the "natural" obligations that inhered between people who shared bonds through blood or legal relationship. Although obligations were conditioned by bloodline and relational proximity, they were affected by other factors such as the behavior of the beneficiaries, regardless of legal or blood relation. The obligations that inhered in affective relationships and in caregiving relationships between testators and their beneficiaries received greater scrutiny when not cloaked in the protection of a legal relationship. These obligations and their legitimacy were conditioned by racial and gender ideologies and were linked legally, semantically, and ideologically to capacity.

In May 1894, Kentucky state legislator Rozel Weissinger delivered an address to the Woman's Club of Louisville. Weissinger, author of the Married Women's Property Acts of 1894, concluded by asking rhetorically if the married woman "shall not have an equal right with man to use her faculties after her own choice, or that she shall be denied the right of property?"[6] When Weissinger connected "faculties," to property rights, he identified the intimate association between testators using their mental faculties – their capacity – and pursuing freedom through property rights. Testamentary capacity disputes became a terrain upon which women's claims for independence were inherently questionable and often undermined. Exercising testamentary freedom implicated debates beyond those over women's innate abilities; testamentary freedom, like other more politicized issues such as suffrage and citizenship, involved questions about who could participate in society as a fully constituted, self-determining human being.

Earlier in his speech, Weissinger observed that critics of the married woman's property laws "predict disastrous social results" because it would threaten "'sacredness of home' that the man is 'head of the family.'" Weissinger correctly identified how women exercising property rights potentially usurped male authority. Inheritance practices, loaded with economic and symbolic meanings, served as a crucial site in the ability of men to govern households and maintain justice and order. When women appeared as testators they did not mediate their testamentary desires through a man; instead, they established a direct relationship with state concerning the validity of their probate.

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[6] Rozel Weissinger, "The Husband and Wife Statute of 1894: An Address before theWoman's Club of Louisville Ky., Delivered May 15, 1894." N.P. Rare Pamphlet Collection, FHS.

The usefulness of the grammar of capacity extended beyond its ability to regulate marriage through husbands and wives. Indeed, it was flexible enough to be brought to bear on all testators who threatened to disrupt normative family relationships by choosing threatening beneficiaries or excluding worthy heirs-at-law. The debates over capacity demarcated the social and legal core of normative behavior within families through monitoring property distribution in inheritance practices. Capacity and incapacity regulated the peripheries of independence. These issues remain relevant today.

BIBLIOGRAPHY

Archival Collections by Repository

Filson Historical Society, Louisville, Kentucky.

- Bullitt Family Papers
- Diary of Lemuel Porter
- Green Family Papers
- Yandell Family Papers
- Pamphlet Collection

Kentucky Department for Libraries and Archives, Frankfort, Kentucky.

- Court of Appeals Records, 1864 - 1911.
- Floyd County Circuit Court Civil Case Files, 1855-1865.
- Garrard County Circuit Court Case Files, 1830 - 1860.
- Harrison County Court Clerk Records, 1795 – 1905.
- Henderson County Court Clerk Records, 1840 – 1850.
- Jefferson County Court of Common Pleas Files, 1830 – 1894.
- Madison County Court Clerk Records, 1840 – 1860.
- Nelson County Court Records, 1831 – 1835.
- Scott County Court Records, 1843-1850.
- Trigg County Court Clerk Records, 1851 – 1865.
- Warren County Court Clerk Records, 1827 – 1898.
- Woodford County Court Clerk Records, 1834 – 1838.

Published Primary Sources

Published Statutes, Digests and State Government Reports

Reports Communicated to Both Branches of the Legislature of Kentucky at the December Session, 1845 (Auditor's Report), Legislative Document No. 10," (Frankfort, Ky., A.G. Hodges, 1845).

Decisions of the Kentucky Court of Appeals in *Kentucky Law Reporter* and *Kentucky State Reports.*

Kentucky Slave Census for 1850.

Private Institution For The Education Of Feeble-Minded Youth Twenty-Fifth Biennial Report. Barre, MA: Charles Rogers, 1898. Report. <http://www.disabilitymuseum.org/lib/docs/1707.htm?page=3.> Last checked 1-20-06.

