Articles

The Demand for Fiduciary Services: Evidence from the Market in Private Donative Trusts

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Recent revelations on the use of fiduciary services raise concerns regarding their use for tax and creditor avoidance. Yet given the secrecy shrouding much of the fiduciary industry, we do not know which fiduciary services are used for such purposes, and to what extent. Shining a light on a particularly obscure part of the industry, this Article presents and analyzes the results of the first-ever global survey of professional service providers to private donative trusts, having obtained 409 usable responses from professionals in 82 jurisdictions, amplified by twenty-five interviews conducted with professional trust service providers in five jurisdictions. I report new data on four controversial features of current trust practice: (1) perpetual and extreme long-term trusts; (2) trust terms exonerating trustees from liability to beneficiaries; (3) tools rendering beneficiaries' entitlements inaccessible to their creditors; and (4) the control of trusts by their creators.

I find that trusts drafted to subsist for more than a century are fairly common, especially offshore, but many such trusts are not in fact likely to survive that long. Trustee exculpatory terms are now standard in donative trusts serviced by professionals, with most settlors neither demanding nor receiving any quid pro quo for their inclusion. Anti-creditor techniques protecting beneficiaries' entitlements are even more ubiquitous than trustee exculpatory terms, particularly in trusts serviced by U.S.-resident providers. Many protected beneficiaries are not less able than the average person to take care of their financial affairs. Finally, express reservation of powers by trust settlors is a majority phenomenon in the United States, but a minority one elsewhere. The actual control of trusts by their settlors is likewise far more common in the United States than elsewhere. I conclude the Article with recommendations for law reform that makes trusts likelier to benefit their beneficiaries and less likely to avoid duties owed to creditors and the state.

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INTRODUCTION

In 2015, an anonymous source leaked 11.5 million documents connected with Mossack Fonseca, an international law firm specializing in asset structuring and tax planning, to the Süddeutsche Zeitung, a German newspaper.[1] The documents, soon after dubbed the "Panama Papers" due to the location of Mossack Fonseca's headquarters,

1. Eric Lipton & Julie Creswell, *Panama Papers Show How Rich United States Clients Hid Millions Abroad*, N.Y. TIMES (June 6, 2016) https://www.nytimes.com/2016/06/06/us/panama-papers.html.

contained information on more than 214,488 offshore entities, exposing how wealthy persons, including political leaders, make use of such structures in order to save taxes, put assets out of the reach of creditors, invest, and transfer assets.[2] The Panama Papers contained references to more than 14,000 clients, including, according to the *New York Times*, "at least 2,400 clients based in the United States over the past decade."[3] In the wake of the April 2016 publication of the Panama Papers data in the world media, Maria Luisa Navarro, the Panamanian Vice-Minister for Multilateral Affairs and Cooperation, commented that while Panama is not a tax haven, tax evasion is "not a crime in our country as is a practice in many other countries."[4]

The Panama Papers open a window onto the global demand for offshore fiduciary services. However, since the data revealed reflects the practice of just one multinational law firm, it cannot support conclusions about the demand for fiduciary services generally, meaning the kinds of fiduciary services generally in demand and the consequences that flow from the services consumed. Aggregate data shows the use of offshore jurisdictions' financial services sectors is heavy and growing: Eight percent of the financial wealth of households and fifty-five percent of the foreign profits of U.S. firms are now held in offshore jurisdictions.[5] The amount of money individuals keep in such jurisdictions has grown by twenty-five percent from 2009 to 2015.[6] Such aggregate data does not show, however, what kinds of fiduciary services are being supplied either onshore or offshore.

Detailed data on the fiduciary services currently being supplied is principally desirable since some fiduciary services are alleged by some to have negative consequences. Some such services are said to benefit the clients purchasing them at society's expense, whether by shrinking the amount of tax clients pay far below the amount which they would otherwise have paid,[7] or by making their property inaccessible to their

2. *Id.*; Jessica Durando, *Panama Papers: What We Know Now*, USA TODAY (last updated May 10, 2016, 6:57 AM), http://www.usatoday.com/story/news/world/2016/05/09/panama-papers-leak-documents-tax-shelters/84132964/; Editorial, *The Panama Papers in Perspective*, WALL ST. J. (Apr. 4, 2016, 6:54 PM), https://www.wsj.com/articles/the-panama-papers-in-perspective-1459810493.

3. Editorial, *Panama Papers Point to Tax Evasion*, N.Y. TIMES (June 6, 2016), https://www.nytimes.com/2016/06/07/opinion/panama-papers-point-to-tax-evasion.html.

4. *Tax Evasion Not a Crime in Panama: Panamanian Minister Maria Luisa Navarro*, THE ECON. TIMES (last updated May 16, 2016, 10:03 PM), http://articles.economictimes.indiatimes.com/2016-05-16/news/73126181_1_tax-haven-tax-evasion-crime.

5. GABRIEL ZUCMAN, THE HIDDEN WEALTH OF NATIONS: THE SCOURGE OF TAX HAVENS 3–4, 34–45 (Teresa Lavender Fagan trans., 2015). "The financial wealth of households is the sum of all the bank deposits, portfolios of stocks and bonds, shares in mutual funds, and insurance contracts held by individuals throughout the world, net of any debt." *Id.* at 35.

6. *Id.* at 4.

7. *See infra* notes 73–74 and accompanying text.

creditors.[8] Other fiduciary services are said to principally benefit the fee-drawing professionals supplying them, while clients collect dwindling sums of money[9] and are increasingly exposed to service providers' negligence.[10] The true extent of these consequences depends on the quantity of such fiduciary services in fact consumed and their precise characteristics.

One part of the market in fiduciary services about which much remains unknown is the market in private donative trusts. While some institutional trustees of private donative trusts report to financial regulatory authorities and all trustees report to the Internal Revenue Service ("IRS"), the data reported is paltry.[11] It does not include detailed information on either the administrative provisions of reporting trusts, which govern trustees' management of trust property, or on their dispositive provisions, which govern trustees' distribution of that property. There is no publicly available cache of donative trust instruments analogous to the corporate contracts disclosed to the Securities and Exchange Commission and utilized for research purposes by scholars including Theodore Eisenberg and Geoffrey Miller,[12] John Coates,[13] Matthew Cain and Steven Davidoff,[14] and Sarath Sanga.[15]

Due to this dearth of hard data, discussion of the important policy questions raised by the current use of private donative trusts has remained largely conjectural. This study contributes to policy debates regarding four controversial features at the heart of current private donative trust practice: (1) perpetual trusts;[16] (2) trust instrument clauses exonerating trustees from liability for loss they inflict on beneficiaries;[17] (3) techniques protecting beneficiaries' entitlements under trust from

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8. *See infra* note 121 and accompanying text.

9. *See infra* notes 70–72 and accompanying text.

10. *See* Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67 (2005); *infra* note 21 and accompanying text.

11. For a detailed description of the data reported, see notes 160–164 and accompanying text.

12. *See generally* Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 VAND. L. REV. 1973, 1975 (2006); Theodore Eisenberg & Geoffrey P. Miller, *The Flight to New York: An Empirical Study of Choice of Law and Choice of Forum Clauses in Publicly-Held Companies' Contracts*, 30 CARDOZO L. REV. 1475 (2009).

13. *See generally* John C. Coates IV, *Managing Disputes Through Contract: Evidence from M&A*, 2 HARV. BUS. L. REV. 295 (2012) (examining dispute management clauses in mergers and acquisitions contracts).

14. *See generally* Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. EMPIRICAL LEGAL STUD. 92 (2012) (concluding, based on a study, that Delaware has become more valuable to corporate actors who influence incorporation choices and that Delaware competes strongly for legal products).

15. *See generally* Sarath Sanga, *Choice of Law: An Empirical Analysis*, 11 J. EMPIRICAL LEGAL STUD. 894 (2014) (proposing a new measure for studying choice of law).

16. *See infra* Part III.A.

