2018 Annual Wisconsin Law Review Symposium

"Wills, Trusts and Estates Meets Gender, Race and Class"

Friday, October 12, 2018

Room 2260, University of Wisconsin Law School

Thursday, October 11, 2018

7:00 pm — **Welcome Dinner**

Reception and Dinner with WLR Board Members, Symposium Speakers and invited guests at the home of Professor Howard and Pam Erlanger (transport will be provided)

Welcome Remarks
Professor Emeritus Howard Erlanger

Friday, October 12, 2018

8:30 am — **Breakfast and Registration**

9:00-9:15am — **Welcome and Opening Remarks**
Erin Kautz and Julia Walsh
Wisconsin Law Review Symposium Editors

Keith Findley
Wisconsin Law Review adviser

9:15-10:45 am — **Panel 1: Voices in the Wilderness: Whose Voices Does the Law Leave Out?**
Moderator: Keith Findley
University of Wisconsin Law School

"Engendering Trust"
Deborah S. Gordon
Drexel University Thomas R. Kline School of Law

"Voice, Strength, and No-Contest Clauses"
Karen Sneddon
Mercer University School of Law

"Testamentary Freedom for Whom?"
Carla Spivack
Oklahoma City University School of Law

10:45-11:00am **Break**

11:00-12:30pm **Panel 2: Widening Access to the Law**
Moderator: Howard Erlanger
University of Wisconsin Law School

"The Socioeconomics of Twenty-First Century Wills Formalities"
Bridget J. Crawford
Elisabeth Haub School of Law at Pace University

"The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testate and Intestate Decedents"
Danaya C. Wright
University of Florida Levin College of Law

"Tribes, ANSCA, AIPRA and the Testator"
Grant Christensen
University of North Dakota School of Law

12:30-2:00 pm **Lunch and Keynote Address**

"Gender, Race, and Class Meet Trusts and Estates Canons"
Naomi Cahn
The George Washington University Law School

2:00-3:30pm **Panel 3: Transmitting Wealth and Lack of Wealth**
Moderator: Marsha Mansfield
University of Wisconsin Law School

"Freedom of Disposition v Duty of Support: What's a Child Worth?"
Phyllis C. Taite
Florida Agricultural and Mechanical University College of Law

"Big Data and the Modern Family"
Shelly Kreiczer-Levy
College of Law and Business, Ramat Gan, Israel

"Dying While Black"
Goldburn P. Maynard Jr.
University of Louisville Louis D. Brandeis School of Law

3:30-3:45pm **Break**

3:45-5:15pm **Panel 4: British Perspectives on Trusts, Equity and Ideology**
Moderator: Gwendolyn Leachman
University of Wisconsin Law School

"Critical Trusts Scholarship Redux"
Nick Piška
University of Kent, Kent Law School, UK

"Management, not Obligation: Reading Trustees' Duties through the lens of *Agamben's oikonomia*"
Hayley Gibson
University of Kent, Kent Law School, UK

"Litigation Blues for Red State Trusts"
Lee-Ford Tritt
University of Florida, Levin College of Law

