2008

On Inheritance and Disinheritance.

Anne-Marie E. Rhodes
Loyola University Chicago, arhodes@luc.edu

ON INHERITANCE AND DISINHERITANCE

Anne-Marie Rhodes*

Editors' Synopsis: This Article discusses how changes in the American family have led some scholars to advocate for a more conduct-based approach to inheritance. The author asserts that this type of approach is not new to inheritance law and outlines how historical changes, including the advent of legal adoption, have changed the landscape of inheritance law. The author asserts that inheritance law will continue to be based primarily on a two-tiered approach—looking at the familial relationship of the actors, with conduct of the potential heir being viewed as a secondary factor.

I. INTRODUCTION

Profound changes in the American family have led to a reexamination of laws concerning families, including those of inheritance.[1] Some schol-

* Professor of Law, Loyola University Chicago School of Law; Visiting Professor, Spring 2008, University of Tennessee College of Law; J.D., Harvard University. This Article is a modestly revised version of a speech presented at the American College of Trust and Estate Counsel Foundation Symposium on Succession Law in the 21st Century at the University of California Los Angeles School of Law on February 8, 2008. The symposium honored Professor Jesse Dukeminier. Able research assistance from Loyola University Chicago law student Sarah Graham is gratefully acknowledged. Helpful commentary from David Hepplewhite improved this piece.

[1] *See* Thomas P. Gallanis, *Frontiers of Succession*, 43 REAL PROP. TR. & EST. L.J.

ars question the ongoing use of a family blood-based relationship as the foundation for inheritance, with some proposing, and some rejecting, conduct as an alternative model.[2] For proponents, conduct primarily would address the goal of fulfilling the decedent's intent and satisfying a norm of reciprocity. Scholars opposed express concern for institutional efficiency, privacy, and difficulty crafting an appropriate legal standard devoid of political ideology.

This Article posits that, contrary to current discourse, inheritance never has rested solely on one basis. The historic norm has been a two-tiered sequential approach encompassing both family relationship and conduct regarding inheritance and possible disinheritance.

This Article focuses on the less-acknowledged role conduct has played over time in shaping inheritance law in three contexts. First, the Article provides a brief review of common law history revealing the implicit role conduct played in creating exceptions to a presumptive family-based inheritance. Second, the Article examines legal adoption and how that nineteenth century innovation in America expanded the meaning of the family beyond biological relationships to include adopted children for inheritance purposes. Third, the Article explores the development of explicit disinheritance norms beginning in the nineteenth century generally based on harmful conduct toward a vulnerable population. The Article concludes with a consideration of the role conduct can play in inheritance reform.

II. COMMON LAW INHERITANCE: EXCEPTIONS BASED ON CONDUCT

The basic rule of common law inheritance stated family bloodline was the critical determinant and, without the requisite family blood tie, one simply could not be an heir. However, whether for sacred or secular concerns, it soon became clear that not all family blood was viewed the

---

419 (2008); Kristine S. Knaplund, *The Parent–Child Relationship in Inheritance Reexamined for the 21st Century*, 43 REAL PROP. TR. & EST. L.J. 393 (2008).

[2] Among those who advocate consideration of behavior is Frances H. Foster. *See, e.g.*, Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199 (2001) (discussing the family model for inheritance and its limits); *see also, e.g.*, Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1 (2000) (discussing current family law principles and proposing an intestacy statute). For those who express concern over such considerations generally and in the context of some of the specific issues, see, for example, Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1057 (2004).

same way. An intricate and complex matrix developed in which sometimes actions of the decedent, actions of the heir, or—for the lack of a better descriptive—political exigencies made some family bloodlines less capable of inheriting or transmitting property.

This matrix developed within an historic background of uncertainty and instability, a time in which multiple forces—the king, the church, the nobility—were struggling for power and recognition.[3] In the context of property, the political balance was struck by allocating power over real property—its ownership, rights, and obligations—to the temporal realm of the king, and power over the rest went by default to the church. This fissure of real from personal property and the separate realms of the king and the church created different rules and resulted in different value judgments that continue today.[4] The family bloodline was the starting point for inheritance but it alone was not sufficient. Four refinements to inheritance based on conduct can serve as examples of the limits of family biology.