17. *See infra* Part III.B.

their creditors;[18] and (4) the control of trustees by trust grantors.[19] All four features are commonly described as harmful. Perpetual and other extreme long-term trusts (those drafted to last more than a century) are claimed to provide tax savings to their settlors and beneficiaries, and fees to the trust service providers servicing them at the expense of the rest of society.[20] The recent eclipse of trustees' traditional duty of care and of their liability for loss resulting from its infringement—dozens of jurisdictions having recently amended their law to clarify that they will respect trust terms relieving trustees from duty, liability, or both—is claimed to have transferred the risk of loss resulting from trustee negligence from trustees to trust funds and the beneficiaries entitled to them.[21] Spendthrift protections and other techniques insulating beneficial entitlements under trust from beneficiaries' creditors allegedly undermine the system of civil liability. They are also said to benefit wealthy indebted beneficiaries at the expense of poorer debtors who, despite not benefitting from any trusts, are exposed to the additional interest creditors charge to compensate themselves for the losses they incur as a result of beneficiaries' use of protective techniques.[22] Finally, many trust grantors are said to retain control over their trustees and enjoy either the tax savings resulting from that retention or the trust property being inaccessible to their creditors, at the expense of those creditors, of poorer debtors who have not created any trusts, and of the rest of society.[23]

How many of the private donative trusts currently in existence are likely to exist, and to provide asset growth free of federal transfer taxation for centuries? How many of the same trusts provide that their trustees will not be liable for loss they negligently inflict on trust beneficiaries? How many of them provide that beneficiaries' entitlements thereunder will not be available to beneficiaries' creditors, potentially including persons beneficiaries have injured, their spouses, and their children? Until the present Article we largely did not know the answers to these questions.

18. *See infra* Part III.C.

19. *See infra* Part III.D.

20. *See, e.g.*, RONALD CHESTER, FROM HERE TO ETERNITY? PROPERTY AND THE DEAD HAND 21, 39, 74, 115 (2007); RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 68–70, 154–55 (2010); Mark L. Ascher, Book Review, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149 (2011) (reviewing LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW (2009)).

21. *See generally* Leslie, *supra* note 10 (discussing the implications of characterizing trustees' fiduciary duties as default rules).

22. *See, e.g.*, Willard M. Bushman, *The (In)validity of Spendthrift Trusts*, 47 OR. L. REV. 304, 312 (1968); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1036 (2000). For the negative impact of creditor avoidance techniques on borrowers generally and low-income borrowers specifically, see Yonathan A. Arbel, *Shielding of Assets and Lending Contracts*, 48 INT'L REV. L. & ECON. 26 (2016).

23. *See infra* Part I.E.

Empirical studies of private donative trusts have been few and far between. American scholars have provided empirical treatments of only two questions: (1) what impact did U.S. states' abolition of the rule against perpetuities have on the quantity of trust assets administered in each state and the average size of trust accounts administered there;[24] and (2) what impact did the 1990s reform of U.S. trust investment law have on trustees' investment practices and the volatility of trust corpus.[25] One other issue, that of settlors' attitudes concerning trustee exculpatory terms, received empirical study in England.[26] Also, an Italian law student in 2014 conducted an empirical study of the Italian trust industry, based on a survey of Italian trust service providers.[27] But that is essentially all.

The present Article plugs this yawning gap in the literature by reporting and analyzing original empirical data I obtained on the current use of private donative trusts. I report the findings of the first-ever global survey of professional service providers to private donative trusts, as well as of a series of detailed interviews I held with professional trust service providers in the United States, England, Italy, Switzerland, and Israel. I garnered data from 434 service providers in eighty-two jurisdictions, the largest, most diverse respondent group ever obtained in research targeting trust service providers.[28]

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24. For information on the effects of the abolition of the rule against perpetuities, see generally James R. Hines Jr., *How Important Are Perpetual Tax Savings?*, 27 TAX POL'Y & ECON. 101 (2013); Max M. Schanzenbach & Robert H. Sitkoff, *Perpetuities or Taxes? Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2006); Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005) [hereinafter Sitkoff & Schanzenbach, *Jurisdictional Competition*].

25. For information on the impact of law reform on trust investment practices, see generally Martin D. Begleiter, *Does the Prudent Investor Need the Uniform Prudent Investor Act—An Empirical Study of Trust Investment Practices*, 51 ME. L. REV. 27 (1999); Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON. 681 (2007); Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC J. 314 (2009); Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Market Risk: An Empirical Analysis*, 14 J. EMPIRICAL LEGAL STUD. 129 (2017).

26. *See* THE LAW COMM'N, *Trustee Exemption Clauses: A Consultation Paper* 30–46 (Consultation Paper No. 171, 2002), https://www.treasurers.org/ACTmedia/cp171.pdf.

27. Lorenzo Ferrari, Il Settore del Trust in Italia (2014) (unpublished thesis, Laurea Specialistica in Management, Università L. Bocconi—Milano), https://rmauro.academia.edu/lorenzoferrari. For survey results, see *id.* at 79–100.

28. Four-hundred and nine trust service providers provided usable survey responses; twenty-five such providers gave me lengthy, in-person interviews. Exactly four survey-based research projects about private donative trusts have reached publication: BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (1986) (surveying the 50 largest of each of U.S. bank trust departments, corporate pension funds, foundations, and private universities, 200 respondents in all, about their investment practices); Francis J. Collin, Jr. et al., *A Report on the Results of a Survey About Everyday Ethical Concerns in the Trust and Estate Practice*, 20 ACTEC NOTES 201 (1994) (surveying 262 members of the American College of Trust and Estate Counsel ("ACTEC") regarding their techniques for coping with the everyday ethical concerns raised by trust and estate practice); Begleiter, *supra* note 25 (surveying 239 corporate trustees in Iowa about their investment practices to examine

I found that trusts drafted to last for more than a century are fairly common, especially offshore. However many trusts which are drafted to last more than a century are in practice unlikely to last that long. Despite this last finding, the number of trusts which are in fact likely to last beyond a century is high enough to raise significant concern. Trustee exculpatory terms are now standard in trusts serviced by professionals, with most settlors neither demanding nor receiving any quid pro quo for their inclusion. Anti-creditor techniques protecting beneficiaries' entitlements are now ubiquitous, particularly in trusts serviced by U.S.-resident service providers. Many protected beneficiaries are as able as the average person to take care of their financial affairs. The express reservation of powers to trust settlors is a majority phenomenon in the United States, but a minority one elsewhere. The actual control of trusts by their settlors, whether in the exercise of expressly reserved powers or otherwise, is likewise far more common in the United States than elsewhere. American settlors' penchant for retaining powers over their trusts is largely a result of the income tax savings resulting from power retention under American law, and of the creditor protection such retention provides.

Based on these results, I offer the following contributions to policy debates regarding the four features under discussion. I suggest that state legislatures make the validity of trusts drafted to last longer than the traditional perpetuity period conditional on the availability of mechanisms for early termination. If jurisdictions wish to recalibrate their trust services markets based on a threshold of trustee liability higher than bad faith, they should enact legislation setting a higher mandatory minimal liability standard for trustees and stating that drafted attempts to provide liability thresholds lower than that standard shall be void. Despite the difficulties raised by such legislation, the higher standards it creates could be used as a marketing tool, leading to a beneficial, interjurisdictional "race to the top." American law should curtail its recognition and enforcement of anti-creditor strategies protecting beneficiaries' entitlements under trusts, limiting the extent of spendthrift protection and creating additional exceptions to that protection. Finally, the perverse tax and creditor-protection incentives fundamental to American settlors' habit of retaining powers over their trusts should be changed, and I suggest means for changing them.

The rest of this Article is structured as follows. Part I provides an introduction to private donative trusts and the four controversial features on which I focus. Part II addresses the challenges of empirical research

the impact on those practices of Iowa legislation of 1991 reforming the traditional prudent man rule); THE LAW COMM'N, *supra* note 26, at 30–46 (surveying 345 English trustees and legal advisors to trustees and settlors about the prevalence of trustee exemption/exculpation terms, settlor attitudes toward such terms, and potential techniques for their regulation).

on the use of private donative trusts and describes the research techniques used. Part III presents and analyzes my empirical results regarding each of the four features examined. Part IV draws policy implications concerning each of the four features. A conclusion follows, along with two appendices. APPENDIX A classifies jurisdictions into onshore, offshore, and midshore, and APPENDIX B addresses the limitations of the data obtained.

I. FIDUCIARY PRODUCTS IN DISPUTE

Before I describe my empirical findings, an introduction to the policy debates is necessary. I open this Part, for background purposes, with a description of an uncontroversial model of private donative trusts. I then discuss the four controversial trust features at the heart of this Article: perpetual and other extreme long-term trusts, trustee exemption clauses, techniques protecting beneficiaries' entitlements from their creditors, and grantors' control of their trustees. I explain the unresolved controversies regarding each of the four features, lay out the different views regarding each and show how empirical data on the use of each feature in practice could resolve them. All references to trusts, in this and later Parts, are to private donative trusts exclusively.

