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Blood and Behavior.

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Blood and Behavior

*Anne-Marie Rhodes, Chicago, Illinois**

The prevailing view of the law of succession is that it is based on blood relationship, and subjective considerations are irrelevant. This perception of a one-dimensional approach is not historically accurate. From the beginning, behavior influenced the distribution of property, albeit at a secondary level.

Two nineteenth-century developments in American succession law, legal adoption and spouse as heir, significantly changed the perception of who should be an heir. At the same time that succession law was expanding heirship beyond blood, the law was contracting heirship because of behavior. This article explores this double-helix approach through history. This article also advocates for an explicit role for behavior in succession law as the law grapples with changing views of family and property.

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INTRODUCTION

One-hundred-twenty-seven years ago on November 25, 1882, the Savoy Theatre in London presented its first opera with the premiere of Gilbert and Sullivan’s satirical fairy opera *Iolanthe*.¹ In it, a chorus of richly robed Lords echoes a fellow Lord’s obvious worthiness as a marriage suitor for a beautiful, but lowly born, young woman, singing:

“Of birth and position he’s plenty;
With blood and behaviour for twenty!”²

William S. Gilbert was a keen satirist, a sharp observer of Victorian times, and a barrister.³ His linking “birth” with “position” and “blood” with “behaviour,” then coupling them together, would have been intentional.⁴ It would likely ring true to many in a London audience, even as his dimwitted Lords and absurd story line would raise questions about the underlying tacit assumption that “blood and behaviour” were equated.

“Blood and behaviour” resonated not only in the popular culture of English theatre and the reality of English monarchy but in English law as well. Nowhere is the constancy of blood as enduring a foundational

¹ 1 THE ANNOTATED GILBERT AND SULLIVAN 163, 165 (Ian Bradley, ed., 1985).

² W.S. GILBERT & ARTHUR SULLIVAN, *IOLANTHE OR THE PEER AND THE PERI*, act I, sc. An Arcadian Landscape, *reprinted in id.* at 185.

³ See Jeffrey G. Sherman, *Law’s Lunacy: W.S. Gilbert and His Deus ex Lege*, 83 OREGON L. REV. 1035, 1036, *passim* (2004) for a thoughtful and engaging analysis of Gilbert and his works, his use of English law, and English times. I am indebted to Professor Sherman for his recollection of the use of the phrase “blood and behavior” in *Iolanthe* during a discussion about this article.

⁴ See 1 ANNOTATED GILBERT AND SULLIVAN, *supra* note 1 at 164.

concept as in the law of inheritance. The role of behavior in inheritance is less obvious, befitting its historically indistinct, subsumed nature.

Profound changes in the American family have led to a reexamination of laws concerning families and inheritance. Scholars are questioning the continuing use of blood relationship as the foundation for inheritance, with some proposing, and some rejecting, behavior as an alternative model.⁵ For proponents, behavior would primarily address the goal of fulfilling decedent's intent, and satisfy the norm of reciprocity. Those opposed express concern for institutional efficiency, privacy, and the difficulty in crafting an appropriate legal standard devoid of political ideology.

It is the thesis of this paper that blood and behavior are not unrelated standards for inheritance. Throughout our common law history, blood and behavior (whether the decedent's or the heir's) have interacted to flesh out the details of actual inheritance. Intestacy's summary listing of blood heirs has routinely been interpreted and refined to have particularized meanings reflecting social and political concerns, especially regarding the parent and child relationship. It is also the thesis of this paper that an inheritance system can properly provide that certain harmful behavior can disqualify one from receiving a presumptive inher-

⁵ An extensive literature concerning consideration of behavior in inheritance, generally, has developed recently. Chief among those who advocate in favor of 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); Frances H. Foster, *Towards a Behavior Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77 (1998) (describing the Chinese system, which specifically considers good and bad behavior); see also, e.g. Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW AND INEQUALITY 1 (2000) (discussing current family principles and law and proposing an intestacy statute); Paula A. Monopoli, "Deadbeat Dads": *Should Support and Inheritance be Linked?*, 49 U. MIAMI L. REV. 257 (1994) (discussing a behavior based model of inheritance by fathers from their deceased children); Anne-Marie E. Rhodes, *Abandoning Parents Under Intestacy: Where We Are, Where We Need To Go*, 27 IND. L. REV. 517 (1994) (discussing parental behavior to qualify for parental intestacy rights).

There are, also, those who express concern over such considerations generally and in the context of some of the specific issues. See, e.g., Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1057 (2004) (italics in original, footnote omitted) ("Assume for a moment the scholars gained acceptance of their view. Whose morality and preferences, then, should inheritance law express? Why, *theirs*, of course! The scholars, in fact, have taken their stance precisely with an eye to promoting an agenda, namely, the legal and social recognition of nontraditional families."); see also Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, U. CIN. L. REV. 803 (1993) (providing a cautionary look at slayer statutes); Richard Lewis Brown, *Undeserving Heirs? – The Case of the "Terminated" Parent*, 40 U. RICH. L. REV. 547 (2006) (discussing the limits of the use of termination of parental rights in determining inheritance). Many other issues and analyses, such as assisted reproduction and non-traditional families, have been discussed that are not presented here.

itance. States are slowly beginning to explicitly codify certain behavior as a separate and additional determinative for inheritance, secondary to today's primary standards of bloodline and marital status. This statutory trend can be fairly and efficiently incorporated within the inheritance system.

Part I will present common law exceptions to an inheritance based solely on blood. Beyond degrees of blood relationship, the common law did not consider all blood the same; certain blood was superior. Moreover, sometimes disruptive actions of some blood relations could result in their disinheritance, or worse. Blood was important as the starting point, but behavior played a role as well.

Part II will consider two nineteenth-century developments in United States inheritance laws that breached the bloodline: adoption and spouse-as-heir. This expansion of heirs beyond the common law blood relatives was a significant development reflecting a new paradigm of family for a new republic.

Part III will discuss another important aspect of nineteenth-century inheritance laws. Alongside the additions to heirs by adoption and marriage, nineteenth-century intestate law in the United States began to formalize a disinheritance norm, the murderous heir. This double helix of heirship addition and subtraction in the nineteenth century provides a direct doctrinal link to the role behavior, positive and negative, plays in inheritance. The twentieth century has two newer types of disinheritance statutes enacted in a minority of jurisdictions, abandoning parents and elder abuse. These twentieth-century additions reflect a theory of disinheritance based on an heir's harmful conduct to a vulnerable person. Disinheritance is viewed from a perspective of destructive conduct vis-a-vis the particular decedent, and not from the social contract perspective of breaking the king's peace. This newer interpretation is squarely within the expressive function of law and moves intestacy, gently and nonradically, towards a more particularized disposition of a decedent's property.

Part IV concludes with a consideration of the place behavior may have in the development of inheritance law.

I. THE LIMITS OF BLOOD IN COMMON LAW INHERITANCE

Blackstone tells us that the origins of the decedent's family as the principal takers of his property seems pragmatic – they were simply the ones present at the decedent's death bed.^{6,7} Perhaps another basis for

⁶ 2 WILLIAM BLACKSTONE, COMMENTARIES *11-12.

⁷ Perhaps the origin, or a major element, of the family of decedents as the recipients of property is found in the Saxon invaders of England. Their societal system has

inheritance could have developed and been superior, but the custom was well established, and essentially, that was that. Pollock and Maitland write that by the end of Henry III's reign (1216-1272), the main outlines of common law inheritance were approaching final form, and the chief rule, recognized still, is that "[t]he first class of persons called to the inheritance comprises the dead person's descendants, . . . 'an heir of his body.'"⁸ They term the preference for descendants "natural."⁹ Atkinson echoes the practical concern that bases other than blood, such as dependency, age, friendship, are so indefinite that they would cause uncertainty and difficulty in application and lead to litigation.¹⁰

Simply put, bloodline is the conduit for the transmission of property at common law. It soon becomes clear, however, whether for sacred or secular concerns, that not all blood is viewed the same way. An intricate, complex matrix develops in which sometimes actions of the decedent, or sometimes actions of the heir, or for the lack of a better descriptive, sometimes political exigencies, made some bloodlines less capable of inheriting or transmitting property. The actions of decedent or heir that could disrupt the normal inheritance were not wholly limited to negative behavior, sometimes even positive behavior worked disinheritance.

Like many of our lasting legal constructs, this matrix developed within an historic background of uncertainty and instability in which multiple forces – the king, the church, the nobility – were struggling for power and recognition.¹¹ In the context of property, the political bal-

been described as "blood and kin," and their "family was the unit, the tribe was the whole." 1 WINSTON S. CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES: THE BIRTH OF BRITAIN* 49 (1956). A "great transition" occurred among the Saxons after their invasion of England with "the abandonment of blood and kin as the theme of their society and its replacement by local societies and lordship based on the ownership of land" and the requirements of founding settlements, reclaiming land, and guarding it. *Id.* Additionally, "the spoils of war were soon consumed, but the land remained for ever." *Id.* at 50. Nonetheless, the old, surely visceral tradition of "blood and kin" would not be expected to disappear easily or wholly and could easily remain and be applied to this new tradition of land ownership. In a very real sense, the importance of "blood and kin" can be considered to have remained alive in the "blood and behaviour" of modern times.

⁸ 2 SIR FREDERICK POLLOCK & FREDERICK WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I* 260 (2d ed. 1959).

⁹ 2 *id.*

¹⁰ THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS AND OTHER PRINCIPLES OF SUCCESSION INCLUDING INTESACY AND ADMINISTRATION OF DECEDENTS' ESTATES* 32-33 (2d ed. 1953).