Statutes and Acts of the Kentucky General Assembly, 1794 – 1910.

Published Primary Sources

Anonymous. "An Enquiry Concerning the Duty of Christian Heads of Families Toward their Black Servants," *The Almoner* (Lexington, Ky.) 1 no. 6 (May 1815).

Allen, James Lane. *The Choir Invisible.* New York: The Macmillan Co., 1898.

Allen, James Lane. *The Reign of Law: A Tale of the Kentucky Hemp Fields.* New York: The Macmillan Co., 1900.

Aunt Alice (pseud.). "Old Age is Honorable," *Saturday Evening Post.* March 23, 1861.

Browne, Martha Griffith. *Autobiography of a Female Slave.* New York: Redfield, 1857. "Documenting Southern History Website." Last checked on 5-21-06. <http://docsouth.unc.edu/browne/browne.html.>

Caldwell, Charles M. "A Succinct View of the Influence of Mental Cultivation on the Destinies of Louisville, An Introductory Lecture Delivered at the Opening of the Louisville Medical Institute." *Louisville Journal of Medicine and Surgery* (1838).

Carroll, Alfred L. "The Plea of Insanity," in *Papers Read Before the Medico-Legal Society of New York.* Third series, 1875 – 1878. Revised edition. New York: The Medico-Legal Journal Association, 1886.

Cartwright, Samuel A. "Report on the Diseases and Physical Particularities of the Negro." *The New Orleans Medical and Surgical Journal* 7 (1851): 692 - 713.

Chipley, William S. "In the Court of Appeals, State of Kentucky: Smith vs. Commonwealth." *American Journal of Insanity* 23 no. 1 (July 1866): 1-45.

Conklin, W.J. "The Medical Expert," *The Ohio Medical and Surgical Journal* (April 1878): 127 - 147.

Cook, George M. "Mental Hygiene," *The American Journal of Insanity* 15 no. 3 (January 1859): 272 - 282.

Douglass, Frederick. *Narrative of the Life of Frederick Douglass, An American Slave.* 1845. Reprint, New York: Dover Publications, 1995.

Grissom, Eugene. "True and False Experts," *The American Journal of Insanity* 35 (July 1878): 1-36.

Hammond, William A. M.D., "Opinion Relative to the Testamentary Capacity of the Late James C. Johnston, of Chowan County, North Carolina," in *Insanity in its Medico-Legal Relations*. New York: Voorhis and Co, second edition, 1875. Original date, 1867.

Harper, William. "Slavery in the Light of Social Ethics." In *Cotton is King and Proslavery Arguments*. Edited by E.N. Elliott. Augusta: Pritchard, Abbott & Loomis, 1860.

Howe, Samuel Gridley. "A Selection from 'Report Made to the Legislature of Massachusetts" (1848). In Noll Steven and James Trent Jr., editors. *Mental Retardation in America: A Historical Reader*. New York: New York University Press, 2004.

Jarvis, Edward. "Insanity Among the Colored Population of the Free States." *The American Journal of Insanity* 8 no. 3 (Jan 1852): 268 – 282.

Jarvis, Edward. "On the Supposed Increase of Insanity," *The American Journal of Insanity* 8 no. 4 (Apr 1852): 333-364.

Jarvis, Edward. "What Shall Do With Our Insane?" *The Western Journal of Medicine and Science* 5 no. 2 (Feb 1842): 81 - 126.

"Letter to Editor," *Southern Literary Messenger* 3 (Dec 1837).

Lee, Charles A. "A Medico-Legal Opinion Relative to the Sanity of Carlton Gates." In *Papers Read Before the Medico-Legal Society of New York.* Pgs. 204-234. First series. Third Edition. New York: The Medico-Legal Journal Association, 1889.

O'Dea, James J. "The Sphere, Rights and Obligations of Medical Experts." In *Papers Read Before the Medico-Legal Society of New York.* First series, Third edition. New York: The Medico-Legal Journal Association, 1889: 402 – 443.