A. PRIVATE DONATIVE TRUSTS: AN UNCONTROVERSIAL BASELINE

Private donative trusts are a technique for allocating interests in property.[29] A person, including a legal entity,[30] can create a trust of any property he, she, or it owns. Trusts can be created in two basic ways. One way is for the person creating the trust, known as the trust settlor or grantor,[31] to transfer one or more assets to another person or entity,[32] instructing that other to hold the assets—henceforth known as the trust property or trust assets[33]—for the benefit of one or more persons or entities[34]—known in trust-speak as beneficiaries[35]—or for a specified

29. 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 2.1.6 (5th ed. 2006); AMY MORRIS HESS ET AL., THE LAW OF TRUSTS AND TRUSTEES § 231 (3d ed. 2007).

30. UNIF. TRUST CODE §§ 103(10)–(15) (UNIF. LAW COMM'N 2010) (enacted in thirty states and the District of Columbia); HESS ET AL., *supra* note 29, § 41. For references to different states' enacted versions of the Uniform Trust Code as of 2012, see the recent RESTATEMENT (THIRD) OF TRUSTS § 105 cmt. c, reporter's notes (AM. LAW INST. 2012). See the current enactment status of the Uniform Trust Code at *Legislative Enactment Status: Trust Code*, UNIF. LAW COMM'N, http://www.uniformlaws.org/LegislativeMap.aspx?title=Trust%20Code (last visited June 4, 2017).

31. HESS ET AL., *supra* note 29, § 1; CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS III, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK 31 (2014); SCOTT ET AL., *supra* note 29, § 2.2.1.

32. UNIF. TRUST CODE § 401; RESTATEMENT (THIRD) OF TRUSTS § 10 (AM. LAW INST. 2003); HESS ET AL., *supra* note 29, § 1; ROUNDS, JR. & ROUNDS III, *supra* note 31, at 31; SCOTT ET AL., *supra* note 29, § 3.1.

33. HESS ET AL., *supra* note 29, § 1; ROUNDS & ROUNDS, *supra* note 31, §§ 20, 31; SCOTT ET AL., *supra* note 29, § 2.2.2.

34. HESS ET AL., *supra* note 29, §§ 1, 41; ROUNDS, JR. & ROUNDS III, *supra* note 31, § 20; SCOTT ET AL., *supra* note 29, § 2.1.6.

purpose. The transferee, who is bound by the settlor's instructions regarding the use of the property transferred,[36] is known as a trustee.[37] Alternatively, the settlor can turn himself into a trustee by declaring that from a certain point in time, he, she, or it will hold certain specified property in trust for certain specified beneficiaries or purposes.[38] While legal entities, such as corporations, can be settlors, trustees, and beneficiaries, the trust itself is a relationship between these three parties rather than a legal entity. It is thus strictly meaningless to speak of a trust owning property or owing duties. It is the trustee, not the trust, who owns and owes.[39] One person or entity can simultaneously be trustee and beneficiary, settlor and beneficiary, or settlor and trustee, and even serve in all three capacities.[40] The one forbidden combination is a trustee also serving as the trust's only beneficiary.[41] In this last case, that person or entity is an absolute owner of the trust property, holding, managing, and enjoying it, leaving no room for a trust relationship.[42]

Trusts enable a separation of property management from the enjoyment of that property;[43] unless they are also beneficiaries, trustees may not enjoy the trust property,[44] except in drawing their fees.[45] Beneficiaries, on the other hand, typically enjoy property they did not own or manage until their trustees distributed it to them.[46] Settlors often give trustees discretion regarding the selection of beneficiaries, the distribution of the trust fund between them, and the timing of that

35. HESS ET AL., *supra* note 29, § 1; ROUNDS, JR. & ROUNDS III, *supra* note 31, § 20; SCOTT ET AL., *supra* note 29, § 2.2.3.

36. JESSE DUKEMINIER & ROBERT H. SITKOFF, WILLS, TRUSTS, AND ESTATES 579 (9th ed. 2013); ROUNDS, JR. & ROUNDS III, *supra* note 31, § 20; SCOTT ET AL., *supra* note 29, § 2.2.4.

37. HESS ET AL., *supra* note 29, § 1; ROUNDS, JR. & ROUNDS III, *supra* note 31, §§ 20, 31.

38. UNIF. TRUST CODE § 401 (UNIF. LAW COMM'N 2010); RESTATEMENT (THIRD) OF TRUSTS § 10 (AM. LAW INST. 2012); HESS ET AL., *supra* note 29, §§ 1, 41; ROUNDS, JR. & ROUNDS III, *supra* note 31, § 31; SCOTT ET AL., *supra* note 29, §§ 3.1, 3.1.1.

39. ROUNDS, JR. & ROUNDS III, *supra* note 31, § 8.15.77.

40. RESTATEMENT (THIRD) OF TRUSTS § 32 (AM. LAW INST. 2012); ROUNDS, JR. & ROUNDS III, *supra* note 31, § 3.1; SCOTT ET AL., *supra* note 29, § 3.1; 2 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS §§ 11.2, 11.3, 12.3, 12.4 (5th ed. 2008).

41. UNIF. TRUST CODE § 402(5); GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 103, 129 (3d ed. 2007); ROUNDS, JR. & ROUNDS III, *supra* note 31, §§ 3.2, 8.7; SCOTT ET AL., *supra* note 29, § 2.1.6; 5 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS, § 34.5 (5th ed. 2008).

42. BOGERT & BOGERT, *supra* note 41, § 129; ROUNDS, JR. & ROUNDS III, *supra* note 31, § 8.7.

43. HESS ET AL., *supra* note 29, § 1; DUKEMINIER & SITKOFF, *supra* note 36, at 579; ROUNDS, JR. & ROUNDS III, *supra* note 31, at 15–16.

44. UNIF. TRUST CODE § 802; RESTATEMENT (THIRD) OF TRUSTS § 78 (AM. LAW INST. 2012); HESS ET AL., *supra* note 29, § 146; ROUNDS, JR. & ROUNDS III, *supra* note 31, § 6.1.3.4; SCOTT ET AL., *supra* note 40, § 17.2.

45. UNIF. TRUST CODE § 708; RESTATEMENT (THIRD) OF TRUSTS § 38 (AM. LAW INST. 2012); ROUNDS, JR. & ROUNDS III, *supra* note 31, § 3.5.2.3; SCOTT ET AL., *supra* note 40, § 21.2.

46. DUKEMINIER & SITKOFF, *supra* note 36, at 579; SCOTT ET AL., *supra* note 40, § 10.1.

distribution.[47] Trustees are under a duty to run the trust for the benefit of its beneficiaries:[48] to manage the assets prudently,[49] with a view to the beneficiaries' needs,[50] and exercise all of their powers with strict impartiality between the beneficiaries.[51] Impartiality does not necessarily mean equal division where, for example, the settlor instructs trustees to distribute the trust fund among its beneficiaries according to their health needs. Trustees of such a trust would not be amiss in distributing large sums to beneficiaries in need of expensive medical treatment and little, if anything, to those beneficiaries with no such needs.[52] Some trusts include a fourth, nonobligatory, trust actor, called a trust protector. Protectors are often given powers to veto trustees' exercise of their powers and discretions, to direct trustees in their exercise, to hire and fire trustees, as well as other powers.[53] Persons providing services to trusts have various professional backgrounds, such as lawyers, accountants, bankers, investment advisors, brokers, insurers, or experts of other types. Such service providers often appear in a trust structure as its trustees, though some appear as protectors, as trustee delegates, or in one of many additional, bespoke positions found in individual trusts. Many trustees and trust protectors are banks, trust companies, or law firms. Others are individual professionals or laypersons. In this Article, I refer to all persons who are not involved in trusts as settlors or beneficiaries as "trust service providers" or "trust practitioners."

Trusts can be created by will, by contract, by deed, or orally.[54] When a trust is created in a written document other than a will, that document is referred to as the "trust instrument."[55] Under traditional trust law,

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47. Helene S. Shapo et al., Law of Trusts & Trustees § 228 (3d ed. 2007); Dukeminier & Sitkoff, *supra* note 36, at 579, 583–84; Rounds, Jr. & Rounds III, *supra* note 31, § 3.5.3.2(a); Scott et al., *supra* note 40, § 20.1.