A. Nonmarital Conduct

The first limit might be seen as one of purity. At earliest common law, a child born outside of marriage was deemed *filius nullius*, a child of no one, and, therefore, that child could not inherit from anyone.[5] Scientifically, the child's blood tie connection to mother and father did not depend on the parents' marital status, but actual bloodline was not a sufficient basis at common law for the child's inheritance.

---

[3] For an eminently readable and insightful history of these conflicts and compromises from the perspective of an English political leader at the highest level during a time of great importance and struggle, see 1 WINSTON S. CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE BIRTH OF BRITAIN xiv-xx, 130, 153–56, 210 (1956). Some of these conflicts are, of course, well known and important to Americans as well as the English. For example, the nobility forced King John to sign the Magna Carta in 1215 as a result of his overreaching policies.

[4] 2 SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 331–32, 351–53, 363 (2d ed. 1996) (illustrating the separation of jurisdiction between state and church and between real property and personal property). The historic judgment on the separate realms is harsh: "It is in the province of inheritance that our medieval law made its worst mistakes. They were natural mistakes. . . . But the consequences have been evil." *Id.* at 363. Or consider the less stern but equally negative assessment: "Here again the fissure in our law of property . . . did much harm." *Id.* at 444.

[5] *See* WILLIAM BLACKSTONE, 1 COMMENTARIES *447.

The nonmarital conduct of the parents apparently was deemed outside the bounds of acceptable conduct; therefore, even if the child's biological relationship was certain, his inheritance was denied. While no special statute at common law stated the rule explicitly, a reference to a descendant was understood to mean a legitimate descendant; the family connection required good conduct by both parents.

B. Criminal Activity

The most obvious example of conduct disinheriting a family member at common law is criminal activity. Life in the Middle Ages was dark, brutal, and brief, and the law regarding criminal activity reflected that. At the same time, the law reflected a strong belief in the importance of good order for a functioning and stable society. Three designations of criminal law—outlawry, felony, and treason—had a particularly important role to play in weaving conduct into inheritance.

The property rules the common law developed for outlawry, felony, and treason were that the outlaw, felon, and traitor's goods and chattels were confiscated by the king. A felon's real property escheated to his lord, but a traitor's real property was forfeited to the king.[6] As harsh as this may sound, the confiscation and forfeiture of property was of little consequence to the outlaw, felon, and traitor of capital offenses because these punishments usually were companions to the death sentence.

Medieval justice demanded more than death, confiscation, and forfeiture for these most base and wicked acts that violated fundamental principles; the outlaw, felon, and traitor's acts were deemed to corrupt the offender's blood:

> Another immediate consequence of attainder is the *corruption of blood*, both upwards and downwards; so that an attainted person can neither inherit lands . . . from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir; . . . and the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor.[7]

---

[6] *See* Matthew R. Ford, Comment, *Criminal Forfeiture and the Sixth Amendment's Right to Jury Trial Post*-Booker, 101 NW. U. L. REV. 1371, 1401–02 (2007).

[7] 4 BLACKSTONE, *supra* note 5, at *381; *see also* 2 *id.* at *251 ("By attainder also, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable.").

An independent America had a decidedly different view of attainder, corruption of blood, and forfeiture. The Constitution flatly prohibits them: "No Bill of Attainder or ex post facto Law shall be passed."[8] "No State shall . . . pass any Bill of Attainder [or] ex post facto Law. . . ."[9] "The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted."[10]

The independent American perspective was clear; an individual is to be judged on his own actions and not those of his ancestors.[11]

C. Good Conduct

Not only misconduct resulted in disinheritance; good, perhaps even saintly, conduct could result in disinheritance. The common law fiction of civil death developed to deal with men and women who entered religion and, as a consequence, left the everyday world.[12] When a man became a monk or a woman a nun, that voluntary action was treated as a death in the secular world. If a monk or nun's relative died and, under the normal rules of inheritance, land would descend to the monk or nun, the civil death doctrine dictated that the land passed to another. The independent action of professing religion terminated the heirship status of a monk or nun despite their pure family relationship and saintly conduct.

D. Alien Conduct

A final example from common law history of asserted misconduct that led to disinheritance is noteworthy because the example actually does not involve conduct but rather status. A clear rule developed at common law that an alien could not hold land in England.[13] If an alien was otherwise entitled to real property under the rules of descent, title would bypass the alien and go to the next person entitled under the rules.[14] If, however, land passed otherwise (say by purchase or gift) to an alien, that transaction was not cancelled, but the King could seize the property for

---

[8] U.S. CONST. art. I, § 9, cl. 3.