6:00-9:00pm **Reception and dinner for speakers, moderators and invited guests**
Union South (1308 W Dayton St, Madison, WI 53715)

~~~~~

Biographies of Speakers and Moderators

Naomi R. Cahn

Naomi Cahn is the Harold H. Greene Professor and the Associate Dean for Faculty Development at The George Washington University Law School. She is the author or co-author of numerous articles and books as well as several casebooks in family law, and trusts and estates. She has co-authored two books with Professor June Carbone (Minnesota): *Red Families v. Blue Families* and *Marriage Markets*. Their forthcoming book, with Professor Nancy Levit (UMKC), *Shafted: Why Women are Losing and What to Do About It*, will be published by Simon & Schuster in 2020. Professor Cahn is a member of the American Law Institute and ACTEC. She served as the Reporter for the Uniform Law Commission's Uniform Fiduciary Access to Digital Assets Act (Revised) and the ULC's Study Committee on the Economic Rights of Non-marital Cohabitants.

Grant Christensen

Grant Christensen is an Associate Professor of Law and an Affiliated Associate Professor of American Indian Studies at the University of North Dakota. He is also the Director of the Indian Law Certificate program, the co-chair of the ABA Business Law section's Tribal Litigation subcommittee, and an Associate Justice on the Standing Rock Sioux Supreme Court. He holds a J.D. from Ohio State and an LL.M. in Indigenous Peoples Law and Policy from the University of Arizona. Professor Christensen's research and teaching interests focus on indigenous peoples and the intersection with family law, corporate law, and trusts and estates. In addition to numerous law review articles and book chapters he has co-authored two textbooks - *American Indians: Historical and Contemporary Perspectives* and *Reading American Indian Law: Foundational Perspectives* forthcoming from Cambridge University Press.

Bridget J. Crawford

Bridget J. Crawford is the James D. Hopkins Professor of Law at the Elisabeth Haub School of Law at Pace University. She teaches courses in Trusts & Estates, Taxation, Corporate Law and Feminist Legal Theory. She is the former chair of the AALS Section on Trusts & Estates and the AALS Section on Women in Legal Education. Professor Crawford is an elected member of the American Law Institute and an Academic Fellow of the American College of Trust and Estate Counsel. She graduated from Yale University (B.A. 1991), the University of Pennsylvania Law School (J.D. 1996) and Griffith University in Brisbane, Australia (Ph.D. 2013). Professor Crawford is the co-editor, with Kathryn M. Stanchi and Linda L. Berger, of *Feminist Judgments: Rewritten Opinions of the United States Supreme Court* (Cambridge 2016) and the U.S. Feminist Judgments Series. Together with Anthony C. Infanti, Professor Crawford is the co-editor of *Critical Tax Theory: An Introduction* (Cambridge 2009) and *Feminist Judgments: Rewritten Tax Opinions* (Cambridge, 2017). Her next article, *Tax Talk and Reproductive Technology*, will be published in the Boston University Law Review. She can be reached at bcrawford@law.pace.edu and on Twitter @profbcrawford.

Howard Erlanger

Howard S. Erlanger is Voss-Bascom Professor of Law, Emeritus, and Professor of Sociology, Emeritus, at University of Wisconsin-Madison, where he served as a full-time faculty member from 1971-2013. He holds a Ph.D. in sociology from the University of California at Berkeley, and a J.D. from University of Wisconsin Law School. His areas of interest include wills, trusts, marital property, estate planning, and socio-legal studies. Professor Erlanger is the recipient of a number of awards for his teaching and research, including the Emil Steiger Award for Distinguished Teaching from the UW-Madison, the Underkofler Award for Distinguished Teaching from the UW System, and the Stan Wheeler Mentorship Award from the Law & Society Association. He is an Academic Fellow of the American College of Trust and Estate Counsel, and a former President of the Law & Society Association. From 1998-2013 he served as Director of the Institute for Legal Studies at the UW Law School and from 2007-2013 he served Director of the Center for Law, Society, and Justice in the College of Letters and Science, which houses the interdisciplinary Legal Studies major and the Criminal Justice Certificate Program. From 1993 to 2006 Professor Erlanger served as Reporter for a committee of the State Bar of Wisconsin that prepared a comprehensive revision of the Wisconsin Probate Code (1997 Wis. Act 188) which became effective in January 1999. A bill containing extensions and technical corrections (2005 Wis. Act 216) became effective in April 2006.

Keith Findley

Keith Findley is an Associate Professor at University of Wisconsin Law School. He joined the tenure track faculty in the fall of 2012, after more than 20 years as a clinical professor, and another 6 years as a public defender. He currently teaches Evidence, Wrongful Convictions, and Criminal Procedure. In 1997, along with Professor John Pray, he co-founded the Wisconsin Innocence Project, and he served as co-director of the project until the spring of 2017, when he assumed the role of Senior Advisor to the Project. From 2009 to November 2014, he served as president of the Innocence Network, an affiliation of nearly 70 innocence organization throughout the world.

Professor Findley's primary areas of expertise are in wrongful convictions, criminal law and procedure, and appellate advocacy. He has previously worked as an Assistant State Public Defender in Wisconsin, both in the Appellate and Trial Divisions. He has litigated hundreds of post-conviction and appellate cases, at all levels of state and federal courts, including the United States Supreme Court. He also lectures and teaches nationally on wrongful convictions, forensic science, evidence, and appellate advocacy. His scholarly agenda focuses on the causes of and remedies for wrongful convictions.