¹¹ For an eminently readable and insightful history of these conflicts and compromises from the perspective of an English political leader at the highest level and at a time of great importance and struggle, see CHURCHILL, *supra* note 7, at xiv-vii, 130, 152-56, 210, *passim*. Some of these conflicts are of course well know and important to Ameri-

ance 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 by default to the church. This fissure of real from personal property, the separate realms of the king and the church, created different rules and resulted in different value judgments that have applications and force today.¹² Inheritance, heirs, and descent were terms originally associated solely with the legal succession to real property, mandated by the king, rules that were given and immutable.¹³ In contrast, the distribution of a decedent’s personal property could be individually provided for by the decedent in his testament, oral or written, and which was governed by ecclesiastical courts under the different, ecclesiastical law of the local communities.¹⁴ This dual structure with dual, often hostile, hierarchies meant common law inheritance developed in an uneven, inconsistent and surprising fashion.¹⁵

cans as well as the English. King John was forced by the nobility to sign the Magna Carta in 1215 as a result of his overreaching. King Henry VIII’s epic battles with the church for supremacy led to the establishment of the Church of England with Henry as its head. See also WILLIAM SHAKESPEARE, *THE LIFE OF KING HENRY THE EIGHTH* for a dramatic presentation of the personalities involved.

¹² See 2 POLLOCK & MAITLAND, *supra* note 8, at 331-32, 351, 352-53, 363 (the separation of jurisdiction between the state and church 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.” 2 *Id.* at 363. Or less stern but equally negative assessment: “Here again the fissure in our law of property . . . did much harm.” 2 *id.* at 444.

¹³ Immutable that is until they weren’t. Consider, for example, the king changing the rule for political purpose. Today, the word “heir” is used and shall be used here for one who would be a recipient of real or personal property under intestacy.

¹⁴ 2 POLLOCK & MAITLAND, *supra* note 8 at 331-32, 351, 352-53, 363.

¹⁵ 2 *id.* at 362-63. It is also worth remembering that much of the law that developed for the distribution of personal property was local in origin, so rules would vary from area to area. Also, the common law evolved over time and at a different pace from area to area. One example of the odd-sounding reference that could result from this unevenness may well be the “puzzling” reference in Shakespeare’s will to his wife, Anne Hathaway, “Item, I give unto my wife my second best bed with the furniture.” *THE YALE SHAKESPEARE: THE COMPLETE WORKS* vii (Wilbur L. Cross & Tucker Brooke, eds, 1993). This “second best” may be nothing more than a local tradition that required the “first best” to go to the church or with the land. 2 POLLOCK & MAITLAND, *supra* note 8, at 348-49, 351, 352-53, 363 (“Again, there are many traces of local customs which . . . will give him various chattels, . . . but the best chattels of every different kind, the best horse (if the church does not take it) and the best ox, . . .”); 2 BLACKSTONE, *supra* note 6, at *425, *426 (“MORTUARIES are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners. . . . the lord must have the best good left him as an heriot; and the church the second best as a mortuary. But yet this custom was different in different places”); David Frisch, *Chattel Paper, Shakespeare, and the Insoluble Question of “Stripping,”* 40 UCC L.J. 1, 8-9 (2007) (footnotes omitted) (“In some Elizabethan English locales the best bed was considered

A. Blood Relatives: Limit of Purity

1. *Illegitimates: Nonmarital Children*

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.¹⁶ Certainly scientifically, the child's blood connection to mother and father did not depend on the parents' marital status, but actual bloodline – even if admitted – was not a sufficient basis at common law for the child's inheritance. Blackstone posits the evidentiary difficulty of proving paternity as the reason for the exclusionary common law rule, which does not explain the original total prohibition of inheriting from either father's or mother's lines.¹⁷

The behavior of the parents was apparently deemed outside the bounds of acceptable conduct; therefore, even if the child's bloodline is certain, his inheritance is denied. No special statute at common law said this; it was just understood that a reference to a descendant meant a legitimate one: blood required good behavior by both parents. Over time, the rigors of the rule were relaxed, and an illegitimate child was permitted to inherit from his mother. Today, in the United States, children born outside of marriage are not denied inheritance solely because of their parents' non-marital behavior.

2. *Half-Bloods*

The question of inheritance by half-bloods (those who share a common mother or father, but not both) arises only if there are no descendants of the decedent. Blackstone's Sixth Canon of Descent provides that half-bloods are absolutely excluded.¹⁸ Blackstone acknowledges that this exclusion is peculiar to the common law and may be considered as a "strange hardship."¹⁹ The harshness of this rule cannot be explained on behavioral grounds as there is no suggestion of improper be-

an heirloom. Where Blackacre was devised, so went its heirlooms, including the best bed. Assuming that Stratford was such a locale, the best bed would have gone to Susanna along with the real property as a matter of custom and law, regardless of any testamentary provision to the contrary. Thus Shakespeare would have had no choice but to leave some other bed (if in fact he was going to leave a bed at all) to Anne."); 2 BLACKSTONE, *supra* note 6, at *427 ("HEIR-LOOMS are such goods and personal chattels, as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor."); *see generally* 2 *id.* at *422-29 (CHAPTER THE TWENTY-EIGHTH: OF TITLE BY CUSTOM, discussing local customs governing the passage of property: heriots, mortuaries and heir-looms).

¹⁶ 1 BLACKSTONE, *supra* note 6, at *447.

¹⁷ 1 *id.* at *435, *443.

¹⁸ 2 *id.* at *224 ("A SIXTH rule or canon therefore is, that the collateral heir of the person last seised must be his next collateral kinsman, of the whole blood.").

¹⁹ 2 *id.* at *228.

havior on anyone's part. Nevertheless, it is absolutely required on evidentiary grounds because "the great and most universal principles of collateral inheritance being this, that an heir . . . must be of the blood of the first feudatory or purchasor."²⁰ As time passes, proof of actual descent from an ancestor of many generations ago may be difficult, so the law allows as next best proof a whole-blood relationship.²¹

Pollock and Maitland present a less doctrinaire and more uncertain view of the original common law, citing instances of half-blood inheritance permitted in certain scenarios.²² Regardless of these fluctuations in common law regarding inheritance by half-bloods, Pollock and Maitland adopt a pragmatic approach. It is important to have a clear rule. "The impact of the rule is of no great moment. Our rule was one eminently favorable to the king; it gave him escheats; we are not sure that any profound explanation of it would be true."²³

Today, in the United States, no state completely excludes relatives of the half-blood from inheriting, although some states do provide a preference for whole-blood relatives, and the policy on the statutory treatment of half-bloods continues to develop and reflect the developing concept of the family.²⁴

3. *Disease*

A common law dilemma on the purity of blood arose in the context of disease; both physical and mental illness provided challenges to the common law. Leprosy provides one example. Unlike the *filius nullius* status of a nonmarital child, a person with leprosy was not a nonperson because he had been a participant in life; he had a legal status. That daily and legal status was altered because of a dreaded disease. As in biblical times, those with leprosy were set apart from the main community because of the fear of contagion. The common law's response paralleled the physical removal. As a consequence of being removed from the community, a person with leprosy was generally removed from the legal realm. He could no longer sue nor make gifts or contracts, nor

²⁰ *Id.*

²¹ 2 *id.* at *228-29.

²² 2 POLLOCK & MAITLAND, *supra* note 8, at 302-05.

²³ 2 *id.* at 305.

²⁴ Ralph C. Brashier, *Consanguinity, Sibling Relationships, and the Default Rules of Inheritance Law: Reshaping Half-blood Statutes to Reflect the Evolving Family*, 58 S.M.U. L. REV. 137 (2005) (discussing current treatment of half-bloods by inheritance statutes, emerging issues arising from current changes in family structure, the need for a more nuanced approach incorporating discretion and the use of discretion in inheritance law as a testing ground of the use of discretion in other areas of probate law related to current family structure).

could he inherit from others. He did not, however, lose or forfeit his own property.²⁵

The common law also developed rules for dealing with the property of those suffering from mental illness. In general, the king claimed wardship of the person's lands, but was to provide for the person and his family out of the estate. If the person recovered sanity, the property would be restored to him; and in "a novel and a noteworthy" development, in no event was the king to keep the property.²⁶

On the other hand, a sane person who committed suicide was dealt with harshly, almost as a criminal. His goods were forfeited.²⁷ The general arbitrariness of disease combined with a hope for recovery may be the reason there was no forfeiture in situations of illness, while the definite, deliberate behavior of the suicide resulted in quite different treatment.²⁸

B. Primogeniture: Limits of Sex and Birth Order

Primogeniture was a direct byproduct of feudalism, a medieval system of political and military relationships among the English nobility that was characterized by the granting of fiefs in land by the sovereign (who held the land "of no one but God") in exchange for military and political service from the vassal.²⁹ The death of a vassal had direct and significant repercussions beyond his immediate family; military and political considerations would also be of systemic interest. The rule of primogeniture was that upon the vassal's death, his title and feudal land along with the required military and political service went wholly to the eldest son. As so evolved,³⁰ primogeniture in England was a delicate equipoise of the interests of the vassal (certainty and continuity of the family's interest, although in a concentrated, non-equitable share) and

²⁵ 1 POLLOCK & MAITLAND, *supra* note 8, at 480.

²⁶ 1 *id.* at 481.

²⁷ 2 POLLOCK & MAITLAND, *supra* note 8, at 488.

²⁸ The "obstinate intestate," *i.e.*, a person who "with fair warning that death was approaching" but obstinately made no will, may also have been subjected to the same forfeiture fate. 2 *id.* at 333 n.2, 359.

²⁹ 2 BLACKSTONE, *supra* note 6, at *44-58.

³⁰ It was not always so. Because of the focus on military duty, originally the fief was for one year only – the lord did not want the vassal to get too comfortable or set down roots. On the other hand, the vassals had families, and desired to provide for them: "[I]n process of time feuds came to be universally extended beyond the life of the first vassal, to his *sons*, or perhaps to such of them, as the lord should name; . . . And the descent, being thus confined to males, originally extended to all the males alike; . . ." 2 BLACKSTONE, *supra* note 6, at *56.

the lord (certainty and continuity of service in one identifiable vassal, although foregoing freedom to choose a new vassal).³¹

In English primogeniture,³² bloodline is critical but again not all blood – this time, not even legitimate, pure blood – is treated the same. Male blood is preferable to female blood (Blackstone’s Second Canon of Descent);³³ and the eldest son’s preferable to his younger brothers’ (Blackstone’s Third Canon of Descent).³⁴ Like the rule excluding half-bloods, primogeniture was not a subtle weighing of rationales, it was a rule of “stern and rugged simplicity” bereft of any behavioral concerns.³⁵

By the Statute of Wills in 1540,³⁶ English land becomes freely devisable, although the rule of primogeniture continued until the Administration of Estates Act 1925 for intestate English property. The American colonies were never impressed with the rule of primogeniture since land was freely devisable by the time of colonization.³⁷

C. Outlaws, Felons and Traitors: Limit of Criminal Behavior

Life in the Middle Ages was dark, brutal, and brief.³⁸ The law regarding outlaws, felons and traitors reflected that darkness and brutality. At the same time, the law can be seen as reflecting a strong belief in the importance of good behavior for a functioning and stable society.