Ordoneaux, John. "The Proper Status of the Insane and Feebleminded." In *Papers Read Before the Medico-Legal Society of New York.* Third series, 1875 – 1878. Revised Edition. New York: The Medico-Legal Journal Association, 1886.

Patterson, Edward. "Monomania as Affecting Testamentary Capacity." In *Papers Read Before the Medico-Legal Society of New York.* Third series, 1875 – 1878. Revised edition. New York: The Medico-Legal Journal Association, 1886.

"Proceedings of the Association: Twentieth Annual Meeting of the Association of Medical Superintendents of American Institutions for the Insane." *The American Journal of Insanity* 23 no. 1 (July 1866): 75 – 145.

Pennington, James C. "The Fugitive Blacksmith; or Events in the History of James C. Pennington." In *I was Born a Slave: An Anthology of Classic Slave Narratives, Volume Two* 1849- 1866. Edited by Yuval Taylor. Chicago: Lawrence Hill Books, 1999.

Ray, Isaac. "American Legislation on Lunacy." *American Journal of Insanity* 21 no. 1 (1864): 21 – 63.

-- "Hints to the Medical Witness in Questions of Insanity." *American Journal of Insanity* 8 no. 1 (July 1851): 53 – 67.

-- *A Treatise on the Medical Jurisprudence of Insanity.* Boston: Little and Brown, 1838.

-- "Testamentary Capacity." In *Papers Read Before the Medico-Legal Society of New York,* Third series, 1875 – 1878. Revised edition. New York: The Medico-Legal Journal Association, 1886.

Redfield, Isaac. *The Law of Wills, Embracing the Making and Construction of Wills; The Jurisprudence of Insanity; The Effect of Extrinsic Evidence; The Creation and Construction of Trusts, So Far As Applicable to Wills, with Forms and Instructions for Preparing Wills* Part I, 2nd edition. Boston: Little Brown and Co, 1866.

"Reports of American Insanity." *The American Journal of Insanity* 21 no. 4 (April 1865): 567-8.

"Review of *The Law of Wills* by Isaac Redfield." *The American Journal of Insanity* 21 no. 3 (January 1865): 406-407.

Stewart, J.Q.A. "The Industrial Department of the Kentucky Institution for the Education and Training of Feebleminded Children." *Proceedings of the Association of Medical Officers of American Institutions for Idiotic and Feeble-Minded Persons* (1882): 236 – 239.

Stokes, William H. "On a Court of Medical Experts in Cases of Insanity." *The American Journal of Insanity* 10 no. 2 (Oct. 1853): 112 – 122.

Temple, William. "Thoughts on Old Age." *Virginia Historical Register and Literary Companion* 5 no. 1 (1852).

Watterson, Henry. "The South at Christmas." In *The Editorials of Henry Watterson, Compiled with an Introduction and Notes by Arthur Krock.* New York: George H. Doran Co., 1923.

Williams, Edward Vaughn. *A Treatise of the Law of Executors and Administrators.* Philadelphia: R.H. Small Law Bookseller, 1849.

Williams, Henry Smith. "Social Relations of the Insane." *North American Review* 157 (Nov 1893): 611 - 622.

Weissinger, Rozel. "The Husband and Wife Statute of 1894: An Address before the Woman's Club of Louisville Ky., Delivered May 15, 1894. N.P. N.D. Rare Pamphlet Collection, Filson Historical Society, Louisville, Ky.

Newspapers

Cincinnati Mirror and Western Gazette of Literature, Science and the Arts
Lexington Weekly Press
Louisville Courier Journal
The Louisville Times
Louisville Daily Journal
Louisville Weekly Journal
New York Times
The South Kentuckian

Ph.D. Dissertations

Bennett, Charles Raymond. "All Things to All People: The American Colonization Society in Kentucky, 1829 – 1860," Ph.D. dissertation. University of Kentucky, 1980.

Shreck, Kimberly A. "Splitting Heirs: Gender, Race and the Properties of Unreconstructed Households," Ph.D. Diss., University of Missouri – Columbia, 2004.

