INTRODUCTION TO THE 2018 *WISCONSIN LAW REVIEW* SYMPOSIUM ISSUE: WILLS, TRUSTS, AND ESTATES MEETS GENDER, RACE, AND CLASS

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I am honored to write the introduction to this Critical Trusts and Estates Symposium issue of the *Wisconsin Law Review*. I want to thank the membership of the *Review* for choosing this symposium for their annual issue, and for all the hard work that went into putting together the conference and this issue. I also want to thank the contributors who spoke at the conference and wrote these pieces for helping, over the past few years, to build a body of Critical Trusts and Estates literature and to identify an agenda for this scholarship going forward. Here I seek to name some central ideas of Critical Trusts and Estates and to place the works in this issue in that context.

Recognizing that, as Lawrence Friedman wrote, "[w]hat DNA is to the physical body, processes of succession are to society—that is, to the social body."[1] Critical Trusts and Estates analyzes the accepted doctrines, methodologies and practices of inheritance law and the ways they replicate inequality and subordination. In so doing, it also questions many of the underlying assumptions of trusts and estates law, assumptions about families and intent, the importance of formalities, the role of cherished doctrines like testamentary freedom and all other forms of received wisdom in the field. It also pays attention to people who have been historically marginalized in relation to property and the transmission of wealth. These groups include women, African-Americans, Hispanics, Native Americans, and others living in poverty which the law helps to reproduce from generation to generation, such as the rural and urban poor.

Critical Trusts and Estates derives its inspiration from, and benefits from the insights of, Critical Legal Studies, Critical Race Studies, and Feminist Legal Theory. As such, it is driven by a few core insights which the articles in this volume reflect and develop. Perhaps the central theme of these schools of thought is a deep suspicion of legal formalism.[2] One scholar defines formalism as "adherence to a

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1. LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS AND INHERITANCE LAW 5 (2009).

2. For a discussion of formalism, see William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998).

norm's prescription without regard to the background reasons the norm is meant to serve (even when the norm's prescription fails to serve those background reasons in a particular case)."[3] Formalism also means the application of laws without regard for the differing material circumstances of those affected, which may undermine or contravene the very norm motivating the law.[4] For example, many laws whose goal is to treat people of different genders, races, etc. equally actually achieve, in reality, a very different effect. This is the case because such rules often ignore the real life conditions under which the law plays out. An example of this in the area of Trusts and Estates which I discuss in my article in this volume is the facial equality in spousal inheritance laws, which make no distinction between male and female surviving spouses. The reality is, however, that women live longer than men, and so are disproportionately affected by them. Thus women are more likely to be impoverished by loopholes in the rules that allow the first spouse to die to deplete the estate.

In another version of the critique of formalism, Lee-ford Tritt's article urges that courts interpreting wills executed before *Obergefell v. Hodges*[5] read words such as "spouse" and "child" in light of social changes which had taken place even before the legalization of same sex marriage. He argues that these social changes likely shed light on the testator's intent, even before the law officially placed same sex marriage and its relationships on the same interpretive plane as opposite sex marriage.

Related to a distrust of formalism is the questioning of the importance of the formalities so historically important to the law of wills and trusts.[6] These formal requirements for a will's validity are meant to ensure fulfillment of a testator's intent,[7] but, as Bridget Crawford points out in her article, in reality can thwart the intentions of those who lack access to legal advice. Reflecting the theme of attention to reality rather than to formal rules, Crawford notes that more people have access to smartphones than to lawyers. She thus proposes that

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3. Larry Alexander, *"With Me, It's All er Nuthin": Formalism in Law and Morality*, 66 U. CHI. L. REV. 530, 531 (1999).

4. Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 510 (1988) ("At the heart of the word 'formalism,' in many of its numerous uses, lies the concept of decisionmaking according to *rule*. Formalism . . . screen[s] off from a decisionmaker factors that a sensitive decisionmaker would otherwise take into account.").

5. 135 S. Ct. 2584 (2015).

6. For the history of wills formalities, see Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453 (2002).

7. John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871 (1992) (identifying the ascendancy of intent over formalities as a theme of the modern law of donative transfers).

authenticity be the only test for determining a will's validity, and suggests that technology be an accepted medium for establishing the authenticity of expressed testamentary intent.