Hayley Gibson

Hayley Gibson has been a Lecturer in Law at the University of Kent since 2016, where she teaches in the area of legal theory and in the area of private law. Prior to this, she completed her PhD (2016) at King's College London. Her thesis was titled "Legal Archaeology: An Historical Grounding of Law Without Origins". Her research focuses on 'poststructuralist' philosophy, jurisprudence, historiography and legal ontology. She has written a forthcoming piece (October 2018) on law and the philosophical conception of the 'archive' as it appears in the work of Jacques Derrida (Zartaloudis, ed. : "Law and Philosophical Theory: Critical Intersections" (Routledge, forthcoming)). In addition to this, she co-hosted with Nick Piska the symposium "Power, Property and the Law of Trusts Revisited" at the University of Kent in October 2017 and is the co-editor of the forthcoming collection "Critical Trusts Law: Reading Roger Cotterrell" (Counterpress, 2019). She serves on the editorial board of feminists@law."

Deborah S. Gordon

Deborah S. Gordon is a professor at Drexel University Thomas R. Kline of Law. She teaches courses in Legal Methods; Wills, Trusts and Estates; Estate and Gift Tax; and Literature and the Law. Her scholarship explores the intersection of language, emotion, and gender in inheritance law. More specifically, Professor Gordon uses narrative theory, rhetorical theory, and literature to explore intergenerational donative transfers and fiduciary responsibilities. Professor Gordon is a co-editor author of *Feminist Judgments: Rewritten Trusts & Estates Opinions* and is a co-author of *Experiencing Trusts & Estates* (West Academic, 2017).

Shelly Kreiczer-Levy

Shelly Kreiczer-Levy is an Associate Professor of Law and the Head of the Research Institute at the College of Law and Business, in Ramat Gan, Israel. She holds an LL. B. (2004) and a PhD (2009) from Tel Aviv University Law School. Professor Kreiczer-Levy clerked for Israeli's Supreme Court Chief Justice, served as the President of the Israeli Association of Private Law, and was the recipient of the Zeltner Award for Young Promising Scholars (2016). Shelly has taught at Cornell Law School, and was a Visiting Researcher at Yale Law School, and a Visiting Scholar at both Harvard Law School and Emory Law School. Her research interests are located at the intersection of property law and intimacy on family property, succession and the home, and in her more recent work on the sharing economy. She is currently working on a book manuscript entitled Destabilized Property: Property Law in the Sharing Economy, which is under contract with Cambridge University Press.

Gwendolyn Leachman

Gwendolyn M. Leachman is an Assistant Professor of Law at the University of Wisconsin Law School and a Faculty Affiliate with the Sociology Department at University of Wisconsin-Madison. She teaches courses in Labor Relations, Employment Discrimination, and Torts. Professor Leachman's research critically examines the interaction between law and social movements, focusing on how litigation strategies affect agenda-setting and representation within movements. Her recent publications include Institutionalizing Essentialism, which examines the institutional factors that generate marginalization within identity movements; The Future of Polyamorous Marriage, which considers the consequences of same-sex marriage litigation for the burgeoning polyamorous marriage equality movement; and Media, Marriage, and the Construction of the LGBT Legal Agenda (forthcoming 2017), a study of media bias in coverage of LGBT rights litigation. Professor Leachman is currently working on a book project, Litigation and the Shaping of the LGBT Movement, which investigates how the pursuit of impact litigation has transformed the movement for LGBT rights. Drawing on original empirical research on LGBT movement activism and organizing over the past three decades, the book highlights a series of mechanisms that have enabled litigation to dominate the broader agendas of LGBT rights activists working outside the courtroom. The book expands on research Leachman completed for her Ph.D. dissertation, which won the Law & Society Association Dissertation Award in 2015.

Professor Leachman received her B.A. with highest honors in Legal Studies and Linguistics from the University of California, Santa Cruz. She received her Ph.D. and her J.D. from the University of California, Berkeley, where she served in editorial positions at the California Law Review and the Berkeley Journal of Employment & Labor Law, and provided bilingual legal aid to Spanish-speaking clients at La Raza Employment Law Clinic and the Legal Aid Society-Employment Law Center. Prior to joining the UW faculty, Professor Leachman was a Williams Institute Law Fellow at the UCLA

School of Law, where she taught courses on sexual orientation and gender identity law.

Marsha Mansfield

Marsha M. Mansfield is the Director of the Economic Justice Institute (EJI), home to the Law School's civil legal clinics: the Consumer Law Clinic, Family Court Clinic, Immigrant Justice Clinic, and Neighborhood Law Clinic. Professor Mansfield directly supervises students in the Family Court Clinic. Under her guidance, law students develop their lawyering skills through representation of and assistance to the underserved in Dane County while learning about the challenges faced by their clients and considering how they might be most effective in their role as lawyers. She also teaches Professional Responsibility. Professor Mansfield served two terms on Wisconsin's Access to Justice Commission. She was the President of the Dane County Bar Association in 2005 as well as Chair of the DCBA Delivery of Legal Services Committee. She served for two terms on the State Bar's Board of Governors and associated committees. She is a member of the Family Law and Litigation Sections, the ABA Family Law Section, and served three terms on the Office of Lawyer Regulation District 9 Committee. She was appointed Reporter for the Office of Lawyer Regulation Procedures Review Committee by the Wisconsin Supreme Court in 2016. She served on the Advisory Board of the Consumer Law Litigation Clinic at the UW Law School and helped create the UW Law School's Pro Bono Project. Professor Mansfield is also of-counsel to the Hawks Quindel Law Firm in Madison, WI.