Outlawry is of the ancient Anglo-Saxon time, before there was a regularized or professional system of justice or law enforcement. An outlaw was one who refused to do justice to others in accord with the law of the community.³⁹ The consequence was that the outlaw was outside the protection of the community and its rules. For those who committed grave offenses, the community had a stronger sanction, it could call for an expedition, and the outlaw could be killed with impunity. To be labeled an outlaw by the community in the ancient times

³¹ The lord eventually demanded the certainty of one identifiable vassal for the provision of military duties. *Id.* at *52.

³² See 2 POLLOCK & MAITLAND, *supra* note 8, at 264-66 (brief description of a different primogeniture, that of Normandy).

³³ 2 BLACKSTONE, *supra* note 6, at *212 (“the male issue shall be admitted before the female”).

³⁴ 2 *id.* at *214 (“where there are two or more males in equal degree, the eldest only shall inherit”).

³⁵ 2 POLLOCK & MAITLAND, *supra* note 8, at 447.

³⁶ 32 Hen. 8, c. 1, *reprinted in* 3 STAT. REALM 744-46 (1963).

³⁷ ATKINSON, *supra* note 10, at 23. However, some colonies, including New York, did adopt the rule of primogeniture, and it continued until after the Revolution.

³⁸ See WILLIAM MANCHESTER, *A WORLD LIT ONLY BY FIRE: THE MEDIEVAL MIND AND THE RENAISSANCE: PORTRAIT OF AN AGE xvii*, 5, 6, 27, 34, *passim* (1992) for an interesting account of the many paradoxes of the dark and brutal medieval life.

³⁹ 1 POLLOCK & MAITLAND, *supra* note 8, at 43, 47.

was a sentence of death;⁴⁰ it also resulted in a forfeiture of the outlaw's goods to the king.⁴¹ Over time, a community's declaration of outlawry was generally displaced⁴² as the power of the king and his kingdom's infrastructure for justice and law enforcement grew.⁴³

Felony, at the beginning, was a name for "the worst, *bootless* crimes," those of a cruel, fierce, wicked, base nature, for which no recompense was possible.⁴⁴ This was especially so when the felony involved "a breach of that trust and faith which should exist between man and a lord."⁴⁵ Using "words of felony" signaled "the moral guilt which deserves a punishment of the highest order."⁴⁶ Felonies soon grew beyond this original construct, no doubt assisted by the rule that a "felon's fee should escheat to the lord."⁴⁷ This escheat was the logical common law consequence of the original grant's being impliedly conditioned on the vassal conducting himself well.⁴⁸ If the vassal's behavior is bad, the condition is breached, and therefore the fee reverts to the lord.

⁴⁰ 1 *id.* at 49, 477.

⁴¹ *Id.*

⁴² Generally displaced but not wholly so because "one act of jurisdiction, one supreme and solemn act, could be performed only in the county courts and in the folk-moot of London, the act of outlawry. Even the King's court did not perform it." 1 *id.* at 554.

⁴³ 1 *id.* at 476.

⁴⁴ 2 *id.* at 464, 465, 466, 470. "We are told that the distinguishing characteristic of a felony in early English law was the fact that it was a "bootless" or a non-compensable crime." "There were also crimes, however, 'that are bootless – that is to say, not amenable by money-such as treason and murder and false coining, and some of these involve death and confiscation of property.'" Richard C. Boldt, *Restitution, Criminal Law, and the Ideology of Individuality*, 77 J. CRIM. L. & CRIMINOLOGY 969, 989 n.108 (1986) citing Gerhard Mueller, *Victims of Criminal Violence*, 8 J. PUB. L. 218, 223 (1959) (italics in original) ("The Jutes, Danes and Norsemen held certain acts – including treason, cowardice, homicide by waylaying and poisoning – to be *botleas*, or non-compensable and punishable by death.").

⁴⁵ 2 POLLOCK & MAITLAND, *supra* note 8, at 465.

⁴⁶ 2 *id.* at 468.

⁴⁷ 2 *id.* at 465. Felonies, thus, came to be defined by their consequences, and not the act. 2 *id.* at 467.

⁴⁸ 2 BLACKSTONE, *supra* note 6, at *252 ("granted to the vafal [vassal] on the implied condition of *dum bene fe gefferit* [*dum bene se gesserit*];" J.W. EHRlich, EHRlich's BLACKSTONE 272 (1959) ("granted to the vassal on the implied condition whilst he shall have conducted himself well"); BLACK'S LAW DICTIONARY 540 (8th ed. 2004) ("*dum se bene gesserit*, . . . [Latin 'while he behaves himself properly'] *Hist.* During good conduct"); *id.* at 591 (rev. 4th ed. 1968) ("DUM BENNE SE GESSERIT. While he shall conduct himself well; during good behavior. Expressive of a tenure of office not dependent upon the pleasure of the appointing power, nor for a limited period, but terminating only upon the death or misconduct of the incumbent."); see discussion *infra* accompanying notes 176-77 for the American version of this standard.

That a felon's fee should escheat to the lord may explain why those in power saw no harm in increasing the scope of felonies over time.⁴⁹ It also partially explains why the king similarly exerted his power and developed an expansive view of treason, treason being purely within the realm of the king.⁵⁰ One consequence of a conviction of treason is that the traitor's land was forfeited directly to the king.⁵¹ Blackstone considers forfeiture for treason a "natural justice . . . that he who hath thus violated the fundamental principles of government, and broken his part of the original contract between king and people, hath abandoned his connexions with society, and hath no longer any right to those advantages which before belonged to him."⁵²

The property rules developed by the common law 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.⁵³ For the outlaw, felon and traitor of capital offenses, the confiscation and forfeiture of property were companions to the death sentence.

Beyond death, confiscation and forfeiture, medieval justice demanded more for these most base and wicked acts that violated fundamental principles. "[U]pon judgment of outlawry, or of death, for treason or felony, a man shall be . . . attainted. The consequences of attainder are forfeiture, and corruption of blood."⁵⁴ The acts of the outlaw, felon and traitor are deemed to corrupt their blood, meaning their blood can no longer serve as a conduit for the transmission of property to others. The reprehensible behavior, disruptive of good society, permanently interrupts the flow of inheritance, it ruptures the logical connection:

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

⁴⁹ 2 POLLOCK & MAITLAND, *supra* note 8, at 466.

⁵⁰ 2 *id.* at 502 ("Treason has a history that is all its own.").

⁵¹ 2 *id.* at 500.

⁵² 4 BLACKSTONE, *supra* note 6, at *375.

⁵³ 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).

⁵⁴ 4 BLACKSTONE, *supra* note 6, at *374; *see also* Alison Reppy, *The Slayer's Bounty – History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q.R. 229, 234 (1942) ("The inheritable quality of the vassal's blood was extinguished and blotted out forever.").

also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor^q.⁵⁵

Blackstone viewed this severe turn to a felony as providing an additional deterrent:

Such forfeitures moreover, whereby his posterity must suffer as well as himself, will help to restrain a man, not only by the sense of his duty, and dread of personal punishment, but also by his passions and natural affections;⁵⁶

An independent America had a decidedly different view of this doctrine of attainder and its attendant corruption of blood and forfeiture. The Constitution flatly prohibits them:

No Bill of Attainder or ex post facto Law shall be passed.⁵⁷

No State shall . . . pass any Bill of Attainder, ex post facto Law⁵⁸

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.⁵⁹

The intensity of America's distaste for these common law doctrines is striking. "James Madison wrote that the Corruption of Blood Clause was designed to prevent Congress from 'from extending the consequences of guilt beyond the person of its author.'"⁶⁰ Moreover, the corruption of the blood clause, which addresses a substantive right of an individual against the sovereign power, is one of only two such rights directly addressed in the original Constitution. The independent American perspective was clear, an individual is to be judged on his own actions and behavior not those of his ancestors.⁶¹

⁵⁵ 4 BLACKSTONE, *supra* note 6, at *381. Footnote q: "See Vol. II. pag. 251." ("7. BY attainder also, for treason or other felony, the blood of the person attainted is so corrupted, as to be rendered no longer inheritable." 2 *id.* at *251.).

⁵⁶ 4 *id.* at *375.

⁵⁷ U.S. CONST. art. I, § 9, cl. 3.

⁵⁸ *Id.* art. I, § 10, cl. 1.

⁵⁹ *Id.* art. III, § 3, cl. 2.

⁶⁰ Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 STAN. L. REV. 727, 730 (1992).

⁶¹ *Id.* at 729-33, 730.

D. Monks and Nuns : Limit of the Spiritual Life

Common law developed the fiction of civil death as a way of dealing with those men and women who entered religion and became professed, and, as a consequence left the everyday world.⁶² Therefore, when a man became a monk or a woman a nun, that voluntary action was treated as a death in the secular world. The monk or nun's heirs "at once inherits" any land, and if the monk or nun had a will, it took effect at that time as if a natural death had occurred. More to the point, if a relative of the monk or nun dies and under the normal rules of inheritance, land would descend to him or her, it will now pass to another. The independent action of professing religion terminates the heirship status of a monk or nun despite their pure, even saintly, blood. In this way, the legal fiction of civil death was a practical response to the political landscape; it maintained the balance between the king and the church.