[9] *Id.* art. I, § 10, cl. 1.

[10] *Id.* art. III, § 3, cl. 2.

[11] *See* Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727 (1992).

[12] *See* 1 POLLOCK & MAITLAND, *supra* note 4, at 433.

[13] *See id.* at 459.

[14] *See id.*

himself.[15] For inheritance purposes, an alien's family bloodline, no matter how pure or well-ordered, was trumped by the political exigency of utmost loyalty to the King. Interestingly, the explanation for the forfeiture was couched in terms of the alien's conduct. Blackstone's *Commentaries* defends the forfeiture as a "way of punishment for the alien's presumption, in attempting to acquire any landed property."[16] As such, the alien's action was an affront to the political order. Even if the King did not take the land during the alien's lifetime, the alien was not able to pass it by descent at death because by virtue of the alien's presumptuous action "the alien had no heritable blood."[17]

III. EXPANDING HEIRSHIP BEYOND BIOLOGY: ADOPTION

This Article has focused mainly on the primary role family bloodlines have played in common law inheritance and the development of implicit rules that, for secular reasons, protect the purity of the family's bloodline for inheritance. The development of legal adoption in nineteenth-century America, however, directly challenged the biological family's monopoly position.

Judges routinely state that adoption did not exist at common law.[18] True, the English system did not admit a nonblood as an heir. This flat rejection of adoption is fully consistent with the common law's embrace of bloodline. An independent America had a different perspective.

Informal adoptions were known to and widely used by the colonists.[19] Some informal adoptions even led to legal recognition by private legislation, sometimes by changing the adoptee's name.[20] More important in mid-nineteenth century America, modern adoption statutes appeared.[21]

---

[15] *See id.*

[16] BLACKSTONE, *supra* note 5, at *360.

[17] THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING INTESTACY AND ADMINISTRATION OF DECEDENTS' ESTATES 54 (2d ed. 1953).

[18] See, for example, the first sentence of the textbook case *Hall v. Vallandingham*, 540 A.2d 1162 (Md. Ct. Spec. App. 1988) ("Adoption did not exist under the common law of England . . . .") (footnote omitted) (1988), *cited in* JESSE DUKEMINIER ET AL., WILLS, TRUSTS AND ESTATES 83 (7th ed. 2005).

[19] *See* E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 6–7 (1998) [hereinafter CARP, FAMILY MATTERS].

[20] *See id.*

[21] In 1849, Mississippi was the first state to have an adoption statute. Alabama, Texas, and Vermont also had statutes before Massachusetts' statute was enacted. *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-

The economic and social transformation of the nineteenth century—"large-scale immigration, urbanization, and the advent of the factory system and wage labor"[22]—resulted in an overwhelming urban and rural poverty for many.

The community's response was to exercise its traditional *parens patriae* to remove orphaned, abused, and neglected children from their families, but instead of placing the children out as apprentices or indentured servants, in a new conception, the children were placed in a new environment, as a new child, in a new family.[23] A judge would make a qualitative assessment of the child's best interests and the parents' fitness and create a new parent–child relationship. Over time, child welfare reformers became disillusioned with this new model and "went to the other extreme and stressed the cultural primacy of the blood bond in family kinship."[24] This variance in views persists today.

The shifting theories of child welfare experts (for example, removal from family of origin to new family or preserve family of origin, with both theories operating through the adoption mechanism)[25] created difficulties for the legal system. While the child welfare system may have recalibrated its view of adoption, there was no legislative or judicial retreat from the primary import of the adoption statutes; a parent–child relationship created by adoption was valid. The parent–child relationship no longer was defined exclusively by biological relationship. Beyond that one relationship, however, legislatures and courts continued to grapple with setting legal rules for the meaning of adoption for inheritance pur-

---

CENTURY AMERICA 271 (1985). Nevertheless, the Massachusetts adoption statute generally is considered to be the first modern statute because of its "new conceptions of childhood and parenthood by emphasizing the welfare of the child and establishing the principle (if not the practice) that judges were to determine whether prospective adoptive parents were 'fit and proper.'" E. Wayne Carp, *Introduction: A Historical Overview of American Adoption*, *in* ADOPTION IN AMERICA HISTORICAL PERSPECTIVES 6 (E. Wayne Carp ed., 2005).

[22] CARP, FAMILY MATTERS, *supra* note 19, at 7.