48. Bogert & Bogert, *supra* note 41, § 541; Dukeminier & Sitkoff, *supra* note 36, at 580, 603; Rounds, Jr. & Rounds III, *supra* note 31, § 6.1.3; Scott et al., *supra* note 40, § 17.2.

49. Unif. Trust Code § 804; Restatement (Third) of Trusts § 77 (Am. Law Inst. 2012); Bogert & Bogert, *supra* note 41; Dukeminier & Sitkoff, *supra* note 36, at 580, 602–03; Rounds, Jr. & Rounds III, *supra* note 31, §§ 6.1, 6.1.1; Scott et al., *supra* note 40, § 17.6.

50. Bogert & Bogert, *supra* note 41; Rounds, Jr. & Rounds III, *supra* note 31, §§ 3.2.6, 6.1, 6.1.3; Scott et al., *supra* note 40, § 17.2.

51. Unif. Trust Code § 803; Restatement (Third) of Trusts § 79; Rounds, Jr. & Rounds III, *supra* note 31, § 6.2.5; Scott et al., *supra* note 40, § 20.1.

52. Restatement (Third) of Trusts § 79; Rounds, Jr. & Rounds III, *supra* note 31, § 6.2.5; Scott et al., *supra* note 40, § 20.1.

53. For information on protectors, see Restatement (Third) of Trusts § 90 cmt. j, § 64(2) cmt. d, § 75 cmts. b–d, reporter's notes, § 94 cmt. d(1), and reporter's notes (Am. Law Inst. 2007); Paolo Panico, International Trust Laws 405–445 (2010); Scott et al., *supra* note 40, § 16.7. For general background information, see generally Andrew Holden, Trust Protectors (David Brownbill ed., 2011).

54. Unif. Trust Code § 401; Restatement (Third) of Trusts § 10; Hess et al., *supra* note 29, § 41; Dukeminier & Sitkoff, *supra* note 36, at 401, 403, 407; Rounds, Jr. & Rounds III, *supra* note 31, at 17, 31; Scott et al., *supra* note 40, §§ 7.1, 3.1.1.

55. Unif. Trust Code § 103(19); Hess et al., *supra* note 29, §§ 1, 147; Rounds, Jr. & Rounds III, *supra* note 31, at 34–35.

once the trust property is held by the trustee, the settlor steps out of the picture, unless he has himself become a trustee or a beneficiary. Even in that case, he steps out of the picture *as settlor*, meaning the settlor, as such, no longer has any powers over either the trustee or the trust property. Assuming the settlor and trustee are different persons, the property is no longer the settlor's, and the trustee, while subject to the provisions of the trust instrument, is not subject to any other wishes of the settlor.[56]

Beneficiaries have some rights against their trustees, including the right to require that a trustee who has negligently, recklessly, or intentionally created a loss for the trust fund use its personal, nontrust assets to make up the loss and restore the fund.[57] Beneficiaries' rights to receive trust property, on the other hand, can be limited, or postponed far into the future.[58] One beneficiary can be entitled to receive any income earned on the trust assets from the creation of the trust until his or her death, another may be entitled to receive any income earned on the same assets after the former beneficiary's death, and a third beneficiary may be entitled to receive the trust corpus, or capital, at some future time.[59] Beneficiaries' rights to receive property can also be made uncertain by giving trustees discretion over the allocation of the trust fund between its potential beneficiaries,[60] or by making beneficiaries' rights to distributions conditional, whether on the achievement of personal milestones such as marriage or college graduation or on beneficiaries' needs, as adjudged by the trustee.[61]

The weak, conditional character of many beneficiaries' rights to receive trust property means trusts can be used as a creditor protection device. While a person's existing definitive right to receive trust property at a future time is available to his current creditors, any property over which trustees have been given a distributive (or "dispositive") discretion is inaccessible to the creditors of any specific beneficiary so long as trustees may choose not to allocate any property to that beneficiary and have not yet allocated any to him, her, or it.[62] The law of all fifty states

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56. HESS ET AL., *supra* note 29, § 42; ROUNDS, JR. & ROUNDS III, *supra* note 31, § 4.1; SCOTT ET AL., *supra* note 40, § 24.4.1.

57. UNIF. TRUST CODE §§ 1001–1013; RESTATEMENT (THIRD) OF TRUSTS §§ 99–100 (AM. LAW INST. 2012); BOGERT & BOGERT, *supra* note 41, § 541; DUKEMINIER & SITKOFF, *supra* note 36, at 580; ROUNDS, JR. & ROUNDS III, *supra* note 31, § 7.2.3; SCOTT ET AL., *supra* note 40, §§ 24.3, 24.11.3.

58. HESS ET AL., *supra* note 29, § 181; ROUNDS, JR. & ROUNDS III, *supra* note 31, § 5.3.1.

59. *See* BOGERT & BOGERT, *supra* note 41; *see also* ROUNDS, JR. & ROUNDS III, *supra* note 31.

60. RESTATEMENT (SECOND) OF TRUSTS § 129 cmt. d (AM. LAW INST. 1959); ROUNDS, JR. & ROUNDS III, *supra* note 31, §§ 3.5.3.2(a), 5.3.1; SCOTT ET AL., *supra* note 40, §§ 18.2, 20.1.

61. HESS ET AL., *supra* note 29, § 181.

62. RESTATEMENT (SECOND) OF TRUSTS § 155 (AM. LAW INST. 1959); SHAPO ET AL., *supra* note 47, § 221; DUKEMINIER & SITKOFF, *supra* note 36, at 687–88; ROUNDS, JR. & ROUNDS III, *supra* note 31, §§ 5.3.3, 5.3.3.3(a); SCOTT ET AL., *supra* note 40, § 15.3.

also allows another kind of creditor-protected trust, known as a spendthrift trust, under which interests may be vested in specific beneficiaries and still remain inaccessible to their creditors until actually distributed to them.[63] Similarly, settlors enjoy the inaccessibility of their former property to their creditors once they have created a trust of that property.[64] Trust property is also not available to the trustee's personal, nontrust creditors.[65] That the trust property can be immune from claims by creditors of all three trust parties hints at the trust's significant potential as a tool of tax planning and creditor protection.[66]

Finally, traditional trust law limited the permissible duration of settlors' allocative plans by subjecting beneficiaries' interests under trusts to the rule against perpetuities. Under the traditional rule, contingent or potential interests were void unless they were bound to vest, if at all, within a period encompassing the lifetime of some person alive at the time of the creation of the interest plus twenty-one more years.[67]

B. Perpetual and Extreme Long-Term Trusts

The conventional model of private donative trusts just described has been disturbed by a number of radical departures from that model. One such departure is the perpetual or extreme long-term trust. This is a trust set up to last longer than the classical perpetuity period just mentioned. Such trusts, which would be impermissible under the rule against perpetuities, have now become legal in the more than thirty states that have either abolished the rule entirely or extended the maximum permissible perpetuity period to several centuries or a thousand years.[68]

Perpetual and other extreme long-term trusts are highly controversial, with most commentators condemning them as a harmful innovation. The principal arguments raised against them are the following. Insofar as settlors attempt to direct the behavior of beneficiaries living more than a century after the creation of the trust by making their entitlements conditional on certain behaviors, the

63. Unif. Trust Code §§ 502–03 (Unif. Law Comm'n 2010); Shapo et al., *supra* note 47, §§ 222, 227; Dukeminier & Sitkoff, *supra* note 36, at 694–95; Rounds, Jr. & Rounds III, *supra* note 31, § 5.3.3.3(c); Scott et al., *supra* note 40, § 15.2.5.

64. Hess et al., *supra* note 29, § 233; Scott et al., *supra* note 40, § 15.4.2.

65. Unif. Trust Code § 507; Restatement (Third) of Trusts § 106 (Am. Law Inst. 2012); Hess et al., *supra* note 29, § 146; Rounds, Jr. & Rounds III, *supra* note 31, at 16–17.

66. Hess et al., *supra* note 29, § 10.

67. Unif. Trust Code § 402(b); Restatement (Third) of Trusts § 29 (Am. Law Inst. 2012); Shapo et al., *supra* note 47, § 213; Dukeminier & Sitkoff, *supra* note 36, at 877; Rounds, Jr. & Rounds III, *supra* note 31, § 8.2.1; Scott et al., *supra* note 40, § 9.3.9.