Wergland, Glendyne R. "Men, Women, Property, and Inheritance: Gendered Testamentary Customs in Western Massachusetts, 1800-1860, Or Diligent Wives, Dutiful Daughters, Prodigal Sons, Westward Migration, Reciprocity, and Rewards for Virtue, Considered." Ph.D. Diss. University of Massachusetts, 2001.

White, Ronald. "A Dialogue on Madness: Eastern State Lunatic Asylum and Mental Health Policies in Kentucky, 1824 – 1883. Ph.D. dissertation. University of Kentucky, 1984.

Secondary Sources

Abel, Emily K. "Family Caregiving in the Nineteenth Century" Emily Hawley Gillespie and Sarah Gillespie, 1858 – 1888." *Bulletin of the History of Medicine* 68 no. 4 (1994): 573 – 599.

Achenbaum, Andrew. "The Obsolescence of Old Age in America, 1865 – 1940." *The Journal of Social History* 8 no. 1 (Fall 1974): 48-62.

Arpey, Andrew W. *The William Freeman Murder Trial: Insanity, Politics and Race.* Syracuse: Syracuse University Press, 2003.

Ayers, Edward L. *The Promise of the New South: Life After Reconstruction.* New York: Oxford, 1992.

Alexander, Gregory S. *Commodity and Propriety: Competing Visions of Property in American Legal Thought, 1776 – 1970.* Chicago & London: University of Chicago Press, 1997.

Aron, Stephen. *How the West Was Lost: The Transformation of Kentucky from Daniel Boone to Henry Clay.* Baltimore: Johns Hopkins Press, 1996.

Baird, Nancy Disher. *David Wendel Yandell: Physician of Old Louisville.* Lexington: University Press of Kentucky, 1978.

Ball, Edward. *Slaves in the Family.* New York: Farrar, Straus and Giroux, 1998.

Bardaglio, Peter. *Reconstructing the Household: Families, Sex and the Law in the Nineteenth Century South.* Chapel Hill: University of North Carolina Press, 1995.

Baynton, Douglas C. "Disability and the Justifications of Inequality in American History." In *The New Disability History: American Perspectives*, edited by Paul K. Longmore and Lauri Umanski, 33-57. New York and London: New York University Press, 2001.

Belkin, Gary S. "Moral Insanity, Science and Religion in Nineteenth Century America: The Gray-Ray Debate," *History of Psychiatry* 7 (1996): 591 – 613.

Bercaw, Nancy. *Gendered Freedoms: Race, Rights and the Politics of the Household in the Delta, 1861 –1875*. Gainesville: University Press of Florida, 2003.

Block, Sharon. "Lines of Color, Sex and Service: Comparative Sexual Coercion in Early America" In *Sex, Love, Race: Crossing Boundaries in North American History*, edited by Martha Hodes, 141-163. New York: New York University Press, 1999.

Bogdan, Robert. *Freak Show: Presenting Human Oddities for Amusement and Profit*. Chicago: The University of Chicago Press, 1988.

Brown, Richard C. "The Free Blacks of Boyle County Kentucky, 1850-1860: A Research Note." *Register of the Kentucky Historical Society* 88 (Autumn 1989): 426-438.

Bynum, Victoria E. *Unruly Women: The Politics of Social and Sexual Control in the Old South*. Chapel Hill: University of North Carolina Press, 1992.

Carson, Martha. "Kentucky Married Women's Property Act: An Early Appeal for Justice," *Border States: Journal of the Kentucky-Tennessee American Studies Association* 5 (1985): 20-28.

Channing, Steven. *Kentucky: A Bicentennial History*. New York: W.W. Norton & Co., 1977.

Chused, Richard "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.

-- "Married Women's Property Law: 1800 – 1850." *Georgetown Law Review* 71 (1983): 1359 – 1425.

Cole, Thomas R. *The Journey of Life: A Cultural History of Aging in America*. New York: Cambridge University Press, 1992.

Cooley, Thomas. *The Ivory Leg in the Ebony Cabinet: Madness, Race, and Gender in Victorian America*. Amherst: University of Massachusetts Press, 2001.

Cott, Nancy. *Public Vows: A History of Marriage and the Nation*. Cambridge: Harvard University Press, 2000.