Goldburn P. Maynard Jr.

Goldburn P. Maynard Jr. is an Assistant Professor at University of Louisville Louis D. Brandeis School of Law. He teaches courses on taxation, gratuitous transfers, and elder law. His research focuses on issues of wealth distribution and inequality, tax policy, and America's aging population. His most recent essay, *They're Watching You: How the NCAA Infringes on the Freedom of Families*, was published in the Wisconsin Law Review. It underscores the inherently unjust nature of NCAA rules that disproportionately disadvantage poor individuals of color. Prior to teaching at Brandeis, Professor Maynard was a Visiting Assistant Professor at Florida State University College of Law and Washington University School of Law. Before entering law teaching, he worked as an estate tax attorney for the Internal Revenue Service. He began his career as a tax associate at Skadden, Arps, Slate, Meagher & Flom.

Nick Piška

Nick Piška is a Senior Lecturer in Law at the University of Kent, UK. His research pursues a critical engagement with private law, particularly in the area of equity and trusts. He is currently writing a book on the fate of equity in modern law and society. He is the founding member of the Equity & Trusts Research Network (https://www.kent.ac.uk/law/research/centres-and-groups/equity.html) as well as a member of the advisory board of the University of Kent's Transfaculty Centre for Critical Thought (https://www.kent.ac.uk/cct). He has previously been a researcher at the Law Commission for England and Wales.

Karen Sneddon

Karen J. Sneddon is a Professor at Mercer Law School where she teaches in the areas of legal writing, client counseling, and trusts and estates. She graduated *summa cum laude* from Tulane Law School. Karen practiced law in the area of trusts and estates at Schulte Roth & Zabel LLP in New York City, and she was a Forrester Fellow at Tulane Law School before joining the Mercer Faculty in

2006. Her scholarly agenda draws from composition theory and linguistics in works such as "Speaking for the Dead: Voice in Last Wills and Testaments" and "In The Name of God, Amen: Evolution of Language in Wills." Professor Sneddon co-authors a regular column entitled "Writing Matters" in the Georgia Bar Journal, has presented at a number of conferences, and is active in the Legal Writing Institute.

Carla Spivack

Carla Spivack is a Professor at Oklahoma City University School of Law. Before joining the faculty, she practiced civil litigation at Cadwalader, Wickersham and Taft, New York. She received her BA from Princeton, her JD from New York University School of Law, and her PhD in English Literature from Boston College. She clerked for the Hon Robert G. Flanders, Jr. of the Supreme Court of Rhode Island.

Professor Spivack's scholarship focuses on gender issues in property and trusts and estates law, as well as comparative law. She writes about ways inheritance law can and should take account of realities like spousal and child abuse, and about how American inheritance law compares with that of civil law countries. She is currently writing a book called "Robbing Women: How American Property Law Cheats Women in Marriage, Divorce and Death." Professor Spivack's work is cited at length in various Trusts and Estates casebooks, and her article, "Let's Get Serious: Spousal Abuse Should Bar Inheritance" was named one of ten "Must Read" Trusts and Estates articles of 2011 by TaxProf Blog, the leading estate planning and tax blog. She is a regularly invited guest speaker at conferences, and in 2013 was named Oxford Research Professor of Law.

Phyllis C. Taite

Phyllis Taite is a Professor of Law at Florida A&M University College of Law. She holds an LL.M. in Taxation from the University of Florida, Levin College of Law, and a J.D. from Florida State University College of Law and a B.S. from Florida A&M University. She teaches Wills and Estates, Trusts and Fiduciary Administration, Estate and Gift Tax, Federal Income Tax and other estates or tax related courses. She has also taught Property I and Property II, Partnership Taxation, Trial Practice, Torts, and Florida Constitutional Law. Prior to teaching, she practiced law for approximately eight years as a commissioned officer and attorney in the United States Army Judge Advocate General's Corps (JAG) where she provided estate planning needs to soldiers serving throughout the country and overseas. Professor Taite focuses her scholarship on leading issues in tax policy. Her articles appear in law reviews across the nation and her articles have been cited by leading tax scholars. She has served as a speaker, panelist, and commentator at a number of national conferences. She has also served as the faculty advisor of the Volunteer Income Tax Program receiving several honors from the community and Internal Revenue Service. She is also a regular contributor to Tax Notes, a leading provider of tax news and analysis for the global community.

Professor Taite is also a community leader. She serves on numerous boards and committees including the FAMU Foundation, Board of Directors, Faculty Senate and the Florida Bar Continuing Legal Education Committee. She is a member numerous professional organizations including the Real Property and Probate Section of the Florida Bar, The Florida Bar, and the American Bar Association. She is admitted to practice in the U.S. Court of Appeals for the Armed Forces and the State Bar of Florida.