E. Aliens: Limit of Citizenship

A clear rule developed at common law, an alien could not hold land in England.⁶³ 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.⁶⁴ If, however, land was to pass otherwise (say by purchase or gift) to an alien, the transaction was not cancelled, but the king could seize the property for himself.⁶⁵ For inheritance purposes, an alien's blood, no matter how pure or well-ordered, was trumped by the political exigency of utmost loyalty to the king, but interestingly, the explanation for the forfeiture was couched in terms of the alien's behavior.

Blackstone's *Commentaries* defends the forfeiture of an alien's real property as a "way of punishment for the alien's presumption, in attempting to acquire any landed property"⁶⁶ The alien's action was an affront to the political order, loyalty to the English sovereign and loyalty to another was not possible. Pollock and Maitland view it as "an exaggerated generalization of the King's claim to seize the lands of his French enemies," an historical reflection of the "growth of the king's prerogatives."⁶⁷ According to Atkinson, even if the king did not take the land during the alien's lifetime, the alien was not able to pass it by

⁶² 1 POLLOCK & MAITLAND, *supra* note 8, at 433.

⁶³ 2 *id.* at 459.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ 1 BLACKSTONE, *supra* note 6, at *360.

⁶⁷ 1 POLLOCK & MAITLAND, *supra* note 8, at 462-63.

descent at his death because by virtue of the alien's presumptuous action, "the alien had no heritable blood."⁶⁸

F. Laughing Heirs : Limit of Too Remote a Degree

Blackstone's Fourth Canon of Descent provides for inheritance by descendants to an infinite degree and, if none, by collaterals to an infinite degree as well.⁶⁹ Despite providing for limitless heirship, at times, no person capable of taking as an heir could be found. In those circumstances, real property would pass to the overlord, if one could be proved, otherwise it would escheat to the king. Personal property would similarly escheat to the king if no distributee could be located. In the United States, escheat also occurs if no heir can be located. Unlike the forfeitures and escheats that involved consideration of behavior or political exigencies that trumped the presumptive bloodline inheritance, this common law escheat was a default that simply filled an unexpected void.

This escheat, however reluctant, does effectively work a limitation on bloodline heirs to those who can be found. It raises an interesting question of basic inheritance policy: how far should the law go to find an heir?⁷⁰ For some, providing for these "laughing heirs" is inefficient, while others similarly believe having property escheat to the state is equally inefficient.⁷¹ Consideration of actual behavior or relationship is apparently irrelevant.

II. BREACHING THE INHERITANCE BLOODLINE: ADOPTION AND SPOUSE-AS-HEIR

This historic inheritance narrative has thus far focused mainly on the primary role blood has played in common law inheritance and the development of implicit or secondary rules, often involving behavior, that for secular reasons protect the purity of the bloodline for inheri-

⁶⁸ ATKINSON, *supra* note 10, at 54.

⁶⁹ 2 BLACKSTONE, *supra* note 6, at *217 ("the lineal descendants, *in infinitum*, of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done, had he been living").

⁷⁰ But when we come to the remote relatives, to a tenth cousin for instance, on what ground will he rest his claim to the estate? "True, I never heard of this dead man," he must say, "until I was told that I was his next of kin. I never expected anything from him, nor should I have felt called upon in any way to assist him. But I am his nearest relative: Give me the property."

What, then, should become of the Property? The answer is obvious; as no one has shown himself entitled to it the State should keep it.

James M. Morton, Jr., *The Theory of Inheritance*, 8 HARV. L. REV. 161, 165 (1894).

⁷¹ See David F. Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203 (1935); David V. DeRosa, *Intestate Succession and the Laughing Heir: Who Do We Want to Get the Last Laugh?*, 12 QUINNIPIAC PROB. L.J. 153 (1997).

tance. Developments in nineteenth-century America, however, directly challenged blood's monopoly position.

In the mid-nineteenth century, a watershed event in family law occurred in the United States: adoption statutes appeared. Legal adoption began the process of creating an equivalent for the blood relationship of a parent and child. The notion that actual blood relationship was the only way to describe a family was now formally and doctrinally obsolete.⁷² It was not, however, universally embraced. A closer look at the history of adoption law and inheritance in the United States reveals an extremely complex story that has ongoing relevance to succession law and policy.

A second, albeit slower, development in nineteenth-century American inheritance law similarly expanded the circle of heirs by breaching the bloodline. The women's rights movement pushed to make women full participants in society, with some reformers looking to move surviving spouses from dower to heir status. By the mid-twentieth century, marital status ultimately made the surviving spouse an heir. Blood, or its equivalent by adoption, now joined by marital status of a surviving spouse form the two recognized bases for heirship today. Like adoption, the story of spouse-as-heir has relevance today.

A. Adoption

Judges routinely state that adoption did not exist at common law.⁷³ The assertion that adoption did not exist at common law is curious or, perhaps, miraculous.⁷⁴ How did England escape the fate of orphan minor children? So stated, the answer is obvious: England did not. The

⁷² Lawyers are not the only ones struggling to define family, social scientists are equally interested. See, e.g. Maria Schmeckle et al., *What Makes Someone Family? Adult Children's Perceptions of Current and Former Stepparents*, 68 J. MARRIAGE & FAM. 595 (2006); Elizabeth Church, *Who Are the People in Your Family? Stepmothers Diverse Notions of Kinship*, 31 J. DIVORCE & REMARRIAGE 83 (1999); and see Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. MARRIAGE & FAM. 1009 (2001) (providing an overview of the flexible criteria and attitudes that many have for determining family, irrespective of legal or biological definitions).

⁷³ See, e.g. *Hall v. Vallandingham*, 75 Md. App. 187, 188, 540 A. 2d 1162 (first sentence of this textbook case: "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).

⁷⁴ See Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1081, *passim* (2003) (presenting an excellent history of American adoption, especially its emphasis on the "continuity of adoption law with cultural and legal norms"); see also Amanda C. Pustilnik, *Private Ordering, Legal Ordering and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263 (2002) (discussing the history, the policy and current issues of adoption).

legal system's response was intrinsically English; it reflected the dominance of land concerns in English law and the bifurcation of the legal system between law and equity.

Adoption was known and used by many ancient societies, being widely used and accepted in Rome.⁷⁵ The primary purpose of adoption in Roman society was the continuity of the adopter's family and its religion, not the welfare or benefit of the adopted child:

Perhaps we should . . . note two very significant elements of early adoption. First, it must be observed that the primary purpose of adoption is the continuity of the adopter's family – there is here no visible concern for the “best interests” of the adoptee. His welfare seems almost irrelevant. Second is the religious emphasis which lies at the foundation of the practice. . . . Again, the sole concern is the adopter's religion without reference to the adoptee's prior beliefs. . . .

. . . The primitive understanding of adoption required the adoptee to become a member of the adopter's family, to acquire a quasi-interest in the adopter's property while the latter lived and to succeed to such property upon the adopter's death. . . .⁷⁶

Given this historic backdrop to adoption, the English could understandably view adoption in a negative light as a way to upset the balance among sovereign, church and nobility that the feudal system was painstakingly developing. This flat rejection of adoption, here specifically meaning the full absorption of a non-blood child into the family for all legal purposes including inheritance, is fully consistent with the common law's embrace of bloodline.

1. *English Response*

Glanvill, in the twelfth century, writes that “only God can make a heres [heir], not man.”⁷⁷ Blackstone reinforces this in the eighteenth century by offering no commentary on adoption. Pollock and Maitland, in the late nineteenth century, flatly assert that “we have no adoption in England.”⁷⁸ This uniform position against English adoption over centuries, however, is at odds with historic realities, and the commentators

⁷⁵ Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744 (1956); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 452 (1971).

⁷⁶ *Id.* at 745.

⁷⁷ RANULF DE GLANVILL, 7 *Tractatus de Legibus et Consuetudinibus Regni Angliae* 1, quoted in 2 POLLOCK & MAITLAND, *supra* note 8, at 254 and Presser, *supra* note 75, at 448-49.

⁷⁸ 2 POLLOCK & MAITLAND, *supra* note 8, at 399.

hint at and each betrays some recognition of this. The English response to the social reality of orphans or abused and neglected children was addressed in a bifurcated manner, with elaborate guardianships for some and with voluntary or involuntary apprenticeships for others.

Pollock and Maitland write that no part of the old law was “more disjointed and incomplete than that which deals with the guardianship of infants.”⁷⁹ For children who inherited land, a guardian would be appointed, and an elaborate system developed that may have benefited the guardian more than the ward.⁸⁰ Allowing the adoption of the child into a new family might benefit the child but would be to the economic and political detriment of the guardian, and could unsettle the well-settled inheritance scheme based on bloodlines. For those minor children without land, “the law . . . was not at pains to designate any permanent guardians. . . we know of no writ which would have compelled [the mother] or anyone else to maintain them Probably, the ecclesiastical courts did something”⁸¹ For a child without title to land, the law was generally uninterested.

For those children who were orphans without land, or who were neglected or abused, another legal approach came into play: the poor laws and apprenticeships. Blackstone tells us that townsfolk were able to remove neglected children from their homes and put them in others.⁸² This practice of “putting out” or “placing out” the child to another home or family was not necessarily limited to lower classes. Apprenticeships, where a child left his natural family to live with another family and learn a trade, were also used by the upper classes.⁸³ In fact, as it was a parent’s duty to educate their children,⁸⁴ apprenticeships were one way of fulfilling that duty. Contracts detailing the terms of the apprenticeship were common.⁸⁵

⁷⁹ 2 *id.* at 443.

⁸⁰ In *Iolanthe*, one of the suitors for the beautiful orphan Phyllis was the Lord Chancellor himself, who just happened to be her legal guardian. GILBERT & SULLIVAN, *supra* note 2, at 175, 179, 181, 183, 245, 247. A guardian had control over the ward’s property as well as personal matters, such as marriage. Gilbert’s dialogue for the Lord Chancellor as he contemplates his own worthiness shows in Gilbert’s fashion the absurdity or lunacy of the law. *Id.* at 181, 183, 245, 247.

⁸¹ 2 POLLOCK & MAITLAND, *supra* note 8, at 444

⁸² 1 BLACKSTONE, *supra* note 6, at *439.

⁸³ Presser, *supra* note 75, at 453-55. An important distinction to be drawn is between voluntary private indentures and forced or public indentures.