[23] See Susan L. Porter, *A Good Home: Indenture and Adoption in Nineteenth-Century Orphanages*, *in* ADOPTION IN AMERICA *supra* note 21, at 27–29 for a discussion of the role the well-known practice of indenture played in the development of adoption in the United States.

[24] CARP, FAMILY MATTERS, *supra* note 19, at 16.

[25] *See* Chris Guthrie & Joanna L. Grossman, *Adoption in the Progressive Era: Preserving, Creating, and Re-Creating Families*, 43 AM J. LEGAL HIST. 235, 236 (1999) (discussing three family paradigms for adoption—family preservation, family creation, and family re-creation).

poses. Three issues were raised that still generate controversy and disparate views: an adopted child's right to inherit from natural parents, an adopted child's right to inherit from collateral relatives of the adoptive parents, and rights of the adoptive and natural families to inherit from the adopted child.

Adult adoptions have been a persistent problem, especially those that are seen by other family members as abusive. In this context, abusive often means that the conduct of the adoptive parent and adopted child does not conform to societal notions of a parent–child relationship. The textbook case of *Minary v. Citizens Fidelity Bank & Trust Co.* is a good example of a situation in which the legal status of parent–child is at odds with the actual conduct of the parties.[26]

In *Minary*, Alfred and Myra were married for twenty-five years. They did not have any children. Alfred was the sole surviving life beneficiary of a trust created by his mother, Amelia, for her husband and her three sons. Upon Alfred's death, the trust would terminate, and the funds were to be distributed to Amelia's "then surviving heirs."[27] Wishing to provide for his wife after his death, Alfred adopted his wife as his child. Though the adoption was granted by a judge, the Kentucky Court of Appeals was asked to determine if this parent–child relationship, validly created by adoption through the voluntary conduct of the husband and wife, was valid for purposes of Amelia's trust. The court held that it was not.[28] The legal relationship was only the first step in determining the takers of property. Amelia's intent was important, and the court saw this adoption as a "subterfuge which in effect thwarts [Amelia's] intent . . . and cheats the rightful heirs."[29] The legal status may have been correct, but the actual conduct of the parties, contrary to societal norms of a parent–child relationship, could not be ignored.

Society is highly aware that adoption today is not a one-size-fits-all enterprise. Some adoptions are of newborns, some are not; some are of blood relatives, some are not; and some are open, some are confidential.[30] These situations and others have led judges and legislatures in some states to retreat from bright-line demarcations of inheritance rights beyond the child and parent in favor of a more complex, fact-sensitive determination

---

[26] *See* Minary v. Citizens Fid. Bank & Trust Co., 419 S.W.2d 340 (Ky. Ct. App. 1967), *cited in* JESSE DUKEMINIER ET AL., WILLS, TRUSTS AND ESTATES (7th ed. 2005).

[27] *Id.* at 341.

[28] *See id.* at 343.

[29] *Id.* at 343.

[30] *See* CARP, FAMILY MATTERS, *supra* note 19, at 223–34.

involving actual interaction and intent.[31] The parent–child relationship formed by adoption is as firm legally as the parent–child relationship formed by blood; beyond that secure, nuclear-family equivalence, the law of inheritance is uneasy. Questions of family are questions of relationship and intent.

IV. THE EMERGENCE OF DISINHERITANCE STATUTES

In 1882, sixteen-year-old Elmer Riggs poisoned his grandfather "to obtain the speedy enjoyment and immediate possession" of the considerable property he knew his grandfather's will provided for him.[32] His murderous misconduct sparked a vigorous debate on whether the judicial system may consider an heir's conduct in inheritance absent a statute. While that question of judicial power in interpreting and applying legislation remains, legislatures responding to public outcry over egregious cases have enacted new statutes disinheriting heirs because of their misconduct.

These disinheritance statutes generally fall into three categories: slayers, child abandonment, and elder abuse. Unlike the situations involving disinheritance at common law, these new disinheritance statutes make explicit that conduct directly harmful to the decedent, especially if the decedent is considered vulnerable, will disqualify the taker from receiving property.