Lee-Ford Tritt

Lee-ford Tritt, NYU School of Law, J.D., LL.M. (taxation) is a law professor and member of the graduate tax faculty at the University of Florida College of Law. In addition, Lee-ford is Director of the Center for Estate Planning and Director of the Estate Planning Practice Certificate Program. Lee-ford's strong commitment to students and the practice of law has helped earn him Professor of the Year for the academic years 2008/2009; 2009/2010; 2010/2011; 2011/2012 and 2012/2013. In addition, he received the University of Florida's Presidential Award for Excellence in Education in 2011 and the University of Florida's Impact Award in 2012.

Lee-ford is a Fellow of the American College of Trust and Estate Counsel and the Vice President of the American Association of Law Schools' Trusts & Estates Division. In addition, Lee-ford serves as Vice Chair of the American Bar Association ("ABA") Real Property Trusts & Estates Law Section's Outreach Committee as well as a Chair of a committee for the Non-Tax Estate Planning Considerations Group. He also is an adviser for the Committee on an Act on the Recovery of Stolen Cultural and Artistic Property for the National Conference of Commissioners on Uniform State Laws.

Lee-ford has published several books and many academic articles. He is frequently cited as an authority in many newspapers, magazines, news broadcasts, radio shows, and academic articles. Lee-ford is a frequent lecturer across the country on various estate planning and tax issues, including presentations for the ABA's national meetings, the ABA's RPTE Law Section's annual meetings, the ABA's Tax Section's annual meetings, the Florida Bar's RPPTL Section's annual meetings, the Heckerling Institute on Estate Planning, and the Notre Dame Tax and Estate Planning Institute.

Before joining UF College of Law in 2005, Lee-ford spent eight years in the New York City trusts and estates departments of Davis, Polk & Wardwell and Milbank, Tweed.

Danaya C. Wright

Danaya Wright is the Clarence J. TeSelle Professor of Law at the University of Florida, Levin College of Law. She holds a B.A. and J.D. from Cornell University, and a Ph.D. from the Johns Hopkins University. Her scholarship focuses on the ways in which probate and succession laws negatively affect non-traditional and minority families, and the legal history of child custody laws that permit removal of children from non-traditional parents. She also writes in the area of real property, the takings clause, and rail-trail conversions. Her work has been cited by numerous courts, including the Supreme Court, and it has received a number of awards and honors, including the Dukeminier Prize for one of the best articles on sexual orientation and the law for 2016. She has received the Sutherland Prize for best article in English Legal History, and was a two-time participant in the Yale/Stanford Junior Faculty Forum. She teaches Property, Constitutional Law, Trusts and Estates, Legal History, and advanced courses in those areas.

Abstracts

Gender, Race, and Class Meet Trusts and Estates Canons

Naomi Cahn
The George Washington University School of Law

The canon of trusts and estates consist of several different overriding narratives, such as dead hand (or transferor) control, formality, and respect for traditional, legally-recognized family. Perhaps the most fundamental -- and, paradoxically, the most visible and invisible - of the narratives is the "wealth" canon, which focuses on the meaning, possession, and transmission of conventional forms of financial assets. It is this final canon, focused on wealth, that I believe structures the rest of the field. My thesis is that the wealth canon is the unacknowledged core of trusts and estates, and the structure of wealth is reflected in the raced and gendered biases of trusts and estates. For example, dead hand control is important because the dead hand earned, or at least safeguarded, the wealth; formality is necessary to protect dead hand control over wealth; and family is, in some ways, yet another form of wealth (consider that fathers were entitled to the earnings from their children's labor). The paper explores the development of race and gender critiques of trusts and estate law, showing how the wealth narrative is central to those critiques. The paper then analyzes the wealth canon at a time of increasing economic inequality, showing how class serves as a challenge to trusts and estates law.

Tribes, ANSCA, AIPRA and the Testator

Grant Christensen
University of North Dakota School of Law

The general rule in common law is that the testator is able to dispose of their property however they wish. Among the legal canons of trusts and estates there exists a principle that probate courts should generally defer to the intent of the testator when resolving disputes. However tribal and federal law interfere with these presumptions for American Indians. The American Indian Probate Reform Act limits the classes of persons who may inherit trust property that is part of an Indian reservation. The Alaska Native Claims Settlement Act creates native corporations, distributes shares to Native Alaskans, and then limits how these may be inherited. Indian tribes often have their own probate codes which may place restrictions upon the ability to inherent various kinds of property. While there are rational reasons for adopting such rules, the effect is to treat American Indian testators differently when attempting to control the distribution of certain assets. The presentation will focus illustrating this legal discrimination and present suggestions for drafting documents for Indian clients who hold trust land so as to avoid costly probate and disputes between beneficiaries.