Coulter, E. Merton. *The Civil War and Readjustment in Kentucky*. Reprint 1966. Chapel Hill: University of North Carolina Press 1926.

Cummings, Scott and Michael Price. "Race Relations and Public Policy in Louisville: Historical Development of an Urban Underclass." *Journal of Black Studies* 27 (1997): 615-649.

Davis, Adrienne D. "The Private Law of Race and Sex: An Antebellum Perspective," *Stanford Law Review* 51 (Jan 1999): 221- 288.

Davis, Lennard J. *Enforcing Normalcy: Disability, Deafness, and the Body*. New York: Verso Press, 1995.

deFuria Jr, Joseph W. "Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?" 64 *Notre Dame Law Review* (1989): 200 - 221.

Dubler, Ariela. "In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State," *Yale Law Journal* 112 (2003), 1645-1651.

Edwards, Laura F. *Gendered Strife and Confusion: The Political Culture of Reconstruction.* Urbana: University of Illinois Press, 1997.

-- "Law, Domestic Violence, and the Limits of Patriarchal Authority in the Antebellum South," *The Journal of Southern History* 65 no. 4 (1999): 733 – 770.

Ely, James W. Jr. *The Guardian of Every Other Right: A Constitutional History of Property Rights*. 2nd Ed. New York & Oxford: Oxford University Press, 1998.

Fellows, Mary Louise. "Wills and Trusts: The Kingdom of the Fathers," *Law and Inequality: A Journal of Theory and Practice* 10 no.1 (Dec 1991): 137 – 162.

Fischer, David Hackett. *Growing Old in America*. New York: Oxford University Press, 1977.

Flannery, Michael A. "Kentucky History Revisited: The Role of the Civil War in Shaping Kentucky's Collective Consciousness." *The Filson Club History Quarterly* 71 no. 1 (Jan 1997): 27-51.

Foner, Eric. *Reconstruction: America's Unfinished Revolution, 1863 – 1877*. New York: Harper and Row, 1988.

-- *The Story of American Freedom*. New York: W.W. Norton and Co, 1998.

Foucault, Michel. *Madness and Civilization: A History of Insanity in the Age of Reason*, Translated by Richard Howard. Vintage Books, New York, 1965.

Fuller, Paul E. *Laura Clay and the Woman's Rights Movement*. Lexington: University of Kentucky Press, 1975.

Genovese, Eugene. " 'Our Family, White and Black': Family and Household in the Southern Slaveholders' Worldview," In *In Joy and In Sorrow: Women, Family, and Marriage in the Victorian South, 1830-1900,* edited by Carol Bleser, 69 – 87. New York: Oxford University Press, 1991.

Greenberg, Kenneth S. *Honor & Slavery: Lies, Duels, Noses, Masks, Dressing as a Woman, Gifts, Strangers, Humanitarianism, Death, Slave Rebellions, The Proslavery Argument, Baseball, Hunting and Gambling in the Old South.* Princeton: Princeton University Press, 1996.

Grob, Gerald N. *From Asylum to Community: Mental Health Policy in Modern America.* Princeton, NJ: Princeton University Press, 1991.

-- *Mental Illness and American Society, 1875-1940.* Princeton, N.J.: Princeton University Press, 1983.

-- *Edward Jarvis and the Medical World of Nineteenth-Century America.* Knoxville: University of Tennessee Press, 1978.

-- "Presidential Address: Psychiatry's Holy Grail: The Search for the Mechanisms of Mental Diseases," *Bulletin of the History of Medicine* 72 no. 2 (1998): 189 - 219.

Gross, Ariela J. *Double Character: Slavery and Mastery in the Antebellum Southern Courtroom.* Princeton: Princeton University Press, 2000.

-- "Beyond Black and White: Cultural Approaches to Race and Slavery," *Columbia Law Review* 101 (April 2001), 640 - 689.

Grossberg, Michael. *Governing the Hearth: Law and Family in Nineteenth Century America.* Chapel Hill: University of North Carolina Press, 1985.

-- *A Judgment for Solomon: The d'Hautville Case and Legal Experience in Antebellum America.* New York: Cambridge University Press, 1996.