68. For current perpetuities law in the several states, see Jeffrey A. Schoenblum, Multistate Guide to Estate Planning 2015 9001–9357 (2014). For a more concise table listing states that have repealed their rules against perpetuities and the maximum trust duration now permitted in each, with statutory references, see Daniel J. Amato, Note, *The Good, the Bad, and the Ugly: The Political Economy and Unintended Consequences of Perpetual Trusts*, 86 S. Cal. L. Rev. 637, 655 (2013).

incentives created may, by the time they are to operate, become relics of the past, unsuitable for present conditions.[69] To the extent that assets subject to extreme long-term trusts are likely to stay subject to those trusts for long periods, they may be inefficiently allocated since persons who are not beneficiaries under the trusts may value them more highly than the trust beneficiaries. While both of these arguments apply to any trust, the inefficiency is likely to increase with the trust duration.

Another much discussed issue is that in the common case of a trust for the settlor's descendants, a trust lasting hundreds of years is likely to eventually have so many beneficiaries that each will only receive a tiny sliver of the trust fund. As Larry Waggoner has pointed out, given conventional assumptions regarding fertility, 450 years after a perpetual trust for a settlor's descendants is created, it may have as many as 1.8 million living beneficiaries. The administrative burden such a trust imposes on its trustees is likely to be heavy, at least if they are granted any discretions, with the predictably large administrative costs being charged to the trust fund.[70] Such a large group of beneficiaries is also likely to be beset with significant collective action problems, as the small amount each beneficiary is likely to reap will make each unlikely to take steps to monitor and enforce trustees' abiding by their duties.[71] Given the heavy administrative costs likely to be charged to the trust fund, beneficiaries' likely tendency to rationally ignore the trust, and trustees' interest in keeping distributions to a minimum, as their compensation is often calculated as a percentage of assets under management, an extreme long-term trust's trustees could therefore become its key actual beneficiaries.[72]

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69. *See, e.g.*, M. W. LAU, THE ECONOMIC STRUCTURE OF TRUSTS 165–79 (2011); MADOFF, *supra* note 20, at 76–77; STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 67–70 (2004); Verner F. Chaffin, *Georgia's Proposed Dynasty Trust: Giving the Dead Too Much Control*, 35 GA. L. REV. 1 (2000); Lionel Smith, *Mistaking the Trust*, 40 H.K. L.J. 787 (2010); Joshua C. Tate, *Perpetual Trusts and the Settlor's Intent*, 53 U. KAN. L. REV. 595, 596 (2005).

70. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 27, introductory note and text accompanying nn.21–50 (AM. LAW INST. 2011); LAWRENCE M. FRIEDMAN, DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW 125–36 (2009); Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003); Scott Andrew Shepard, *A Uniform Perpetuities Reform Act*, 16 N.Y.U. J. LEGIS. & PUB. POL'Y 89, 104–05 (2013) [hereinafter Shepard, *A Uniform Perpetuities Reform Act*]; Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* 6–11 (U. Mich. Law Sch. Law & Econ. Working Paper Series, Working Paper NO. 76, 2014). But *cf.* Scott Andrew Shepard, *Which the Deader Hand?: A Counter to the American Law Institute's Proposed Revival of Dying Perpetuities Rules*, 86 TUL. L. REV. 559 (2012). For criticism of Waggoner's fertility-based calculus, see William J. Turnier & Jeffery L. Harrison, *A Malthusian Analysis of the So-Called Dynasty Trust*, 28 VA. TAX REV. 779 (2009). As to the large administrative costs involved in running an extreme long-term trust, see RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 692 (8th ed. 2011).

71. Amato, *supra* note 68, at 663–64.

72. *Id.* at 664–65; Lucy A. Marsh, *The Demise of Dynasty Trusts: Returning the Wealth to the Family*, 5 EST. PLAN. & COMMUNITY PROP. L.J. 23, 25 (2012).

Finally, some commentators worry that perpetual trusts are likely to exacerbate the large concentrations of wealth and economic inequality typical of current society.[73] A principal dynamic facilitating such an outcome are the tax savings perpetual trusts make possible for their settlors and beneficiaries. Once assets have been settled on trust, they are not subject to federal transfer taxation (the estate tax, the gift tax, and the generation-skipping transfer tax) for the duration of the trust, meaning, in the case of a perpetual trust, forever. Such a multigenerational exemption from federal transfer taxation may lead to revenue shortages, the consequences of which will be largely borne by persons who do not use trusts. Trust assets are also not subject to capital gains tax so long as they are not sold.[74]

Other commentators argue that many of these criticisms are partly founded at best. The fear that perpetual trusts will bind beneficiaries living centuries after their creation to behavioral patterns preferred by the long-dead settlor is contradicted by the expectation that far future beneficiaries of trusts for the settlor's descendants are only likely, due to the logic of reproduction, to receive tiny slivers of property. Beneficiaries entitled to such a sliver are likely to forego it rather than adhere to outdated behavioral mandates. If a long-term trust's far future beneficiaries forego their beneficial interests though, one wonders what remaining purpose such a trust fulfills.

The case of beneficiaries with a larger stake in the trust assets is more difficult. Take a trust settled for a 300-year term, to pay ten percent of the assets to the settlor's eldest descendant in each generation throughout that term, so long as that descendant abides by some outdated behavioral condition set by the settlor. While statute empowers courts to modify a trust "upon consent of all the beneficiaries if the court concludes that modification is not inconsistent with a material purpose of the trust,"[75] many beneficiaries of the trust in question are minors or unborn and cannot consent,[76] while courts may see the behavioral condition current beneficiaries want to have set aside as a material

73. *See, e.g.*, CHESTER, *supra* note 20, at 21, 39, 74, 115; MADOFF, *supra* note 20, at 68–70, 154–55; Ascher, *supra* note 20; John V. Orth, *Allowing Perpetuities in North Carolina*, 31 CAMPBELL L. REV. 399, 410 (2009); Note, *Dynasty Trusts and the Rule Against Perpetuities*, 116 HARV. L. REV. 2588, 2603–08 (2003).

74. *See, e.g.*, Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511, 2511, 2518–19 (2006); Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 24, at 370–73.

75. *See* UNIF. TRUST CODE § 411(b) (UNIF. LAW COMM'N 2010).

76. So-called "virtual representation" under the Uniform Trust Code allows a minor or unborn beneficiary to "be represented by and bound by another having a substantially identical interest with respect to the particular question or dispute, but only to the extent there is no conflict of interest between the representative and the person represented." *Id.* § 304. It is far from clear, however, that an adequate representative would be available in the scenario I describe, since each beneficiary would profit from other beneficiaries' forfeiting their shares of corpus due to their having infringed the settlor's condition.

purpose of the trust. Another statutory provision empowers the court to "modify the administrative or dispositive terms of a trust or terminate the trust if, because of circumstances not anticipated by the settlor, modification or termination will further the purposes of the trust,"[77] but courts may see setting aside a settlor's conditions as contrary to the purposes he or she set for the trust. And while courts can hold that trust provisions contrary to public policy are invalid,[78] many outdated conditions are unlikely to be seen as so abhorrent as to infringe public policy. The law governing trust modification, termination, and invalidity does not appear equal to the task of eliminating every outdated or inefficient condition settlors set for their beneficiaries, which renders extreme long-term trusts concerning, since the longer trusts can endure, the more numerous are such conditions likely to be. It is of course true that a choice to forego a conditional gift in order not to abide by the condition does not bar all existing routes to social and political status.[79]

Worries regarding the inefficient allocation of specific trust assets are more easily relieved, since under current law trustees are both empowered to freely alienate trust assets and under a fiduciary duty "to invest assets efficiently for the benefit of the beneficiaries,"[80] which

77. *See id.* § 412(a). Enacted versions were applied in *In re* Moeder, 978 N.E.2d 754 (Ind. Ct. App. 2012); *In re* Steven L. Chapman Irrevocable Trust Agreement, 953 N.E.2d 573 (Ind. Ct. App. 2011); *In re* Nobbe, 831 N.E.2d 835 (Ind. Ct. App. 2005); *In re* Fee Trust, No. 92,928, 2005 Kan. Unpub. LEXIS 72 (Kan. Apr. 22, 2005); *see also* RESTATEMENT (THIRD) OF TRUSTS § 66(1) (AM. LAW INST. 2003); UNIF. TRUST CODE § 412(b) (authorizing the court to "modify the administrative terms of a trust if continuation of the trust on its existing terms would be impracticable or wasteful or impair the trust's administration."). This does not apply to dispositive provisions, which conditions imposed on beneficiaries' rights to enjoy the income or capital are.