Another important theme of this volume is attention to those left out by traditional narratives. In this vein, Naomi Cahn's article critiques the "wealth narrative" and points to those it excludes, such as the large number of people who die intestate. Cahn goes further, suggesting that the "wealth narrative" must expand to include discussions of economic inequality in life. Similarly attentive to peoples' real lives, Danaya Wright's empirical study of wills and intestacy in a Florida county shows a clear correlation between intestacy and lack of wealth, and she points out the ways intestacy rules inhibit effective wealth transfer, thus making an important empirical point about the replication of inequality.

Shelly Kreiczer-Levy, for her part, points to those left out by intestacy law's limited set of relational formulas, and suggests the use of data collection to better reflect the probable intent of the majority of people who die without a will. She offers ways the use of data about specific relationships in people's lives could offer a more granular system of intestate succession based on the wide range of people's actual relationships and probable preferences based on those connections.

Critical Trusts and Estates also continues the Critical Legal Studies tradition of revealing the subjective values inherent in the law, and in legal language. Deborah Gordon, for example, shows how the language of trusts jurisprudence "engenders" the subordination of women, depicting them as helpless, irresponsible or greedy. Can such language possibly be connected to the forms of the trust which deny women financial autonomy, such as the QTIP trust?[8] Karen Sneddon likewise reveals how the formulaic language in no-contest clauses may actually provoke or encourage will contests with its "mechanical, masculine voice" and thus undermine testamentary intent – the opposite of what it is intended to do.

Finally, Critical Trusts and Estates encompasses challenges to hallowed doctrines, as Phyllis Taite shows in her critique of testamentary freedom and its license to disinherit even minor children. She compares this aspect of American inheritance law unfavorably to civil law regimes, which protect part of a parent's estate for his or her offspring, and suggests reforming American law to protect children from disinheritance.

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8. For a feminist critique of the QTIP trust, see Wendy C. Gerzog, *The Marital Deduction QTIP Provisions: Illogical and Degrading to Women*, 5 UCLA WOMEN'S L.J. 301 (1995).

A common theme of these articles is their empirical engagement, attention to the reality of people's lived experience, their expressed, not surmised, wishes and preferences, and their actual, not theoretical, relationships. This empirical grounding has been a theme of scholarship in other areas of law at least since the 1980's;[9] the field of trusts and estates, with some notable exceptions,[10] has lagged behind this intellectual curve.[11] One aim of Critical Trusts and Estates is to further this empirical direction.

These contributions point out many important directions for inquiry in the scholarly flied of Critical Trusts and Estates. They share a commitment to giving voice to those left out by traditional doctrines, grounding the law of wealth transfer in the material conditions of people's lives, and revealing the subjective values that have shaped the law—and by extension society as well. These wonderful articles present an exciting beginning for this area of scholarship. As it continues to grow in multiple directions, one of its goals will be not only to study real people's lives, but to have an effect on them as well. As these articles suggest, it can lay the groundwork for changes in intestacy laws, conceptions of wealth, access to wills, interpretation of testamentary language, the reassessment of defaults, the rethinking of formulaic language, and changes in the way wealth is passed between generations. Much exploration and discovery lies ahead.

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9. Daniel E. Ho & Larry Kramer, *Introduction: The Empirical Revolution in Law*, 65 STAN. L. REV. 1195, 1196 (2013).

10. Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235 (reporting on a first-ever survey of fiancés and divorcing and permanently separated spouses about their testamentary preferences); Reid Kress Weisbord & David Horton, *Boilerplate and Default Rules in Wills Law: An Empirical Analysis*, 103 IOWA L. REV. 663 (2018) (arguing that "simple" default rules should be replaced by "sticky" defaults, which would better insulate a testator's likely desires from testamentary boilerplate); Danaya C. Wright & Beth Sterner, *Honoring Probable Intent in Intestacy: An Empirical Assessment of the Default Rules and the Modern Family*, 42 ACTEC L.J. 341 (2017) (reporting on results of study showing gaps between intestacy law and what members of blended families actually prefer); Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27 (2008) (reporting on study of holographic wills in Pennsylvania country showing that fears of ambiguous and unclear dispositions are unfounded); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005) (presenting an empirical study of trust funds); Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. J. 1, 32–35 (1998) (reporting results of survey of attitudes toward intestacy laws allowing committed partners to inherit).

11. *See* FRIEDMAN, *supra* note 1, at 5–6 (noting the relative lack of empirical work in this area).