Gutman, Herbert. *The Black Family in Slavery and Freedom, 1750-1925.* New York: Vintage, 1977.

Harris, J. William. *Plain Folk and Gentry in a Slave Society: White Liberty and Black Slavery in Augusta's Hinterlands.* New Hampshire: University Press of New England, 1985.

Harrison, Lowell Hayes and James C. Klotter. *A New History of Kentucky.* Lexington: University Press of Kentucky, 1997.

Hartog, Hendrik. "Marital Exits and Marital Expectations in Nineteenth Century America." *Georgetown Law Journal* 80 (1991): 109 - 129.

-- *Man and Wife in America: A History.* Cambridge and London: Harvard University Press, 2000.

-- "Lawyering, Husbands' Rights and the 'Unwritten Law' in Nineteenth Century America," *Journal of American History* 84 no 1 (1997): 67-96.

Hindus, Michael. *Prison and Plantation: Crime, Justice, and Authority in Massachusetts and South Carolina, 1767- 1878*. Chapel Hill: University of North Carolina Press, 1980.

Hodes, Martha. *White Women, Black Men: Illicit Sex in the Nineteenth Century South*. New Haven: Yale University Press, 1997.

Hoff, Joan. *Law, Gender, and Injustice: A Legal History of Women*. New York: New York University Press, 1991.

Howard, Victor B. "The Kentucky Press and the Negro Testimony Controversy." *Register of the Kentucky Historical Society* 71 (April 1974): 111-142.

Horine, Emmet Field. *Biographical Sketch and Guide to the Writings of Charles Caldwell, M.D.* Brooks, Kentucky: High Acres Press, 1960.

Howington, Arthur F. " 'Not in the Condition of a Horse or an Ox': *Ford v. Ford*, the Law of Testamentary Manumission, and the Tennessee Court's Recognition of Slave Humanity," *Tennessee Historical Quarterly* 34 no. 3 (1975): 249 – 265.

Hughes, John S. *In the Law's Darkness: Isaac Ray and the Medical Jurisprudence of Insanity in the Nineteenth Century America*. New York: Oceana Publications, 1986.

-- "Labeling and Treating Black Mental Illness in Alabama, 1861-1910," *The Journal of Southern History* 58 (August 1993): 435- 460.

Ireland, Robert. *The County Courts in Antebellum Kentucky*. Lexington: University Press of Kentucky, 1972.

-- *The County in KentuckyHistory*. Lexington: University Press of Kentucky, 1976.

-- *Little Kingdoms: The Counties of Kentucky, 1850-1891*. Lexington: University Press of Kentucky, 1977.

-- "Insanity and the Unwritten Law," *The American Journal of Legal History* 32 no. 2 (1988).

Johnson, Walter. *Soul by Soul: Life Inside the Antebellum Slave Market*. Cambridge, Mass: Harvard University Press, 1999.

Jones, Jacqueline. "The Political Economy of Sharecropping Families: Blacks and Poor Whites in the Rural South, 1865-1915," In *In Joy and In Sorrow: Women, Family, and Marriage in the Victorian South, 1830-1900,* edited by Carol Bleser, 196 - 215. New York: Oxford University Press, 1991.

Karlsen, Carol F. *Devil in the Shape of a Woman: Witchcraft in Colonial New England.* New York: Vintage Books, 1987.

Klages, Mary. *Woeful Afflictions: Disability and Sentimentality in Victorian America.* Philadelphia: University of Pennsylvania Press, 1999.

Klotter, James C. *Kentucky Justice, Southern Honor, and American Manhood: Understanding the Life and Death of Richard Reid* (Baton Rouge: Louisiana State Press, 2003).

Lebsock, Suzanne. *The Free Women of Petersburg: Status and Culture in a Southern Town, 1784 – 1860.* New York: W.W. Norton & Co., 1984.

Leslie, Kent Anderson. *Woman of Color, Daughter of Privilege: Amanda America Dickson, 1849 – 1893.* Athens, GA and London: University of Georgia Press, 1995.

McCandless, Peter. *Moonlight, Magnolias and Madness: Insanity in South Carolina from the Colonial Period to the Progressive Era* (Chapel Hill: University of North Carolina Press, 1996).