The Socioeconomics of Twenty-First Century Wills Formalities

Bridget J. Crawford
Elisabeth Haub School of Law at Pace University

Individuals have executed wills the same way for centuries. But over time, traditional requirements have relaxed. This Article makes two principal claims, one descriptive and the other normative. First, the traditional requirements that a will must be in writing and signed by the testator in the presence of (or acknowledged before) witnesses have never adequately served the stated purposes of wills formalities. In other words, strict compliance with formalities cannot be justified by their cautionary, protective, evidentiary and channeling functions. Reducing or eliminating most of the long-standing requirements for execution of a will is consistent with the true purpose of wills formalities – authenticating a document as the one executed by the testator with the intention of having it serve as the binding directive for the distribution of the testator's property.

This Article's account has important implications for the way that legal scholars, lawmakers and lawyers think about wills. The Article's second claim is that the substantive standard of the harmless error rule – that the decedent intended the document to be the decedent's last will and testament – should be all that must be satisfied for a court to admit a document to probate. Widespread adoption of such an intent-based rule is preferable to one that is overly formalistic. Current formalism leads to both false positives (i.e., when a document not intended by the decedent to be the decedent's will is probated) and false negatives (i.e., when a document clearly intended by the decedent as the decedent's will is rejected). An intent-based rule would make more likely the valid execution of wills by poor and middle-income people who typically do not consult attorneys. An intent-based standard also sets the stage for widespread recognition of electronic wills, if states are able to address concerns about authentication, fraud and safekeeping of documents. Technological developments could permit estate planning in the twenty-first century to become more accessible than ever before to people of all wealth and income levels, if the legal profession is prepared to embrace new ways of executing wills.

"Management, not Obligation: Reading Trustees' Duties through the Lens of Agamben's oikonomia"

Hayley Gibson
University of Kent, UK

The Italian philosophical theorist Giorgio Agamben has developed over several years a genealogy of modern government as *oikonomia*, in which political sovereignty is vacated and in its place emerges a complex, bipolar system of being and praxis. In short, the political power of the world is dispersed into the discrete praxes of managerial governance. The form of the trust, I have argued, replicates precisely this bipolar system of being and praxis, altering the nature of property and ownership by virtue of the managerial praxis of trusteeship. In this paper, I wish to extend this thesis by returning to an old question, expressed in the wealth of literature which asks whether the trust is a form of property, or a form of obligation. By referring to recent decisions in England (*AIB* and *Target Holdings*) and politicized pensions disputes that span the whole of the UK (specifically in the Universities sector), I will attempt to show that the relationship of trustees to the trust (as opposed to beneficiaries) is irredeemably bound to this '*oikonomic*' form of the trust. This

form has as its guiding principle the withdrawal of the settlor and the managerial dispersal of power to trustees, in a manner not merely similar to, but exemplary of, Agamben's theory of *oikonomic* governance. Moreover, this thesis premised on a vacancy of originary power engenders temporal and ontological consequences that govern, in turn, the juridical conceptualization of trustees' liability. By problematizing the temporality of trustee liability, I wish to put forward a strategy for dispensing with the notion of 'obligation' in the trust, in favor of a more formidable managerial power. Thus, I wish to discuss whether the curtailment of trustees' liability in recent years is not merely the consequence of the apparently increasing obsolescence of conscience under the auspices of neoliberalism: but whether, and moreover, this tendency constitutes an irredeemable feature of the trust form conceived as *oikonomia*.

Engendering Trust

Deborah S. Gordon
Drexel University Thomas R. Kline School of Law

While scholars have explored how gender inequities and stereotypes persist in wills law, intestacy doctrines, and some varieties of non-probate transfers, surprisingly little has been written about how gender impacts trusts and trustees in both language and effect, apart from some groundbreaking work in areas where trusts intersect with marriage (such as the use of QTIPs). One explanation for the gap may be that so much of trust planning occurs in private, which makes gathering empirical evidence about it tricky. And yet, the void is surprising because of trust law's distinctly gendered legacy (think "Prudent Man Rule") and because the revocable trust is the modern vehicle for property transmission and involves complex and ongoing relationships that often rest on power differentials, information asymmetries, and incompatible or at least discordant beneficial interests. The purpose of this piece, then, is to start to fill this void. I begin by briefly describing inheritance law's history and reviewing some of the innovative scholarship that has exposed and explored inheritance doctrines that treat women inequitably. I then describe a survey of five years of trust case law that has allowed me to examine the characteristics unique to trusts, including divided ownership and the trustee role, longevity, and privacy, from the perspective of gender. I ultimately argue in favor of a deliberately "engendered" approach to trust law, which uses perspective and rhetoric to disrupt rather than reinforce existing social patterns and pervasive myths about trusts and trustees.