⁸⁴ 1 BLACKSTONE, *supra* note 6, at *434, *438-40.

⁸⁵ MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 260 (1985).

2. *American Response*

The legal perspective in colonial America was somewhat different. Whether through intent or ignorance, the colonies did not uniformly embrace English inheritance law. For example, the colonies generally rejected primogeniture and the preference for male inheritance over female.⁸⁶ Land was plentiful, and there was no need for the restrictive English rules. This situation may also have influenced the colonists' independent views on adoption. "[A]t its beginning, colonial Americans showed little preference for the primacy of biological kinship, practiced adoption on a limited scale, and frequently placed children in what we would call foster care."⁸⁷ Informal adoption (those without legal proceeding) and testamentary adoption (childless couples providing generously in their will for children who had been "put out" to their service) were known to and used by the colonists.⁸⁸ A natural consequence of an informal adoption was that over time, the parties who had formed familial type attachments desired some formal recognition of the relationship. A common approach was to seek private legislation legalizing an informal adoption, sometimes by changing the adoptee's name.⁸⁹ In Massachusetts, from 1781 to the time of its adoption statute in 1851, 101 private name change acts were formalized, compared to four in the previous colonial century.⁹⁰

The increase in the number of these petitions was one factor in the 1851 enactment of Massachusetts Adoption Act, generally regarded as the nation's first modern adoption statute.⁹¹ More significant were the economic and social changes of the nineteenth century:

⁸⁶ ATKINSON, *supra* note 10, at 60-61.

⁸⁷ E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION* 5 (1998); *see also* Stephanie Coontz, *Historical Perspectives on Family Studies*, 62 *J. MARRIAGE & FAM.* 283, 287 (2000) ("In colonial America, families routinely sent young children and adolescents to live in other people's homes as servants, apprentices, or simply dependent kin.").

⁸⁸ CARP, *supra* note 87, at 6-7.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ The first state to have an adoption statute was Mississippi, in 1846, and Alabama, Texas and Vermont also had statutes before Massachusetts. GROSSBERG, *supra* note 85, at 271. Nevertheless, the Massachusetts adoption statute is generally 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); *see id.* at 5 (describing Mississippi and Texas statutes as embodying civil law that merely formalized private adoption agreements); GROSSBERG, *supra* note 85, at 271 (concluding a change from earlier, civil law statutory approaches); Catherine N. McFarlane, *The Missis-*

By the mid-nineteenth century, under the impact of large-scale immigration, urbanization, and the advent of the factory system and wage labor, the compact, stable, agricultural communities of colonial America were giving way to overcrowded sprawling coastal cities. One of the effects of these wrenching economic and social transformations was that both urban and rural poverty became major problems. Consequently, humanitarian and religious child welfare reformers all over the United States turned to large-scale institutions, such as public almshouses and private orphanages to reduce the expense of poor relief and with utopian expectations, to reform, rehabilitate, and educate paupers.⁹²

One response to these economic and social shifts was for the community to exercise its traditional *parens patriae*, first to remove neglected children from their families, and then in a new conception, to rehabilitate them in new settings and with new families.⁹³ The number of neglected or abandoned children, often new immigrants or children of new immigrants, overwhelmed the traditional system. Rev. Charles Loring Brace, one of the leaders of the nineteenth century child welfare reform and founder of the Children's Aid Society, abandoned individual placement in favor of group placement by introducing the use of orphan trains.⁹⁴ Over 84,000 children were placed this way from 1854 until 1890. For a newly developing system, without professional standards, overwhelmed by numbers and fueled by reformers' zeal tinged with a religious fervor, abuses were inevitable. Over time, child welfare reformers became disillusioned with the persistent inability of their insti-

Mississippi Law on Adoptions, 10 Miss. L.J. 239, 239-40, *passim* (1938) (describing the first Mississippi statute and development of its adoption law).

⁹² CARP, *supra* note 87, at 7.

⁹³ See Susan L. Porter, *A Good Home: Indenture and Adoption in Nineteenth-Century Orphanages*, in *ADOPTION IN AMERICA* at 27-28, 29 for a discussion of the role the well known practice of indenture played in the development of adoption in the United States:

Adoption . . . may have been . . . an offshoot of indenture (an economic and conditional contract based on exchange of labor) rather than as a legal arrangement based on mutual sentiment.

The managers of private, nonsectarian Protestant orphan asylums established by women between 1800 and 1820 were primarily concerned about the welfare of the children . . . and used whatever options they had to further that welfare as they perceived it. . . . Managers embraced adoption as one means of solving their difficulties with the indenture system.

However, because the managers found that adoptive parents did not make as clear a distinction between indenture and adoption, in the end they decided that adoption was not the panacea for which they had hoped.

⁹⁴ Carp, *supra* note 87, at 9.

tutional almshouses and orphanages to improve the lives of their charges.⁹⁵ By the end of the early twentieth century, the prevailing thought among the child welfare experts “went to the other extreme and stressed the cultural primacy of the blood bond in family kinship.”⁹⁶ Adoptions decreased against this new expert view aided by popular culture concerns.⁹⁷

The shifting theories of child welfare experts (*i.e.* removal from family of origin to new family, or preserve family of origin, with both theories operating through the adoption mechanism)⁹⁸ created difficulties for the legal system as legislatures and courts grappled with setting the legal rules for the day-to-day meaning of adoption. While the child welfare system may have recalibrated its view of adoption from family creation to family preservation, or to include both, there was no legislative or judicial retreat from the primary and ancient import of the adoption statutes: a parent-child relationship by adoption was valid. That relationship was not defined exclusively by blood relation.⁹⁹ What that meant to a centuries-old tradition of blood-based inheritance was revolutionary and, for some disappointed heirs, hard to accept.

Four scenarios came to dominate the intersection of inheritance and adoption. Courts first dealt with the question of inheritance by the

⁹⁵ Porter, *supra* note 93, at 29.

⁹⁶ Carp, *supra* note 91, at 16.

⁹⁷ *E.g.* Cahn, *supra* note 74, at 1098-99 (footnotes omitted):

. . . In addition to the traditional Anglo-Saxon emphasis on blood relationships, there was a profound fear in nineteenth-century America of the confidence man, the swindler, who was not what he appeared to be, and a strong belief in eugenics

These anxieties manifested themselves in fears over taking in unknown children who might revert to their parents' ways. Indeed, throughout the nineteenth and early twentieth century, there was a strong belief that the child would turn out like her biological parents. Moreover, social workers assumed that a “definite link existed between illegitimacy and inherited feeble-mindedness.”

⁹⁸ 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) for a discussion of the three family paradigms for adoption:

Family preservation adoption, which reflected a tie to the past, informal “adoption” practices, enabled adopters to keep already-established families and family money together.

Family creation adoption, which emerged as the dominant type of adoption in the late nineteenth and early twentieth centuries, gave childless couples a way to approximate the biological parent-child relationship.

And *family re-creation* adoption, a precursor to the modal practice of adoption in the mid-to-late twentieth century, enabled stepfathers to remake families previously disrupted by divorce or death.

⁹⁹ CARP, *supra* note 87, at 12.

adopted child from the adoptive parents. Initially, there was not uniformity of position, but eventually, adoption was recognized to be the equivalent of blood relationship to permit the adopted child to inherit from the adoptive parents. Beyond that generally accepted result, three additional questions 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.

3. *A Case Study in Statutory Response: Illinois*

It is in the statutory law and judicial interpretations that the interplay between adoption and inheritance best illustrates the conflicting theories and practices of adoption over time. It also provides a sense of how sweeping generalizations regarding families and property can doggedly play out in the legal system. This section presents a brief history of one state's, Illinois', adoption statute for inheritance purposes. The Illinois statute and its history are extensive and complex and by virtue thereof provide an illustration of the major trends.

Illinois' first adoption statute, enacted in 1867, provided in two short sections¹⁰⁰ the procedure to follow for any person wishing to adopt a child "so as to render it capable of inheriting his or her estate."¹⁰¹ If the required consents were obtained and if the court is "satisfied that such adoption will be to the interest of the child," then the court is to issue an order "declaring the said child to be the adopted child of such person, and capable of inheriting his or her estate."¹⁰² From the adoptive parents' perspective, the point of Illinois adoption seemed to be similar to the ancient Roman tradition, to make an heir for the adoptive parent. This statute specifically stated that the adoptive parents "shall never inherit from the child," and that with respect to all other persons, the child shall "stand related as if no such act of adoption had been taken."¹⁰³ This stranger-to-the-adoption rule was fairly common, perhaps reflecting the rule of construction that statutes in derogation of the common law are to be strictly construed. This asymmetric relationship may also reflect the historic tradition of families voluntarily placing children with relief agencies during a temporary crisis or the more formal apprenticeships whereby families apprenticed their children to others, in either case without relinquishing their own family con-

¹⁰⁰ STAT. ILL. (GROSS) (1818-1869), ch. 47, ¶¶ 38-39; Laws 1867, 133 (eff. Apr. 29, 1867).

¹⁰¹ *Id.* at § 38.

¹⁰² *Id.*

¹⁰³ *Id.*

nections. For many, it was merely a temporary, perhaps contractual, arrangement.¹⁰⁴ Adoption in this way is superimposed on the apprenticeship model.

By 1874, the adoption provision in Illinois was totally revised and became a separate chapter with eighteen sections.¹⁰⁵ The procedure to be followed for adoption and what the court must factually determine became more precise. If the requirements were met, then a decree shall be made that “the child shall, to all legal intents and purposes, be the child of the petitioner.”¹⁰⁶ Despite how this sounds to modern ears, for purposes of inheritance by the child, even though the adopted child shall be deemed a child of the adoptive parent “the same as if he had been born to them in lawful wedlock,”¹⁰⁷ the statute did not extend inheritance rights for property “expressly limited to the body or bodies of the parents by adoption” nor to inheritance from the lineal or collateral kindred of the adoptive parents.¹⁰⁸ The stranger-to-the-adoption rule continued and was strictly construed. On the other hand, the adoptive parents now could inherit from the adopted child but “only such property as (the adopted child) has taken . . . from or through the adopting parents.”¹⁰⁹ The adoptive parents specifically, however, shall not inherit any property “which the child had received from his kindred by blood.”¹¹⁰ The ancient concept of ancestral property was applicable to both families, again underscoring the reality that this child has ties to two families, just as an apprenticed child might have had.