McCurry, Stephanie. *Masters of Small Worlds: Yeoman Households, Gender Relations, and the Political Culture of the Antebellum South Carolina Low Country.* New York: Oxford University Press, 1995.

Mohr, James C. *Doctors and the Law: Medical Jurisprudence in Nineteenth Century America.* New York: Oxford University Press, 1993.

-- "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 – 435.

Moss, Kay, ed. *Southern Folk Medicine, 1750-1820.* Columbia: University of South Carolina Press, 1999.

Murphy, Lamar Riley. *Enter the Physician: The Transformation of Domestic Medicine, 1760-1860.* Tuscaloosa: University of Alabama Press, 1991.

Murthy, Veena K. "Undue Influence and Gender Stereotypes: Legal Doctrine or Indoctrination?" *Cardozo Women's Law Journal* 4 (1997): 105 - 135.

Narrett, David E. *Inheritance and Family Life in Colonial New York City.* Ithaca :Cornell University Press, 1992.

Parsons, Elaine Frantz. *Manhood Lost: Fallen Drunkards and Redeeming Women in the Nineteenth Century United States.* Baltimore: The Johns Hopkins University Press, 2003.

Porter, Ray. *Madness: A Brief History.* New York: Oxford University Press, 2002.

Richards, Penny L. "'Beside her Sat her Idiot Child': Families and Developmental Disability in Mid-Nineteenth Century America,"65-79, in Steven Noll and James w. Trent Jr., eds. *Mental Retardation in America: A Historical Reader.* New York: New York University Press, 2004.

Rothman, David J. *The Discovery of the Asylum: Social Order and Disorder in the New Republic.* Boston: Little, Brown, 1990.

Rosenberg, Charles E. and Janet Golden. *Framing Disease: Studies in Cultural History.* New Brunswick, N.J.: Rutgers University Press, 1992.

Smith-Rosenberg, Carroll. "Discourses of Sexuality and Subjectivity: The New Woman, 1870-1936," in *Hidden From History: Reclaiming the Gay and Lesbian Past,* edited by Martin Bauml Duberman, Martha Vicinus, and George Chauncey Jr., 264-280. NAL Books: New York, 1989.

Ross, Brian Alan. "Undue Influence and Gender Inequity," *Women's Rights Law Reporter* 19 (Fall 1997): 97 - 119.

Rothman, David. *The Discovery of the Asylum: Social Order and Disorder in the New Republic.* Boston and Toronto: Little, Brown and Co., 1971.

Russett, Cynthia Eagle. *Sexual Science: The Victorian Construction of Womanhood.* Cambridge: Harvard University Press, 1989.

Ryan, Mary P. *Cradle of the Middle Class : The Family in Oneida County, New York, 1790-1865.* Cambridge and New York :Cambridge University Press, 1981.

Salmon, Marylynn. *Women and the Law of Property in Early America.* Chapel Hill and London: University of North Carolina Press, 1986.

Scull, Andrew. *Social Order/Mental Disorder: Anglo-American Psychiatry in Historical Perspective.* Berkeley: University of California Press, 1989.

Schafer, Judith. *Becoming Free, Remaining Free: Manumission and Enslavement in New Orleans, 1846 – 1862.* Baton Rouge: Louisiana State University, 2003.

Shammas, Carole, Marylynn Salmon, and Michel Dahlin. *Inheritance in America from Colonial Times to the Present.* New Brunswick and London: Rutgers University Press, 1987.

Shammas, Carole. *A History of Household Government in America.* Charlottesville: University of Virginia Press, 2002.

Showalter, Elaine. *The Female Malady: Women, Madness and English Culture, 1830-1980.* New York: Pantheon, 1985.

Siegel, Reva B. "She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family," *Harvard Law Review* 115 (February 2002): 947 – 1046.

Smith-Rosenberg, Carroll. "The Hysterical Woman: Sex Roles and Role Conflict in Nineteenth-Century America." In *Disorderly Conduct: Visions of Gender in Victorian America.* New York: Knopf, 1985.

