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Deconstructing Foundational Principles of Trusts and Estates Law

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Naomi R. Cahn, [Dismantling the Trusts and Estates Canon](#), 2019 **Wis. L. Rev.** 165 (2019).

All areas of the law have certain foundational principles or beliefs that are widely shared. These underlying assumptions often go unchallenged. In the trusts and estates field, these principles include: (1) giving a certain amount of ongoing control to the transferor, or in the case of a decedent, to the “[dead hand](#),” (2) respect for formality, (3) the importance of the traditional, legally-recognized family, and (4) the “wealth” narrative that focuses on the transmission of conventional forms of wealth.

In her thought-provoking article, Professor [Naomi Cahn](#) challenges these underlying principles. She, correctly, I believe, identifies the wealth narrative as the “strand...that structures the rest of the field.” For example, she notes that dead-hand control is only important when a decedent dies with wealth to be transferred, and she analyzes how wealth helps transfer privilege and maintain the status quo. Professor Cahn also looks at who has wealth and recognizes that the sociodemographic diversity of who has wealth impacts this area of law. She seeks to get her readers to challenge the foundational principles of the field by considering new perspectives from race, gender, class, and sexual orientation.

Part I of the article celebrates societal changes that are impacting core principles of trusts and estates law. Professor Cahn focuses on three key changes. First, there have been changes to our view of property. At a basic level, the definition of “property” has changed greatly since early in our country’s history when enslaved blacks were legally classified as immovable property. Similarly, restrictions on non-citizens owning certain property have been eliminated over time, and the right of women to own property has changed, as has the value of certain types of property.

Second, while the U.S. generally lauds dead-hand control (including freedom of testation), that control is often limited when it clashes with dominant notions of inheritance. Professor Cahn commends the changes occurring to those notions. For example, after the [Civil War](#), anti-miscegenation statutes prevented African Americans from inheriting from white spouses. Similarly, dower and curtesy limited the testation rights of husbands and wives, and other limitations existed on what property testators could leave to married women. In addition, [undue influence](#) was often used to overturn bequests to same-sex partners. Professor Cahn also identifies some issues with formal will requirements, including the fact that women tend to use precatory language while formal wills use the more directive language that men use.

Third, the definition of family continues to evolve. Historically, slave children inherited their status as slaves from their mothers, and nonmarital children could not inherit from their fathers. Today, LGBTQ jurisprudence has begun to question the primacy of bloodlines as the basis for defining families. These changes are altering core principles of trusts and estates law, such as the basic notions of dead-hand control and the primacy of the bloodline.

In Part II, Professor Cahn applies a class lens to trusts and estates law. She notes that more than half of the population do not write wills, yet we use the preferences of people who die testate to make recommendations for intestacy schemes. People who die testate tend to be older, wealthier, and white. This means that the assumptions that we derive from examining how they dispose of their property really just tell us about the preferences of people in that demographic, yet their preferences have an outsized impact on intestacy laws. This creates a potential for bias because we rely upon the preferences of people who, as a group, are more likely to leave wills.

Professor Cahn proceeds to spell out the difference between income and wealth. She notes that income and wealth vary among different races, age groups, and genders. For example, she notes that African Americans in the 50 to 65-year-old age group have about 10 percent of the wealth of whites in that age group. Similarly, Professor Cahn focuses on age and notes that women over age 65 have incomes 25 percent lower than men of the same age, and women in this age group are 80 percent more likely than men to experience poverty. She also notes that women have different amounts of wealth than men in our country. Though the data varies, one report estimates that women control approximately one-fifth of U.S. wealth.

Professor Cahn additionally focuses on the impact of wealth on children and notes that intergenerational wealth accounts for over half of the net worth of American families. Inherited wealth impacts credit, which in turn impacts employment, housing options, access to financial products, and interest rates for borrowing money. In effect, these patterns perpetuate racial inequalities across generations.

In Part III of her article, Professor Cahn notes that focusing on the wealth narrative allows us to see the impact of trusts and estates doctrine on people of varying socioeconomic levels. It also demonstrates the need to change the doctrine to address actual preferences, and it illustrates the benefits of considering alternate experiences and perspectives.

Professor Cahn examines the wealth narrative in two contexts. First, she questions the notion that everybody needs a will. She concludes that it may not hold true for people who prefer that survivors do what they think is best or for families in which it would disrupt family harmony for the person to make such decisions in a will. Second, she considers intestacy and notes that the rules should expand to include civil unions, domestic partners, and stepchildren, in order to reflect the reality of many modern families.

Professor Cahn ends by noting that this approach is likely to lead to challenges of other doctrines as well, such as revocation upon divorce statutes, which are not useful to low-income, unmarried people. She also notes that critically reexamining the trusts and estates canon is only one way to look at issues of social inequality. Larger scale reforms could include changes to labor market policies, universal access to health insurance, free early childhood education, retraining opportunities, and minimum incomes.

Overall, Professor Cahn has written thought-provoking article. By looking at the trusts and estates canon with a critical eye, she is helping us to reform our laws in light of modern realities.

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