In 1939, Illinois enacted a new probate act “to revise, consolidate, clarify and codify the probate law.”¹¹¹ Included within its provisions was a new section on “Adopted Child and Adopting Parent.”¹¹² This enactment formally separated the adoption process from its inheritance consequences. For purposes of inheritance, a lawful adoption made the adopted child a deemed descendant of the parent and the adoptive parent the parent of the adopted child.¹¹³ Each pronouncement of equivalence was still specifically subject to the property restrictions of the past.¹¹⁴ The adopted child was still not allowed to participate in inheritance from lineal or collateral kindred, nor permitted to take property

¹⁰⁴ Porter, *supra* note 93, at 29; Cahn, *supra* note 74, at 1093.

¹⁰⁵ ANN. STAT. ILL. (Starr & Curtis May 1, 1896) ch. 4, ¶ 1-8 (eff. July 1, 1874).

¹⁰⁶ *Id.* at 1-3.

¹⁰⁷ *Id.* at ¶ 5.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at ¶ 6.

¹¹⁰ *Id.*

¹¹¹ 1939 Ill. Laws 4.

¹¹² *Id.* at 12, § 14; ILL. REV. STAT. ch. 3, ¶ 165 (1939).

¹¹³ ILL. REV. STAT. ch. 3, ¶ 165 (1939).

¹¹⁴ *Id.*

expressly limited to the body of the adopting parent.¹¹⁵ Similarly, the adoptive parent could inherit from the child “only such property as the child has taken from or through . . . the adopting parents”¹¹⁶ It omitted, however, the former parallel reference to the natural family’s ancestral property.¹¹⁷

By the time of the amendments in 1955,¹¹⁸ “a trend toward more liberal legislation” for inheritance by adopted children was apparent.¹¹⁹ Now, Illinois statutory law extended to the lawfully adopted child the right to inherit “from the lineal and collateral kindred of the adopting parent.”¹²⁰ Moreover, “the lineal and collateral kindred . . . shall [also] inherit property from a child . . . to the exclusion of the natural” family, except for ancestral property taken by the child from or through the child’s natural family.¹²¹

For purposes of determining takers of property pursuant to written instruments, a new paradigm was created. For documents executed on or after September 1, 1955, an adopted child shall be “deemed a natural child unless the contrary intent plainly appears by the terms thereof.”¹²² The presumption going forward was now in favor of total equivalence for inheritance and testate purposes of a child by birth and a child by adoption. Almost a century after Illinois’ first adoption statute, the stranger-to-the-adoption rule was essentially abolished as the memory of the indenture and apprenticeship foundation of adoption finally faded, and the paradigm of one new family for all purposes prevailed, at least for a time.

In 1989, the Illinois adoption legislation¹²³ strengthened the equivalence norm in two respects. First, for written instruments executed on or after September 1, 1955, the 1989 legislation modified the standard of proof required to overturn the equivalence norm from “contrary intent plainly appears” to “clear and convincing evidence.”¹²⁴ More signifi-

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* ch. 4, ¶ 5 (1937). The new provision did newly provide that if a child is adopted by a blood relative, the adopted child can take “only as an adopted child and not by blood.” ILL. REV. STAT. ch. 3, ¶ 165 (1939).

¹¹⁸ 1955 Ill. Laws 288.

¹¹⁹ Raymond E. Denz, *Adopted Children: Forgotten Boys and Girls*, 41 ILL. B.J. 500, 500 (1953).

¹²⁰ ILL. REV. STAT. ch.3, ¶ 14 (1955).

¹²¹ *Id.*

¹²² *Id.*

¹²³ 1989 Ill. Laws 4636-38 (eff. Sept. 1, 1989). The legislation also applied these new standards to non-testamentary instruments by amending ILL. REV. STAT. ch. 40, ¶ 1652, *recodified* 760 ILL. COMP. STAT. 30/1 (1992). 1989 Ill. Laws 4635 (eff. Sept. 1, 1989).

¹²⁴ ILL. REV. STAT. ch. 110½, ¶ 2-4(e), *recodified* 755 ILL. COMP. STAT. 5/2-4(e) (1992).

cantly, after September 30, 1989, for written instruments executed *before* September 1, 1955, a child whenever adopted is now “deemed a child born to the adopting parent” unless the “intent to exclude such child is demonstrated by the terms of the instrument by clear and convincing evidence.”¹²⁵ The presumption of equivalence now spanned both sides of the 1955 written instruments benchmark and to overcome the equivalence required clear and convincing evidence from the terms of the instrument itself.

While this virtually irrefutable presumption of equivalence for all pre- and post-1955 written instruments was pronounced for legal purposes, actual adoption practice continued to raise concerns. One in particular was the issue of adult adoption. Illinois responded in 1998 with yet another refinement.¹²⁶ If the adoption takes place after a child attains eighteen years of age and if the child never resided with the adopting parent before reaching age eighteen, then the adopted child shall *not* be considered a descendant of the adopting parent for purposes of inheritance from or through the lineal or collateral kindred.¹²⁷ The adoption is valid for the child and the parent, but with respect to others, concern for abuse or subterfuge exists.¹²⁸ Put another way, the stranger-to-the-adoption rule was statutorily revived for certain adoptions.

The fits and starts of the Illinois statute reflect society’s awareness that adoption is not a one-size-fits-all enterprise. Some adoptions are of newborns, some are not; some are of blood relatives, others are not; some are open, others desire confidentiality.¹²⁹ These facts and others led to a retreat in Illinois from bright line demarcations of inheritance rights beyond the child and parent in favor of a more complex, fact sensitive determination involving actual interaction and intent. The parent-child relationship by adoption is as firm legally as the parent-child relationship by blood; beyond that secure nuclear family equivalence, the law of inheritance is uneasy. Questions of family are questions of relationships and intent.

¹²⁵ ILL. REV. STAT. ch. 110½, ¶ 2-4(f), (f)(1), *recodified* 755 ILL. COMP. STAT. 5/2-4(f), (f)(1) (1992).

¹²⁶ 1997 Ill. Laws 2884.

¹²⁷ 755 ILL. COMP. STAT. 5/2-4(a) (1998).

¹²⁸ *See, e.g.,* Cross v. Cross, 177 Ill. App. 3d 588, 590-92, 532 N.E. 2d 486 (1st Dist. 1988) (adopting an adult solely for purposes of making him or her a beneficiary of an ancestor’s will or trust was a “subterfuge” and did great violence to the intent and purpose of the adoption law); Michael C. Connelly, *Wills and Trusts: Disqualifying Adopted Adult “Children,”* 78 ILL. B.J. 612 (1990) (discussing *Cross* and its impact in Illinois). This is not a new issue at all. *See also* Huard, *supra* note 75, at 744-45 (quoting a Roman report and its challenge to the propriety of certain adult adoptions).

¹²⁹ *See* Guthrie & Grossman, *supra* note 98; and CARP, FAMILY MATTERS, *supra* note 87.

B. The Surviving Spouse as Heir

The economic and social transformations of nineteenth-century America in conjunction with the ideological and political legacy of the American revolution also reverberated in a rethinking of the legal position and status of women. Nineteenth-century women's rights reformers began to press for full inclusion in the life of the new Republic, with their greatest focus on securing the right to vote.¹³⁰ Dower and the law of inheritance, among other discrete topics,¹³¹ were viewed as manifestations of the unequal and subordinate role accorded to women, but not as the central goal. Nonetheless, some took on the task of reforming dower and inheritance, and kept the topic alive.¹³² By the end of the nineteenth century, states were moving toward abolishing dower and curtesy while substituting the surviving spouse as an heir of the decedent spouse.¹³³ By mid-twentieth century, common law dower and curtesy had virtually disappeared in the United States with "the surviving spouse [becoming] the favorite in inheritance."¹³⁴ This "great transforming trend" in inheritance "where the position of the surviving spouse has steadily improved everywhere at the expense of the decedent's blood relatives"¹³⁵ is the second breach in inheritance's bloodlines. In many ways, it was the easier of the two.¹³⁶

Adoption and spouse-as-heir share a time frame in which great social, economic and political upheavals created a climate that permitted

¹³⁰ Ariela R. Dubler, *The Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1673 (2003).

¹³¹ See, e.g., GROSSBERG, *supra* note 85, at 244-47 (discussing the establishment of women's custody and guardianship rights over their children as an important issue for legal reform in the nineteenth century).

¹³² Dubler, *supra* note 130, at 1673-82; Donna C. Schuele, *In Her Own Way: Marietta Stow's Crusade for Probate Reform within the Nineteenth-Century Women's Rights Movement*, 7 YALE J.L. & FEMINISM 279 (1995). Ironically, the Nineteenth Amendment wasn't passed and ratified until 1920.

¹³³ See Kristine S. Knaplund, *The Evolution of Women's Rights in Inheritance*, 19 HASTINGS WOMEN'S L.J. 3,4 (2008) ("The enactment of Married Women's Property Acts in the mid-nineteenth century changed women's will-making status. . . . The old concepts of dower and curtesy, in which a widow or widower received a life estate in some or all of the decedent's property, were replaced in many states by an award in fee simple, thus giving many women who outlived their husbands more property to will away.").

¹³⁴ MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 242 (1989).

¹³⁵ *Id.* at 238.