78. RESTATEMENT (THIRD) OF TRUSTS § 29 (AM. LAW INST. 2003) ("An intended trust or trust provision is invalid if . . . it is contrary to public policy.").

79. For the diminished weight of the "dead hand" in modern society, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 16–18 (1992); Shepard, *A Uniform Perpetuities Reform Act*, *supra* note 70, at 106–09. However, given Thomas Piketty's argument that private capital growth has been outpacing income in the rich countries since the 1970s, the dead hand may well be staging a comeback. THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 170–76 (Arthur Goldhammer ed., 2014).

80. *See* Amato, *supra* note 68, at 669; *see also* UNIF. TRUST CODE § 815(a)(2)(A) ("A trustee, without authorization by the court, may exercise . . . except as limited by the terms of the trust: all powers over the trust property which an unmarried competent owner has over individually owned property."). A trustee's powers include the power to "acquire or sell property, for cash or on credit, at public or private sale," and, with regard to real property, to:

> construct, or make ordinary or extraordinary repairs to, alterations to, or improvements in, buildings or other structures, demolish improvements, raze existing or erect new party walls or buildings, subdivide or develop land, dedicate land to public use or grant public or private easements, and make or vacate plats and adjust boundaries.

Id. §§ 816(2), 816(8); *see also* Stewart E. Sterk, *Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.*, 24 CARDOZO L. REV. 2097, 2110 (2003) (noting that since trust property is marketable, there is no issue with dead-hand control); Shepard, *A Uniform Perpetuities Reform Act*, *supra* note 70, at 94; *Dynasty Trusts and the Rule Against Perpetuities*, *supra* note 73, at 2599.

would presumably include selling the current assets to the highest bidder where such a sale is in beneficiaries' interests. As for the threatened fractionalization of beneficial interests under an extreme long-term trust, this threat is not an issue where trustees are given power to distribute the trust fund between beneficiaries in such shares as they see fit, as is common. Trustees of such a discretionary trust can divide the fund into shares large enough to make a difference, so long as this suits the settlor's plan. Even if trustees must give each beneficiary of a perpetual family trust an equal share of the fund or the income earned thereon, the appearance of thousands or millions of beneficiaries is far from certain, due to the many brakes on human reproduction: lethal wars, epidemics and natural disasters, legislation limiting fertility, natural and induced sterility, and the choice to limit or eschew reproduction. Even fractionalization itself is not as problematic given financial assets, which make up most of the contents of present-day trusts,[81] as with farming land: While small plots of land cannot be profitably farmed,[82] small amounts of money undeniably benefit their recipients. Under the law of decreasing marginal returns, benefit fractionalization can even be seen as positive, especially given that many descendants of even a wealthy settlor are likely to be quite poor. Further, software and the Internet have made complex administrative tasks created by large numbers of beneficiaries less daunting. Even where trustees are directed to distribute a fund between hundreds of thousands of beneficiaries according to some characteristics of each, and therefore need complex information about each, beneficiaries can be directed to input the necessary information into a website, and software could be programmed to exercise trustees' distributive discretion according to data supplied by the beneficiaries and data the software obtains from other sources.[83] Such software could be programmed, for instance, to minimize the difference between each beneficiary's total income from trust and other sources and the cost to that beneficiary, given his or her family and other circumstances, of attaining a specific living standard.

The risk that trustees of extreme long-term trusts become their main real beneficiaries is to some extent countered as a matter of law by statutes providing that "[t]he court may modify or terminate a trust . . . if it determines that the value of the trust property is insufficient to justify the cost of administration."[84] Trustees are also under a duty not to waste trust property,[85] and indeed to invest it so as to maximize its value,

81. *See* John H. Langbein, *The Rise of the Management Trust*, 143 Tr. & Est. (Special Issue) 52, 53 (2004) (noting that today's trusts typically hold a portfolio of complex financial assets).

82. Hodel v. Irving, 481 U.S. 704, 704 (1987).

83. *See* Michael Vincent, *Computer-Managed Perpetual Trusts*, 51 Jurimetrics 399, 435 (2011).

84. Unif. Trust Code § 414(b) (Unif. Law Comm'n 2010).

85. *See* Amato, *supra* note 68, at 670.

subject only to the settlor's instructions and the beneficiaries' interests.[86] One commentator claims that given beneficiaries are, unlike trustees, under no such duties regarding property distributed to them, the public interest in the efficient utilization of assets is aligned with prolonging the duration of trusts.[87] The practical effect of the trustee duties just cited, however, depends on trustees' actual conduct as well as on the availability of persons willing and able to monitor that conduct and pursue a judicial or arbitral remedy where it is found unsatisfactory. Given that some beneficiaries are minors or unborn, some, while adult, are practically unable to monitor their trustees and pursue applicable remedies, and some rationally choose not to involve themselves in trust matters, it appears possible that in many cases no monitoring or enforcement will take place. As a result, the risk remains that perpetual trusts mainly benefit the service providers involved.

Regarding, finally, the tax saving potential of perpetual trusts, some commentators note that wealth transfer taxation is not currently a major revenue generator for the federal government.[88] Perpetual trusts could, however, be one cause of this situation.

A minority of commentators argue that perpetual trusts are a positive development. They allege that extreme long-term trusts will all eventually be run by corporate trustees, likely to be more expert than individual trustees.[89] This claim is not supported by evidence that corporate trustees in fact do a better job than individual trustees. Even if corporate trustees produce more value than other trustees, they may take most of that value themselves or pay it to other trust service providers. It is then said perpetual trusts encourage saving and capital accumulation:

> Although derided as tools of inequality in the existing literature, perpetual trusts are likely to increase overall societal wealth and provide for stronger redistribution. An increase in savings enhances future economic growth potential by making more money available for investment, lowering interest rates, and increasing productivity and aggregate gains. Since more money is saved and invested, the total capital stock increases. With more capital, labor is more productive and brings a higher rate of return which, over time, reduces inequality as wealth is redistributed.[90]

While perpetual trusts may encourage saving and capital accumulation, the claim that they are an engine of wealth redistribution seems far-fetched. Even if the availability of perpetual trusts increases savings and the wealth saved is efficiently invested, and even if this additional capital investment makes labor more productive, it is not obvious that the added

86. UNIF. PRUDENT INV'R ACT §§ 1–2 cmt. (UNIF. LAW COMM'N 1994).
87. *See* Amato, *supra* note 68, at 665.
88. *See id.* at 672–78; *See* Hines Jr., *supra* note 24, at 104.
89. *See* Amato, *supra* note 68, at 670.
90. *See id.* at 667–68.

gains from labor will be distributed to workers; employers may keep them, as by using low-cost labor with little bargaining power.

Several of the arguments against perpetual trusts thus appear to point to concerns which defenders of these trusts have not been able to allay: (1) the inability of the law governing trust modification, termination, and invalidity to eliminate settlors' misguided, inefficient, or outdated allocative choices, which are likely to become more numerous the longer trusts are allowed to subsist; (2) the potential for trust service providers to become the main beneficiaries of perpetual trusts; (3) the tax saving potential of such trusts; and (4) their consequent contribution to the entrenchment of economic inequality. These concerns would, in principle, appear to justify the reimposition of a temporal limit on trusts.

But conclusions true in principle may be far from true in empirical reality. If perpetual trusts are few, as at least one scholar opined,[91] their problematic potential is rarely realized and of little concern. Several commentators noted that it is not unusual for trusts that are on their face expected to exist in perpetuity, or at least for a few centuries, to give each of their beneficiaries a power to appoint a share of corpus, free of trust, among his or her descendants, thus creating potential for the trust to be emptied long before the end of the traditional perpetuity period.[92] Settlors of such trusts, it is said, fully expect those powers to be used, and thus do not truly intend or expect their trusts to last in perpetuity, or even particularly long.[93] Some corporate trustees apparently counsel potential settlors to give trustees of perpetual trusts a discretionary power to terminate the trust should specified contingencies arise.[94]

If perpetual trusts are few, or are in practice unlikely to exist longer than trusts drafted subject to traditional perpetuities limitations, they raise no concerns beyond those raised by all trusts. An empirical inquiry is therefore necessary to determine the true extent of special harm, if any, in perpetual and other extreme long-term trusts. While one scholar noted pessimistically that, "it is impossible as a practical matter to assess the degree to which [trust provisions allowing premature termination of

91. *See* Hines Jr., *supra* note 24, at 104.