Spitko, Gary. "Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration." *Case Western Law Review* (Winter 1999): 275 - 314.

Sprague, Stuart Seely. "The Kentucky Pocket Plantation: Sources and Research Strategies, Mason County as a Case Study," *The Filson Club Quarterly* 71, no. 1 (January 1997): 69 – 86.

Stevenson, Brenda. *Life in Black and White: Family and Community in the Slave South.* New York: Oxford University Press, 1996.

Sussman, Marvin B., Judith N. Cates, and David T. Smith, *The Family and Inheritance.* Russell Sage Foundation, New York, 1970.

Tachau, Mary K. Bonsteel. *Federal Courts in the Early Republic: Kentucky, 1789 – 1816.* Princeton: Princeton University Press, 1978.

Tallant, Harold B. *Evil Necessity: Slavery and Political Culture in Antebellum Kentucky.* Lexington: University of Kentucky Press, 2003.

Thomson, Rosemarie Garland. *Extraordinary Bodies: Figuring Physical Disability in American Culture and Literature.* New York: Columbia University Press, 1997.

Torrey, Fuller E., and Judy Miller. *The Invisible Plague: The Rise of Mental Illness from 1750 to the Present.* New Brunswick, New Jersey and London: Rutgers University Press, 2001.

Trent, James Jr. *Inventing the Feeble Mind: A History of Mental Retardation in the United States* Berkeley and London: The University of California Press, 1994.

Tushnet, Mark V. *The American Law of Slavery, 1810-1860: Considerations of Humanity and Interest.* Princeton: Princeton University Press, 1981.

Waldinger, Robert. "The Sleep of Reason: John P. Gray and the Challenge of Moral Insanity," *Journal of the History of Medicine* 34 no. 2 (April 1979): 163 – 179.

Waldrep, Christopher. "The Impact of Race Law on Kentucky," *The Register of the Kentucky Historical Society* 90 no. 2 (Spring 1992): 165 – 182.

Warner, John Harley. *The Therapeutic Perspective: Medical Practice, Knowledge, and Identity in America, 1820-1885.* Cambridge, Mass: Harvard University Press, 1986.

Wendell, Susan. *The Rejected Body: Feminist Philosophical Reflections on Disability.* New York: Routledge, 1996.

White, Ronald. "Custodial Care for the Insane at Eastern State Hospital in Lexington, Kentucky, 1824 – 1844." *Filson Club Quarterly* 62 (1988): 303 – 335.

--- "John Rowan Allen, M.D., and the Early Years of the Psychiatric Profession in Kentucky, 1844 – 1854." *Filson Club Quarterly* 63 (January 1989): 5-23.

--- "William Stout Chipley and the Evolution of the Medical Superintendency at the Eastern State Lunatic Asylum, 1855 – 1869." *Filson Club Quarterly* 69 (April 1995): 140 – 158.

Whites, LeeAnn. *The Civil War as a Crisis in Gender: Augusta Georgia, 1860-1890.* Athens: University of Georgia Press, 1995.

Wiggins, Sarah Woolfolk. "A Victorian Father: Josiah Gorgas and His Family," In *In Joy and In Sorrow: Women, Family, and Marriage in the Victorian South, 1830-1900,* edited by Carol Bleser, 233 - 252. New York: Oxford University Press, 1991.

Woodward, Vann C. "Introduction," In *In Joy and In Sorrow: Women, Family, and Marriage in the Victorian South, 1830-1900,* edited by Carol Bleser, xxi. New York: Oxford University Press, 1991.

Works Project Administration. *Medicine and its Development in Kentucky.* Louisville, Kentucky: Standard Printing Company, 1940.

Wright, George C. *Life Behind a Veil: Blacks in Louisville Kentucky, 1865 –1930.* Baton Rouge: Louisiana State University Press, 1985.

-- *Racial Violence in Kentucky, 1865 – 1940: Lynching, Mob Rule and "Legal Lynchings."* Baton Rouge: Louisiana State University Press, 1990.

Wyatt-Brown, Bertram. Southern Honor: Ethics and Behavior in the Old South. New York and Oxford: Oxford University Press, 1982.