A. Slayer Statutes

When *Riggs* was decided by the New York Court of Appeals in 1889, the court's decision to bar Elmer as a legatee and heir of his grandfather was unusual and at odds with the prevailing judicial view.[33] Judge Earl agreed that the statutes gave the grandfather's property to Elmer, but he invoked two canons of construction, "rational interpretation" and "equitable construction," to reconcile the statutory result with lawmakers' intention:

---

[31] See, for example, 755 ILL. COMP. STAT. ANN. 5/2-4(a) (West 1998), which provides that if an adoption takes place after a child reaches the age of eighteen years and if the child never resided with the adopting parent before reaching the age of eighteen years, then that adopted child shall not be considered a descendant of the adopting parent for purposes of inheritance from or through the lineal or collateral lines.

[32] Riggs v. Palmer, 22 N.E. 188, 189 (N.Y. 1889).

[33] *See, e.g.*, Owens v. Owens, 6 S.E. 794, 795 (N.C. 1888), *cited and discussed in* Alison Reppy, *The Slayer's Bounty—History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229, 248 (1942).

> We need not, therefore, be much troubled by the general language contained in the laws. Besides, all laws . . . may be controlled in their operation and effect by general, fundamental maxims of the common law. No one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, . . . or to acquire property by his own crime.[34]

Judge Earl's reasoning was severely criticized for decades by a majority of other courts and by many academic commentators.[35] The chief criticism was that the court lacked the power to change or overrule a statute: "[B]y what right can the court declare a will [devising real estate to the slayer] revoked by some other [nonstatutory] mode?"[36]

Judge Earl's result, however, was desired. Judges on both sides of the controversy were dismayed. After a fifteen-year lag, some courts began to follow Judge Earl's lead and "in most of the jurisdictions in which the courts refused to engraft an exception, a statute rectifying the omission was passed shortly thereafter."[37] All jurisdictions now make explicit that a murderous heir's misconduct can prevent inheritance of the decedent's property.

B. Child Abandonment

In 1926, the North Carolina Supreme Court ruled in *Avery v. Brantley*[38] that a father who had abandoned his four-year-old daughter was nevertheless entitled to inherit from her wrongful death action. Judge Clarkson wrote, "[w]e cannot stretch the [statute's] language . . . to meet the facts in the present case. To do so we would make, and not construe, the law."[39] One year later, the North Carolina legislature responded with an amendment to the intestate statute: "*Provided*, that a parent, or parents, who has wilfully abandoned the care, custody, nurture and maintenance of such child . . . shall forfeit all and every right to participate in any part of

---

[34] Riggs, 22 N.E. at 190.

[35] *See* Reppy, *supra* note 33, at 251–55.

[36] *Id.* at 253 (footnote omitted) (quoting Harvard Law School Dean James Barr Ames).

[37] John W. Wade, *Acquisition of Property by Willfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715, 716 (1936) (footnote omitted).

[38] 131 S.E. 721 (N.C. 1926).

[39] *Id.* at 722.

said child's estate."[40] This was the first statute in the United States making a parent's behavior, aside from murder, a factor in inheriting from a child.

The North Carolina statute was a significant step in making an heir's actions an explicit factor for inheritance. First, unlike the slayer statute with its common law antecedents of outlawry or felony, there was no recognized applicable common law precedent or doctrine.[41] Second, the prohibited action was not one criminal act resulting in the decedent's death but a course of willful conduct over time that may have had no direct bearing on the decedent's death. Third, the statute focused on one particular relationship, that of parent and child, with duties of care and protection owed to a vulnerable party.

For the eleven states today with a child abandonment disinheritance statute, the legislative message is clear. Becoming a parent, whether by blood or its legal equivalent of adoption, is a necessary condition for inheritance, but it alone is not sufficient. Being a parent and fulfilling basic duties owed to one's child is equally important. If a parent's willful conduct does not match up with a parent's legal duties, that conduct explicitly disqualifies the parent as an heir.

C. Elder Abuse

In 1999, California added a new and unique provision focusing on elder abuse and neglect to its probate code.[42] Section 259 restricts a person who either was convicted of, or found liable by clear and convincing evidence of, elder abuse or neglect from receiving certain property from the elderly victim's estate.[43] The significance of section 259 lies not in its sweep but in its existence.[44] California, the most populous state in the nation with the largest elderly population, may be the bellwether state

---

[40] Act of March 9, 1927, ch. 231, 1927 N.C. Sess. Laws 591 (amending 1 N.C. CONS. STAT. § 137(6) and recodified as N.C. GEN. STAT. § 28-149(6) (1943)).

[41] A civil law doctrine existed—*indignitas*, or unworthy heirs—that is analogous. *See* Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need to Go*, 27 IND. L. REV. 517, 530–32 (1994).