Big Data and the Modern Family

Shelly Kreiczer-Levy
College of Law and Business, Ramat Gan, Israel

Despite numerous reforms over the years, intestate succession rules continue to privilege traditional, white, heterosexual families. It is evident that the one-size-fits-all scheme cannot truly reflect diversity of lifestyles and associations. This Article considers an innovative option that has become increasingly popular in recent years: using big data to create personalized rules, tailored to the personal characteristics of each decedent. This Article explores the promise and drawbacks of personalized intestacy, arguing that personalized default rules fall short in the realm of inheritance, because these rules are personal and inheritance law is inherently relational. It then offers preliminary guidelines for adapting big data techniques to the relational aspects of inheritance.

Dying While Black

Goldburn P. Maynard Jr.
University of Louisville Louis D. Brandeis School of Law

Race and class interact in complicated ways in the lives of elderly citizens. The long-standing racial wealth gap often prevents minorities from accessing sophisticated legal advice and quality health care. African Americans disproportionately populate low-quality nursing homes and are subject to more aggressive end of life care. As long-term care costs continue to balloon it is likely that this situation will only get worse. This paper analyzes some of the legal and extralegal causes of these disparities and explores interventions to reverse inequalities in the health care system.

Critical Trusts Scholarship Redux

Nick Piška
University of Kent, U.K.

In the heyday of critical legal scholarship, both in the US and UK, most doctrinal categories and practices came in for a sustained 'trashing', a sustained critique of their traditional foundations, jurisprudence, assumptions and politics. However, one concept, category or institution that received less attention than most was the trust. For example, David Kairys' classic collection *The Politics of Law: a Progressive Critique* does not have a chapter on trusts, the chapter on property only making fleeting reference to trusts, and *The Critical Lawyers' Handbook* has chapters on all English Qualifying Law Degree modules, plus a range of other subject areas and topics, but no chapter on trusts. The only clear statement, in this period, of the form that a critical trusts scholarship might take is Roger Cotterrell's classic article 'Power, Property and the Law of Trusts', which must be read in conjunction with his other work on trusts, along with feminist critiques of implied trusts over the family home. While equity (both as a jurisprudence and as a category of law) has subsequently received attention from critical scholars, Chancery's 'greatest achievement' – the trust – appears to remain largely immune to critical theory. The aim of this paper is twofold: first, to pull together the fragments of such a tradition, to retrieve the outline of a lost critical jurisprudence of trusts; and secondly, to suggest a new agenda for critical trusts scholarship: a critique of the political economy of the trust assemblage.

Voice, Strength, and No-Contest Clauses

Karen J. Sneddon
Mercer University School of Law

The will is a unilateral written disposition of probate property to be effective upon the will-maker's death. To have any legal effect, however, the will-maker's family, beneficiaries, and personal representatives, along with the probate court need to enforce the provisions. To provide motivation, the language of the will is definitive, certain, and strong. But when the will relies upon standardized language, the voice of the will-maker is flattened or even missing completely. The absence of the will-maker's voice may jeopardize the legal effect of the will.

This article argues that the over-reliance on "time-tested" formulaic language endows the will with a mechanical, masculine voice that is ill-fitting for most testators and does not advance the particular goals of the testator. Specifically, this article will focus on the use and language of the no-contest clause. Will-makers and will-drafters have long abandoned the language of in terrorem clauses that threaten eternal damnation for anyone who seeks to alter the will. Yet, the force and strength of the standard no-contest clause has continuing appeal to testators and drafters, despite concerns raised about the flattening of the testator's voice and provocative nature of the language.

This article argues that the effect of the no-contest clause is undermined by the generic, hollow language replicated in form no-contest clauses. Rather than discouraging will contests, the language may actually encourage will contests. To support this argument, this article first sets the concept of voice in the context of testamentary language. The article next examines the purpose, structure, appeal, and concerns of the no-contest clause. Then, this article reviews how courts, focusing particularly on cases decided across the country within the last five years, have interpreted the language in no-contest clauses. This article concludes by emphasizing how the reliance on "time-tested" formulaic language perpetuates stereotypes, most specifically gender stereotypes, and inhibits drafting innovation. After all, a will is more than a mere legal instrument that transfers widgets and greenacres. The voice in the will should likewise be authentic and genuine.

Testamentary Freedom for Whom?

Carla Spivack
Oklahoma City University School of Law