¹³⁶ *But see* Harry H. Schneider & Bertram M. Landesman, "Life, Liberty – and Dower" *Disinheritance of the Spouse in New York*, 19 N.Y.U. L.Q. 343, 344 (1942) (conveying a sense of how difficult the actual transition from dower to heir was in New York: "Unfortunately, the results of these still recent enactments have not come up to all expectations, particularly in those instances where the first dying spouse has attempted to cut down or completely cut off the inheritance of the survivor . . .").

and even demanded a rethinking of traditional society, including family life. In common understanding, husband, wife and children would be the basic components of a family, with the husband and wife linked by bonds of marriage and the children by blood to both. In this configuration, the husband and wife, in a voluntary relationship entered into between competent adults, were the set piece, with their status formally protected at the death of one of them through dower and curtesy. The surviving spouse was formally and historically recognized in the English inheritance scheme, admittedly not as heir or owner, but with a recognition nonetheless carefully crafted over centuries. Moving from rights of dower and curtesy to status as heir was, in the end, simply a matter of garnering more for one already recognized.

On the other hand, an adopted child, as one without any blood connection to the decedent, was totally outside the circle for common law inheritance, a stranger without any recourse. Opening the centuries-old blood based process to adopted children was without common law precedent; and common law lawyers, being creatures of precedent, addressed that by declaring the adoption to be the equivalent of blood relationship. Blood or its equivalent created the parent-child relationship, an asymmetrical, perhaps even involuntary, relationship between unequals.¹³⁷ The sweeping statement of legal equivalence had to yield over time to the hard realities of unsettled expectations and, from some perspectives, manipulative or abusive adoptions, often of adults, in which the behavior of the adoptive child and parent did not conform to the societal expectation of the parent and child relationship.¹³⁸

¹³⁷ See MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 110-139 (2000) (analyzing the parent and child relationship as more beneficially viewed in terms of covenant than contract, for one reason among others, that children are not merely “little adults” and that regarding them as independent legal actors, in general, can undermine the entire family).

¹³⁸ The textbook case of *Minary v. Citizens Fidelity Bank & Trust Co.*, 419 S.W. 2d 340 (Ky Ct. App. 1967) 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. 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.” 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. 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.” 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.

III. BEHAVIOR MADE EXPLICIT – THE EMERGENCE OF DISINHERITANCE STATUTES

In 1882, the same year *Iolanthe's* chorus sang “with blood and behaviour for twenty,” a young man of good blood in New York demonstrated just how wrong that premise could be. 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. In doing so, his murderous misconduct sparked a vigorous debate on whether the judicial system may consider an heir’s behavior in inheritance absent a statute. That question of judicial power in interpreting and applying legislation remains; but in that one hundred twenty-eight years, 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 shaped by a heavy handed, blunt feudalism and an ever increasing king’s prerogative, these new disinheritance statutes make explicit that conduct directly harmful to the decedent and not the sovereign, especially if the decedent is considered vulnerable, will disqualify the taker from receiving property. Behavior continues to matter.

A. Slayer Statutes

When *Riggs v. Palmer* was decided by the New York Court of Appeals in 1889, its decision to bar Elmer as a legatee and heir of his grandfather¹³⁹ was unusual and at odds with the prevailing judicial view. In 1888, just a year before *Riggs*, the North Carolina Supreme Court determined that a wife who murdered her husband was nevertheless entitled to her dower because “forfeitures of property for crime are unknown to our law,” and “the law-making power alone” can prescribe a result different from that “which the law itself gives.”¹⁴⁰ Judge Earl in New York viewed the matter differently in *Riggs*. While agreeing that the statutes would facially give the grandfather’s property to Elmer, he invoked two canons of construction, “rational interpretation” and “equitable construction,” to modify the statutory result to be consistent with the intention of the lawmakers:

¹³⁹ *Riggs v. Palmer*, 115 N.Y. 506, 514, 22 N.E.2d 188 (1889).

¹⁴⁰ *Owens v. Owens*, 100 N.C. 240, 242, 6 S.E. 794, 795 (1888), *cited and discussed in* Reppy, *supra* note 59, at 248. Today, “forfeitures of property for crime” is no longer an unknown in our system. *E.g.*, Racketeer Influenced and Corrupt Organizations Act (“RICO”), 18 U.S.C. §§ 1961-68 (2000).

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.¹⁴¹

Judge Earl's reasoning was severely criticized for decades by a majority of other courts and by many academic commentators.¹⁴² The chief criticism was not an approval of the slayer's action but that the court lacked the power to change or overrule a statute: "by what right can the court declare a will [devising real estate to the slayer] revoked by some other [nonstatutory] mode,¹⁴³ by the "so-called rule of public policy?"¹⁴⁴ Another concern was framed in terms of the common law doctrines of forfeiture and corruption of blood that had been expressly prohibited by the federal Constitution as well as by many state constitutions.¹⁴⁵ Those concerns were dealt with easily. This was not a forfeiture of property owned by the slayer but a method of "preventing him from acquiring property in an unauthorized and unlawful way."¹⁴⁶ As for corruption of blood, the argument "is hardly deserving of comment, since it does not prevent heirs of the slayer from inheriting from him that which he already owns."¹⁴⁷

Judge Earl's result was desired, however. Judges on both sides of the controversy shared dismay. After a lag of about fifteen years, some courts began to follow his 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."¹⁴⁸ By 1936, twenty-five states (including the District of Columbia) had some type of slayer statute.¹⁴⁹ Today, forty-eight of fifty-one states (including the District of Columbia) do, with the three remaining jurisdictions addressing the issue by

¹⁴¹ *Riggs*, 115 N.Y. at 511.

¹⁴² Reppy, *supra* note 54, at 251-55.

¹⁴³ *Id.* at 265.

¹⁴⁴ *Id.* at 253 (footnote omitted), quoting Dean James Barr Ames

¹⁴⁵ At common law, this slayer problem would not have arisen since the slayer, as an outlaw or felon, would not have been able to receive property. See discussion *supra* Part I.C.

¹⁴⁶ John W. Wade, *Acquisition of Property by Willfully Killing Another – A Statutory Solution*, 49 HARV. L. REV. 715, 720 (1936) (footnote omitted).

¹⁴⁷ *Id.* at 721.

¹⁴⁸ *Id.* at 716. (footnote omitted).

¹⁴⁹ *Id.* at 715 n.1.

case law.¹⁵⁰ All jurisdictions now make explicit that a murderous heir's behavior can prevent his or her inheritance of the decedent's property.

B. Child Abandonment

In 1926, the North Carolina Supreme Court ruled in *Avery v. Brantley* that a father who had abandoned his daughter was nevertheless entitled to inherit from the wrongful death action of his four-year-old daughter.¹⁵¹ Like his judicial predecessor in *Owens v. Owens*, who allowed the murderous wife to receive her dower,¹⁵² Judge Clarkson wrote "We cannot stretch the language . . . to meet the facts in the present case. To do so would make, and not construe, the law."¹⁵³ One year later, the North Carolina legislature responded with an amendment to the intestate statute: "Provided, that a parent, or parents, who has willfully abandoned the care, custody, nurture and maintenance of such child . . . shall forfeit all and every right to participate in any part of said child's estate."¹⁵⁴ This was the first statute in the United States to make 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 behavior an explicit factor for inheritance. Ten additional states have since added a child abandonment statute.¹⁵⁵ First, unlike the slayer statute with its common law antecedents of outlawry or felony, there was no recognized applicable common law precedent or doctrine.¹⁵⁶ Second, the behavior was not one criminal act resulting in the decedent's death but a course of willful conduct over time that may have no bearing on the decedent's death. Third, the statute focused on one particular relationship, that of parent-child, with duties of care and protection owed to a vulnerable party.

For these eleven states, 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. The behav-

¹⁵⁰ Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 979 n. 20 and accompanying text (2007).

¹⁵¹ *Avery v. Brantley*, 191 N.C. 396, 131 S.E. 721, 722-23 (1926).

¹⁵² *Owens v. Owens*, 100 N.C. 240, 6 S.E. 794, 794-795 (1888).

¹⁵³ *Avery*, 131 S.E. at 722.

¹⁵⁴ 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)).

¹⁵⁵ Those states are Connecticut, Illinois, Kentucky, Maryland, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina and Virginia. See Rhodes, *supra* note 150, at 983 n.3.

¹⁵⁶ A civil law doctrine existed, *indignitas*, or unworthy heirs, that is analogous. See Rhodes, *supra* note 5, at 530-32 (discussing the nature and use of the doctrine of *indignitas* generally and as common law precedent).

ior of being a parent and fulfilling basic duties owed one's child is equally important. If a parent's willful behavior does not match up with a parent's legal duties, that behavior explicitly disqualifies the parent as heir. Blood and behavior matter for inheritance.

C. Elder Abuse

In 1999, California added a new and unique provision focusing on elder abuse and neglect to its probate code.¹⁵⁷ Section 259 restricts a person who either was convicted or found liable by clear and convincing evidence of elder abuse or neglect from receiving certain property from the elderly victim's estate.¹⁵⁸ The significance of section 259 lies not in its sweep but its existence.¹⁵⁹ California, the most populous state in the nation with the largest elderly population, may be the bellwether state for elder abuse as disinheriting behavior.¹⁶⁰

Domestic violence has come to the fore in the last forty years, first with child abuse, then spouse abuse and now elder abuse.¹⁶¹ Unlike the reactive quality of the slayer and child abandonment statutes, the elder abuse statute has a quality of a slow awakening to a major problem. In 1981, the House of Representatives Select Committee on Aging issued *Elder Abuse: An Examination of a Hidden Problem*. It concluded that elder abuse was widespread and largely unreported; it recommended that Congress assist states in identifying and treating victims.¹⁶² Federal budget cuts and Congressional inaction, however, made the report's rec-

¹⁵⁷ CAL. PROB. CODE §§ 259 (intestate succession), 2583 (substituted judgment by the court) (West 2008); 1998 Cal. Legis. Serv. 935 (S.B. 1715) (all elder abuse amendments).

¹⁵⁸ *Id.* § 259 (a), (b).

¹⁵⁹ 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); Thomas H. Shepherd, *It's the 21st Century . . . Time for Probate Codes to Address Family Violence: A Proposal that Deals with the Realities of the Problem*, 20 ST. LOUIS U. PUB. L. REV. 449, 474 (2001) ("This statute may not be very applicable to the issue of family violence, but it is a giant step forward in the disqualification of an heir's rights of succession.").