92. *See* Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 24, at 413 n.147 ("We are told that such [special powers] are boilerplate in transfer-tax-exempt perpetual trust forms."); Bridget J. Crawford, *Who Is Afraid of Perpetual Trusts?*, 111 MICH. L. REV. FIRST IMPRESSIONS 79, 86–87 (2012); Waggoner, *supra* note 70, at 9–10.

93. *See, e.g.*, Crawford, *supra* note 92, at 86–87; Waggoner, *supra* note 70, at 9–10.

94. *See* Amato, *supra* note 68, at 664 (citing ANN HART WERNZ ET AL., WELLS FARGO FAMILY WEALTH, GENERATION-SKIPPING AND DYNASTY TRUSTS: SELECTED ISSUES IN PLANNING, DRAFTING AND ADMINISTRATION 13 (2008)) ("One estate planning guide prepared by Wells Fargo advises those considering perpetual trusts to include a discretionary termination clause, allowing the trustee to terminate the trust if specified contingencies arise").

perpetual trusts] are used,"[95] the results of just such an empirical assessment are reported in Part III.A.

C. Trustee Exculpatory Terms

The second policy debate to which my findings contribute addresses trustee exculpatory terms: trust instrument clauses curtailing trustees' duties to their beneficiaries, exculpating them from liability for loss their beneficiaries suffer as a result of trustees' infringement of those duties, or both. Trustee exculpatory terms are one among several prominent aspects of contemporary trust practice which contradict the classical image of trustees as selfless preservers of their beneficiaries' interests, who are "held to something stricter than the morals of the market place."[96] While Judge Cardozo wrote of trustees that "not honesty alone, but the punctilio of an honor the most sensitive, is [for them] the standard of behavior,"[97] current law in more than thirty states allows trustees to exempt themselves in their trust instruments from liability to their beneficiaries for even grossly negligent conduct, drawing the line at recklessness.[98] The Uniform Trust Code permits the exclusion of all trustee liability to beneficiaries except liability for fraudulent actions and those taken in bad faith, dishonestly, or out of a reckless indifference to the impact of trustee actions on beneficiaries' interests.[99] The Code further provides that in case a trustee drafted the exculpatory term, or caused it to be drafted, the trustee must prove in court that the term is "fair under the circumstances and that its existence and contents were adequately communicated to the settlor," otherwise the term is held

95. *See id.* at 664.

96. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). At least some settlors are surprised to discover these terms: Mui Yim-Fong (梅艷芳), also known as Anita Mui, the well-known Hong Kong pop singer and actress was:

> slightly surprised to learn [on having a trust deed she was executing explained to her, A.H.W.] that the standard provisions in the trust deed gave the trustee a very wide indemnity; she remarked that the trustee was having a very good bargain under the trust deed ("好着數").

Tam Mei Kam v. HSBC Int'l Tr. Ltd. [2008] 93 H.C.A.P. (C.F.I) (China), http://legalref.judiciary.hk/lrs/common/ju/ju_frame.jsp?DIS=61401.

97. *Meinhard*, 164 N.E. at 546.

98. *See, e.g.*, Unif. Trust Code § 1008 (Unif. Law Comm'n 2010); *see also* Louise Lark Hill, *Fiduciary Duties and Exculpatory Clauses: Clash of the Titans or Cozy Bedfellows?*, 45 U. Mich. J.L. Reform 829 (2012). For the older law, see Charles Bryan Baron, *Self-Dealing Trustees and the Exoneration Clause: Can Trustees Ever Profit from Transactions Involving Trust Property?*, 72 St. John's L. Rev. 43 (1998); Henry A. Shinn, *Exoneration Clauses in Trust Instruments*, 42 Yale L.J. 359 (1933) (reviewing the treatment of exculpatory terms in breach of trust cases arising from the Great Depression). For English law on point, see Armitage v. Nurse, [1998] Ch. 241 at 251–56 (Eng.), followed by the majority of the Privy Council panel to hear Spread Tr. Co. Ltd. v. Hutcheson, [2011] UKPC 13, [2012] 2 A.C. 194, [57], [108] (appeal taken from Gue).

99. Unif. Trust Code § 1008.

"invalid as an abuse of a fiduciary or confidential relationship" and is unenforceable.[100]

Policy debate concerning trustee exculpatory terms is focused on whether these terms promote, or do not promote, beneficiaries' welfare. The latter may be the more intuitive position: Trustee exculpatory terms may seem like an instance of service-provider-penned boilerplate serving its authors' interests, with legislatively-mandated disclosures failing to lead to removal or modification of the boilerplate.[101] Most modern trust instruments are put together not by the settlor, but by his advisor, with some degree of input from the settlor, the trustee, or both. Melanie Leslie suggested that where trustees are professionals, such as banks, attorneys, or trust companies, rather than laypersons, courts should uphold

> broad exculpatory clauses [relieving trustees from liability for negligent behavior generally, rather than for specific choices, outcomes or transactions] . . . only if the professional trustee formally offers the settlor two prices for two different services: one commission for full-service trusteeship, and a lower commission for an agreement that includes an exculpatory clause.[102]

Taking a somewhat more permissive stance, Leslie later suggested that for exculpatory terms to be enforced, professional trustees would have "to prove that [the] settlor expressly agreed to the clause"[103] and that "[c]ourts should enforce waivers of fiduciary duties only when there is clear evidence (such as pricing or transaction specificity) that the settlor possessed full information."[104]

If trustee exculpatory terms harm beneficiaries, their presence in trusts requires explanation: Trusts are, after all, principally intended to benefit their beneficiaries. The presence of exculpatory terms may be explained by "[i]nformation asymmetries between trust settlors and

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100. *Id.*; *see* DUKEMINIER & SITKOFF, *supra* note 36, at 611–13; John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1123–25 (2004); Leslie, *supra* note 10, at 85–88, 96–119 (noting that the Uniform Trust Code followed the lead of many state legislatures in authorizing exculpatory clauses); *see also infra* note 142. Section 96(1) of the RESTATEMENT (THIRD) OF TRUSTS uses similar language, adding that provisions purporting to relieve trustees of accountability for profits derived from a breach of trust are unenforceable. Some U.S. courts seem to be more restrictive in construing specific exculpatory terms than the statutory provisions cited appear to require. *See* Leslie, *supra* note 10, at 74; sources cited *supra* note 42; SCOTT ET AL., *supra* note 40, §§ 24.27–27.3; HESS ET AL., *supra* note 29, § 542.

101. UNIF. TRUST CODE § 1008(b). For the failure of mandated disclosure in other contexts, see OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

102. Leslie, *supra* note 10, at 102.

103. *Id.* at 109. Leslie believed exculpatory terms to be generally unproblematic in the case of lay trustees. *Id.* at 101. *See generally* Melanie B. Leslie, *Common Law, Common Sense: Fiduciary Standards and Trustee Identity*, 27 CARDOZO L. REV. 2713 (2006) (providing background information on the enforcement of exculpatory terms).

104. Leslie, *supra* note 10, at 119.

professional trustees."[105] The terms may be hidden deep inside protracted trust deeds in classic boilerplate fashion, away from trust users'—settlors' and beneficiaries'—attention. Further, if exculpatory terms are common form in trust instruments, even trust users who are aware of a term's existence may be slow to realize that it is not an inevitable part of every trust. And even those trust users who are aware of the existence of the term, understand its consequences, and realize that it is at least potentially subject to modification may be prone to accept it rather than challenge it if trustee exculpatory terms have become a common baseline, deviating from which is expensive. Finally, cognitive limitations, such as the tendency "to equate 'low probability' risks with 'zero probability' risks,"[106] may prevent even such informed clients from concluding that the term's potential consequences may justify active negotiation over its curtailment, removal, or the receipt of some quid pro quo.[107] While a settlor's attorney could potentially correct any mistakes of judgment the settlor may make, many settlors' attorneys who draft trusts are in practice recommended by the trustee, or are hoping for such referrals in the future, and thus may refrain from correcting suboptimal settlor choices which benefit trustees.[108]

The competing view is that trustee exculpatory terms do not cause significant harm to beneficiaries. This may be the case for three potential reasons. One is the possibility that trustee exculpatory terms are rare, as Leslie believed.[109] Another potential reason is that even if such terms are ubiquitous, and even if they are potentially harmful, settlors and beneficiaries may receive some quid pro quo for their inclusion so that the overall package of terms agreed on between trust service providers and their clients benefits the latter more than it costs them. The quid pro quo clients may receive can be of several kinds. It can be a price cut; Omri Ben-Shahar points out that boilerplate terms which eliminate some rights consumers enjoy vis-à-vis vendors are often matched with a relatively affordable price. For many consumers, the resulting

105. *Id.* at 70; *see also id.* at 85–88, 103.