The principle of testamentary freedom is the lodestar of American succession law. With very few restrictions, a testator may dispose of her property in any way she wishes, no matter how quirky, antisocial, bizarre, or infuriating to relatives her desires may be. Ample grounds exist to challenge the dominance of this principle: almost no other Western country, for example, allows a parent to completely disinherit a child, but this right is well established in American law. This article does not question the wisdom of the principle of testamentary freedom. Rather, it takes the law at its word: if testamentary freedom is a fundamental principle of our system, surely it should apply to everyone equally. What this article shows is that it does not. In fact, gender, race and other factors often determine just how much testamentary freedom a person has.

This inequality becomes clear when one shifts lens through which we view testamentary freedom. The legal focus has always been on the legitimacy of the testator's attempts to control property after death: can he restrict distributions from a trust, for example, to descendants who marry within the family faith? The literature has ignored the antecedent question: what constitutes the property the testator is attempting to control? It seems worthwhile to define this "pot" of property before we argue about what the testator can do with it. Surprisingly, no one has tried to do this.

When we look at testamentary freedom from this perspective, and ask what rights the testator has in property post mortem, sharp divergences between groups of people emerge. It becomes clear that the definition of that property can differ depending on gender, race, or social status. What would be deemed a person's property available for testamentary disposition – the fruits of one's labor, for example – to one person is not defined that way for another, similarly situated person.

This article offers four case studies which exemplify this phenomenon; they are not, and are not intended to be, exclusive. I discuss gender, specifically, the case of the surviving spouse; race, in the case of 1983 damages; the disabled, in particular, the individual on public assistance, and the restrictions the law imposes on the testamentary freedom of Native Americans. In each case, I will show that property which would be subject to disposition in the hands of another person who seems to be similarly situated with regard to the same property rights is simply not defined part of the estate, or not subject to the same rights, in the hands of the groups I identify. It challenges the law to justify such an outcome, and offers a remedy in the form of a reframing of the idea of testamentary freedom.

Freedom of Disposition v Duty of Support: What's a Child Worth?

Phyllis C. Taite
Florida A&M University College of Law

Mandating financial responsibility for the care of children during one's lifetime is without question. Child support laws have been implemented in every state in America based on the inherent duty to financially support dependent children. Some laws even extend that duty to provide financial support to children over the age of majority when the child has a disability or if the child pursues higher education.

Just as entrenched is the right to dispose of one's property as he pleases after death, testamentary intent. Every state has intestacy provisions that provide for disposition of property after a decedent's death, trumped by specific wishes of the decedent in the form of a will or other testamentary document. When these two principles clash, what public policy principle should prevail, freedom of disposition or duty of support?

The civil and common law systems are in sync as applied to child maintenance and support laws that mandate financial support for minor children. The two systems are also in sync for spousal and children's share of the estates under the intestacy laws and for spousal shares in testate estates. The civil and common law systems depart at providing minimum financial support for minor children in testate estates. The common law should adopt the civil law provisions that provide minimum inheritance for children in testate estates. This paper explores historical justifications for favoring testamentary intent in the common law system and a comparative analysis of the two systems and proposes ways to balance freedom of disposition with the duty of support.

The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testate and Intestate Decedents

Danaya C. Wright
University of Florida Levin College of Law

This article continues empirical analysis of decedents whose estates were probated in 2013 by comparing the demographics of testate and intestate decedents. Not surprisingly, the data showed that testate decedents whose estates were probated tended to be older, white, and female, while those who died intestate tended to be younger, of color, and male. When we consider that those who had estate planning services are likely to be better able to preserve wealth as it transfers from generation to generation, the growing wealth gap can be linked to rates of intestacy and the different ways the default intestate rules promote dissipation rather than consolidation of wealth. Although many may argue that inherited wealth leads to stagnation and an unwillingness to work, lack of inherited wealth in the poorest populations contributes to serious wealth instability, poverty, and all of its attendant social problems. By better understanding how the probate codes contribute to the dissolution of wealth through the generations, and identifying the populations most likely to be negatively affected by the probate codes' default rules, we can better channel estate planning services to those who most need it and identify the populations where intervention might make a profound difference.