¹⁶⁰ A few other states (Illinois, Maryland, Oregon and Pennsylvania) have joined California and enacted some type of disinheriting statute based on elder abuse. See Rhodes, *supra* note 150, at 986-87. It is worth noting that these additional states also have statutes on child abandonment.

¹⁶¹ Seymour Moskowitz, *Saving Granny from the Wolf: Elder Abuse and Neglect – The Legal Framework*, 31 CONN. L. REV. 77, 82-85 (1998); LAWRENCE A. FROLIK & ALISON McCHRISTAL BARNES, ELDER LAW: CASES AND MATERIALS 607 (4th ed. 2007).

¹⁶² STAFF OF HOUSE SELECT COMM. AGING, 97TH CONG., ELDER ABUSE (AN EXAMINATION OF A HIDDEN PROBLEM) III, VII, XII, XIV, 124, 125, 125-29 (Comm. Print 1981).

ommendations rather hollow.¹⁶³ Within a decade, the Committee issued another report, *Elder Abuse: A Decade of Shame and Inaction*, and concluded that the incidence of elder abuse was increasing nationally, was more prevalent than previously thought and that state adult protective services have been hampered by inadequate funding.¹⁶⁴

Despite these federal reports, it is the state and local governments that have the most responsibility for dealing with elder abuse reporting, prevention and services.¹⁶⁵ The states' main legal responses to elder abuse are criminal laws that outlaw the conduct and mandatory reporting laws that require certain professionals to report suspected instances of abuse.¹⁶⁶ These traditional approaches to domestic violence have not worked particularly well. California has been active and innovative in responding to the challenges presented by an aging population.¹⁶⁷

Estimates of elder abuse are frustratingly fluid, some suggest it could number anywhere from half a million to five million victims each year.¹⁶⁸ While most elderly are not abused or neglected,¹⁶⁹ those who are 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."¹⁷⁰ "Elderly persons who are unable to care for themselves, and/or are mentally confused and depressed, are especially vulnerable to abuse and neglect."¹⁷¹ Similarly, those who abuse the elderly share a dominant profile: they are family members; generally adult children, other family members and spouses.¹⁷² Elder abuse, therefore, often involves family members, people who are related by blood or marriage, exactly the same group as one's heirs. From this perspective, the statute seems a logical response

¹⁶³ Moskowitz, *supra* note 161, at 84; Audrey S. Garfield, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859, 862-69 (1991).

¹⁶⁴ STAFF OF HOUSE SUBCOMM. HEALTH LONG-TERM CARE, SELECT COMM. AGING, 101ST CONG., ELDER ABUSE: A DECADE OF SHAME AND INACTION V-VI, X, XI-XII (Comm. Print 1990).

¹⁶⁵ NAT'L CTR. ELDER ABUSE AT AM. PUBL. HUM. SERV. ASS'N, THE NATIONAL ELDER 5-8 (1998) [hereinafter NAT'L CTR. ELDER ABUSE].

¹⁶⁶ Moskowitz, *supra* note 161, at 80.

¹⁶⁷ See, e.g. Julia L. Birkel et al., *Litigating Financial Elder Abuse Claims*, 30 L.A. LAW. 19 (Oct. 2007) (discussing new California laws that continue to "improve upon the recovery avenues available in financial elder abuse cases, such as through attachment or reimbursement of attorney's fees, the likelihood of a positive outcome . . . should improve dramatically and encourage more attorneys to come to the aid of elderly clients").

¹⁶⁸ See Elder Financial Abuse Task Team Report to California Commission on Aging 3 (2005); *but see* NAT'L CTR. ELDER ABUSE, *supra* note 165, at 5-1 (1998).

¹⁶⁹ Moskowitz, *supra* note 161, at 88.

¹⁷⁰ FROLIK & BARNES, *supra* note 161, at 611.

¹⁷¹ NAT'L CTR. ELDER ABUSE, *supra* note 165, at 5-8 (1998).

¹⁷² FROLIK & BARNES, *supra* note 161, at 612.

to a pernicious problem “deserving of special consideration and protection . . . because elders may be . . . less able to protect themselves.”¹⁷³

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

IV. BEHAVIOR IN THE ONGOING DEVELOPMENT OF INHERITANCE LAW

The premier of *Iolanthe* in 1882 was the first time that a play premiered in two different countries on the same day.¹⁷⁴ Within a few hours of its London close, a New York audience was also enjoying the rousing chorus of “with blood and behaviour for twenty.”¹⁷⁵ No doubt the American audience appreciated the wit being expressed, it had been after all a part of the American tradition. That the aristocratic “blood and behavior” approach had been forcefully rejected by the American Revolution would have added a decidedly different meaning to the phrase for the New York audience.

In an independent America, an individual’s merit and achievement replaced blood as the determinant of position, but consideration of “behaviour” did not disappear. The Constitution makes that clear:

Judges . . . shall hold their Offices during good Behaviour;¹⁷⁶

Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour¹⁷⁷

A federal judge or a federal lawmaker becomes such based on merit, not birth. But they retain their positions only if they meet the explicitly expressed Constitutional standard of “Behaviour.”

At common law, blood was the standard for inheritance, and the role of behavior was as a spoiler, a disqualifier from presumptive inheritance. Behavior was understood, construed broadly and developed mostly within a shifting political framework so that affronts to the sovereign or the good order of the community could work a disinheritance. Blood relationship provided a degree of certainty and stability for families, but not at the expense of the social order.

Now, centuries removed from these origins of common law, American inheritance law retains behavior as a disinheritance norm in a different fashion. Behavior is neither broadly construed nor implicit, but it

¹⁷³ CAL. PENAL CODE § 368 (West 2008); *see also* NAT’L CTR. ELDER ABUSE, *supra* note 165; 1998 CAL. LEGIS. SERV. 935 (S.B. 1715) (all elder abuse amendments).

¹⁷⁴ 1 ANNOTATED GILBERT & SULLIVAN, *supra* note 1, at 163.

¹⁷⁵ *Id.*

¹⁷⁶ U.S. CONST. art. III, § 1, cl. 2.

¹⁷⁷ *Id.* art. I, § 5, cl. 2.

still manifests a quality of being for the good order of the community. Behavior's role is clearly secondary to the status of heir determined by blood, its equivalent by adoption, and surviving spouse status. It is unlikely that behavior would 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. Behavior alone, whether defined in good or bad terms, untethered to an underlying objective relationship is legislatively and administratively unworkable. A legislature would be hard pressed to word an inheritance statute based primarily on behavior. Administering such a statute would be equally unwieldy, inefficient, and intrusive.

Unlikely as behavior is to become the primary determinant for inheritance, behavior is as likely to continue in a secondary role. The disqualification of the murderous heir by statute or case law in all jurisdictions assures this. That some states have enacted additional disinheritance statutes also suggests an ongoing legislative and public interest in considerations of behavior.¹⁷⁸ Additionally, the Constitutional references to "Behaviour" provide an analogous working model of importance and long-standing.

Beyond these obvious points, what do considerations of behavior suggest about developing inheritance laws to respond to the changing dynamic of the American family?¹⁷⁹

First, the backdrop for behavior as a disinheritance norm has changed dramatically over time. The behavioral limits placed on inheritance at common law generally proceeded from a desire for stability and certainty writ large, that is, from the primary perspective of solidifying the sovereign's power and position, not the decedent's intent nor the family's power. Corruption of blood was the most egregious example of this heavy-handed power of the sovereign. Today, the primary focus in the three types of disinheritance statutes has shifted away from the sovereign to the individual decedent and heir. It is this reorientation in

¹⁷⁸ 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 paper. See Rhodes, *supra* note 150, at 975 and the statutes and commentary discussed therein.

¹⁷⁹ It is a basic principle of our Anglo-American law that the common law should follow the values of society:

The true science of the law does not consist mainly in the theological working out of dogma or a logical development as in mathematics, or only in a study of it as an anthropological document from the outside; *an even more important part consists in the establishment of its postulates from within upon accurately measured social desires instead of tradition.*

Oliver W. Holmes, *Law in Science and Science in Law*, in COLLECTED LEGAL PAPERS 210, 225-26 (1920) (emphasis added). Statutory law, too, can and should follow society's values.

primary focus away from the sovereign and to the individual decedent and heir that may have the most relevance to the future development of inheritance statutes.

Fundamentally by requiring a consideration of the actual relationship of the particular decedent and heir, it reorients one's view away from status to how people act. People who feloniously kill, parents who abandon their children and children who abuse their elderly parents are not acting appropriately. While the consideration is of an individual's actions and behavior, the articulated standard is communally determined and communally enforced. Today's disinheritance standards – murder, abandonment and abuse – are explicitly defined by statute. They are not vague standards of amorphous or shifting content; they are objective, measurable and understandable by all. They are also all negative behaviors, a pragmatic reflection of the limits of legislation, a nod to Holmes's bad man of the law.

Second, this reorientation to the behavior of particular individuals is now taking place within a framework of expanded heirship; the common law's primacy of blood alone has been displaced for over a century. Voluntary relationships of the decedent by adoption and marriage, sanctioned by law, can equally serve to create heirship status. Adoption, by ignoring the boundaries of birth and blood, forced the law to make a qualitative assessment of the parent-child relationship, one that focused on the best interests of the individual child and the fitness of the particular parent. Having done so, adoption was not deemed a new construct but was placed within the traditional legal framework to become the legal equivalent of blood. Adoption, the legal equivalent of the traditional base of blood for inheritance, provides an important conceptual link to considerations of actual relationships of individuals who would be heirs. At the same time, the history of adoption and inheritance rights with its forced equivalence and concern for abuse and subterfuge beyond the immediate participants provides a cautionary tale for all reformers who seek to understand or effect change.

Yet, fundamental change born of sustained pressure and external realities can continue to occur within the framework of the inheritance system. It is good to remember that inheritance law, one of the most basic of common law's constructs, reflects society. It has the power to make families and consequently to prevent families. This expressive role of inheritance law, when paired over time with the reorienting influence of the new disinheritance norms, may well result in imbuing affective attachments with new importance and significance. Behavior, born of the lingering centuries-old, implicit condition of good "behaviour" should be very important for future development of inheritance law.