[42] *See* CAL. PROB. CODE §§ 259 (intestate succession), 2583 (substituted judgment by the court) (West 2006); 1998 Cal. Legis. Serv. 935 (West) (all elder abuse amendments).

[43] *See* CAL. PROB. CODE § 259 (a), (b).

[44] *See* Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537 (2001) (discussing the law's shortcomings).

for recognizing elder abuse as disinheriting conduct.[45] In enacting section 259, the legislature emphasized the victim's vulnerability.

While most elderly people are not abused or neglected,[46] those who are victims of abuse share characteristics suggesting particular vulnerability to abuse. "The most likely victims are of age seventy-five or older who are dependent on the abuser for care and protection."[47] "Elderly persons who are unable to care for themselves, and/or are mentally confused and depressed are especially vulnerable to abuse and neglect."[48] Similarly, abusers share a dominant profile: they are family members—generally adult children, other family members, or spouses.[49] Elder abuse, therefore, often involves family members—people who are related by blood or marriage to the decedent—exactly the same group as one's heirs. From this perspective, the statute is a logical response to a pernicious problem "deserving of special consideration and protection . . . because elders . . . may be . . . less able to protect themselves."[50]

Again, the legislative message is clear: The abusive behavior of heirs targeting a vulnerable population merits disinheritance.

V. CONCLUSION

At common law, family blood relationship was the standard for inheritance, and the role of conduct was as a spoiler, a disqualifier from presumptive inheritance. Courts construed the requisite conduct broadly, and the conduct developed mostly within a shifting political framework so that affronts to the sovereign or to the community's good order resulted in disinheritance. Family blood relationship provided a degree of certainty and stability for individuals and their communities but not at the expense of the social order.

---

[45] A few other states—Illinois, Maryland, Oregon, and Pennsylvania—joined California in enacting some type of disinheritance statute based on elder abuse. *See* Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 986–87 (2007) [hereinafter Rhodes, *Rules to Discretion*].

[46] *See* Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect—The Legal Framework*, 31 CONN. L. REV. 77, 87 (1998) (discussing 1981 House Select Committee report that estimated 4% of elderly may be victims of abuse).

[47] LAWRENCE A. FROLIK & ALISON MCCHRYSTAL BARNES, ELDER LAW: CASES AND MATERIALS 611 (4th ed. 2007).

[48] NAT'L CTR. ON ELDER ABUSE AT AM. PUB. HUMAN SERVS. ASS'N, THE NATIONAL ELDER 5–8 (1998).

[49] *See* FROLIK & BARNES, *supra* note 47, at 612.

[50] CAL. PENAL CODE § 368 (West 1999 & Supp. 2008); *see also* 1998 Cal. Legis. Serv. 935 (West) (all elder abuse amendments).

Now, centuries removed from these origins of common law, American inheritance law retains the two-tiered approach to inheritance and disinheritance. The starting point remains the family—no longer defined exclusively by blood ties—but expanded to include relatives by adoption and spouses. Conduct continues to be a disinheriting norm but in a different fashion. It is neither broadly construed nor implicit but continues to serve the best interests of the community. Conduct's role clearly is secondary to family status. Considerations of an heir's conduct likely will not supplant blood, adoption, or marital status to become the primary determinant of heirship status. The weight of history is against this, and for good reason.

Unlikely as conduct is to become the primary determinant for inheritance, conduct is as likely to continue in its secondary role for disinheritance. The murderous heir's disqualification by statute or case law in all jurisdictions assures this. Some states' enactment of additional disinheritance statutes also suggests an ongoing legislative and public interest in considerations of misconduct.[51]

Beyond these two observations, does recognizing family relationships explicitly (however defined) and an heir's conduct as related and sequential inheritance and disinheritance standards hold a larger lesson for the development of inheritance law? The answer to this well may lie within the nature of modern day disinheritance statutes. These statutes, which center on harmful conduct to a specific decedent, reorient the focus of inheritance away from an objective status to a subjective determination of how particular people act toward each other. This reorientation holds the possibility of reimagining heirship on an individual basis in a time of profound social change.

---

[51] An additional consideration arises when behavior is considered: what is the role of discretion to be given to a judge in determining behavior? This issue, too, has begun to emerge but is outside the scope of this Article. *See* Rhodes, *Rules and Discretion*, *supra* note 45, at 975.