106. *See* Robert A. Hillman, *Online Boilerplate: Would Mandatory Web Site Disclosure of e-Standard Terms Backfire?*, *in* BOILERPLATE: THE FOUNDATION OF MARKET CONTRACTS 83, 85 (Omri Ben-Shahar ed., 2007).

107. For these limitations, see, for example, OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012); BEN-SHAHAR & SCHNEIDER, *supra* note 101, at 59–78; Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003).

108. *See* Leslie, *supra* note 10, at 84; *see also* Amato, *supra* note 68 and accompanying text; *supra* note 95 and accompanying text.

109. Leslie believed that "most well-established institutional trustees do not feel the need for broad clauses and do not insist on them." Leslie, *supra* note 10, at 101. But see her comment that "corporate trustees routinely insert exculpatory clauses into trust documents . . . ." *Id.* at 71.

package—price plus terms—is often superior to a more costly alternative more respectful of consumers' rights under default law.[110]

Alternatively, the quid pro quo clients receive could be trustees' very preparedness to serve as such. Professional trustees, who are subject to a higher prudence standard than other trustees,[111] may not be prepared to serve absent an exculpatory clause, even for a higher price. They may fear that without such a clause beneficiaries will constantly harass them with litigation. Finally, the quid pro quo clients receive may be trustees' preparedness to undertake excess risk, as where they are asked to hold an under-diversified investment portfolio.[112] A third potential reason for exculpatory terms not harming beneficiaries is that they are not enforced. There is anecdotal evidence that where trustees who are protected by exculpatory terms engage in significant breaches of trust for the results of which they are not liable, given the terms, beneficiaries sue anyway despite the presence of the terms, and trustees settle rather than defend by invoking the terms.[113] Exculpatory terms not enforced following significant breaches may have been intended to deter opportunistic beneficiaries from trying their luck at meritless lawsuits, giving trustees discretion whether to insist on the clause.[114]

An empirical inquiry is necessary to resolve the debate concerning the extent of harm in trustee exculpatory terms. If such terms are rare, if clients receive sufficient quid pro quo for their inclusion, or if they are not enforced in meritorious cases, they may not significantly injure beneficiaries despite the unfavorable impression created by trust drafting so far removed from holding trustees to "the punctilio of an honor the most sensitive."[115] Empirical research into the use of trustee exculpatory terms has begun: Alison Dunn's 2002 survey of 345 English trustees and legal advisors showed that most settlors served by her respondents did

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110. *See* Omri Ben-Shahar, *Regulation Through Boilerplate: An Apologia*, 112 MICH. L. REV. 883, 895–99 (2014).

111. UNIF. PRUDENT INV'R ACT § 2(f) (UNIF. LAW COMM'N 1994) ("A trustee who has special skills or expertise, or is named trustee in reliance upon the trustee's representation that the trustee has special skills or expertise, has a duty to use those special skills or expertise.").

112. Cases of settlors and testators directing their trustees to hold on to the specific assets settled on trust, undiversified though they may be, are legion. *See, e.g.*, early twentieth century examples in Shinn, *supra* note 98, at 360–64.

113. Telephone Interview with Robert Sitkoff, Professor, Harvard Law School (June 13, 2016).

114. For analysis regarding one-sided contracts, see Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 827–28, 830, 835 (2006).

115. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928). A separate question is whether trustee exculpatory terms cause harm to parties other than the settlors and beneficiaries of trusts which contain them. Leslie argued that such terms, if upheld by courts, are likely to erode the moral and social norms restraining trustee conduct, rendering the trust mechanism less valuable for trust users who prefer traditional fiduciary protections. Leslie, *supra* note 10, at 90–92. Leslie further argued that legitimizing far-reaching exculpatory terms will increase the agency costs of the trust relationship by introducing uncertainty regarding the basic terms of that relationship. *Id.* at 92–94.

not ask their service providers to remove the exculpatory terms from trust instrument drafts provided by the trustees. Nor did these British settlors expressly ask for any specific quid pro quo for the terms' inclusion.[116] In Part III.B I report the results of the first worldwide empirical research effort concerning the frequency of trustee exculpatory terms, as well as of explicit settlor bargaining seeking quid pro quo for the inclusion of such terms.

D. Anti-Creditor Techniques Protecting Beneficiaries' Entitlements

The third policy debate to which the empirical results reported in Part III contribute concerns techniques inserted in trust instruments to render beneficiaries' interests under trust inaccessible to their creditors. One such prominent technique is giving trustees absolute discretion over the distribution of trust property between beneficiaries: until this discretion is exercised, no beneficiary has a vested interest in any part of the trust property, and so their creditors cannot reach any of that property until it is distributed to the relevant debtor/beneficiary.[117] A second technique is the spendthrift trust, under which beneficiaries may not either voluntarily alienate their interests under trust or have them involuntarily taken by their creditors in satisfaction of their debts.[118] A third technique is the practice of providing in trust instruments "that an interest shall terminate or become discretionary upon an attempt by the beneficiary to transfer it or by the beneficiary's creditors to reach it, or upon the bankruptcy of the beneficiary."[119] Under all three techniques, income or capital distributed to a beneficiary is accessible to his or her creditors.[120]

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116. *See* The Law Comm'n, *supra* note 26, at 36–37.

117. *See* Restatement (Third) of Trusts § 60 (Am. Law Inst. 2012) ("[I]f the terms of a trust provide for a beneficiary to receive distributions in the trustee's discretion, a transferee or creditor of the beneficiary is entitled to receive or attach any distributions the trustee makes or is required to make in the exercise of that discretion after the trustee has knowledge of the transfer or attachment."). If the trustee is not required to distribute any property to an indebted beneficiary and does not in fact do so, the latter's creditors have no way of reaching the trust property in order to satisfy the debt; *see also* Unif. Trust Code § 504(b) (Unif. Law Comm'n 2010); Shapo et al., *supra* note 47, §§ 228–230; 3 Austin Wakeman Scott et al., Scott and Ascher on Trusts §§ 15.3–15.3.1 (5th ed. 2007).

118. *See* Restatement (Third) of Trusts § 58(1) (Am. Law Inst. 2012) ("[I]f the terms of a trust provide that a beneficial interest shall not be transferable by the beneficiary or subject to claims of the beneficiary's creditors, the restraint on voluntary and involuntary alienation of the interest is valid"); *see also* Unif. Trust Code § 502; Shapo et al., *supra* note 47, §§ 221, 223, 225–27; 3 Scott et al., *supra* note 117, § 15.2.

119. Restatement (Third) of Trusts § 57 (Am. Law Inst. 2012); *see* Shapo et al., *supra* note 47, §§ 220–21, 230; Scott et al., *supra* note 117, § 15.1. In England, such clauses are called "protective trusts." Trustee Act 1925, 15 & 16 Geo. 5 ch. 19, § 33 (Eng.); *see also* Jonathan Garton, Moffat's Trusts Law: Text and Materials 299–317 (6th ed. 2015); Lynton Tucker et al., Lewin on Trusts 229–39 (19th ed. 2015).

120. For discussion, see Dukeminier & Sitkoff, *supra* note 36, at 694–714.

Debate regarding the justifiability of techniques protecting beneficiaries' entitlements under trusts from their creditors has been raging since the late nineteenth century. Critics of such techniques, starting with the legendary John Chipman Gray of Harvard, raise three main arguments. One is that the existence of a class of property interests in equity which beneficiaries' creditors cannot reach so long as income or corpus are not distributed impedes the enforcement of judicial and administrative orders and demands by levying against obligors' property, thereby fundamentally undermining the system of civil liability.[121] Effective use of the techniques concerned can lead to shocking results, as where the New Hampshire Supreme Court let a child molester enjoy his beneficial interest under a trust, blocking the attempt of the molested's guardian to attach the molester's interest for the satisfaction of the tort judgment in the case.[122] The threat of such outcomes may make firms and individuals obtain otherwise superfluous insurance.

Another argument against protective techniques is that they may impede the operation of the credit economy, since lenders are likely to make credit more expensive to compensate for the significant error potential created by these techniques. That error potential is evident where beneficiaries appear to control and enjoy trust assets which have not been distributed to them: Beneficiaries may, for example, live in a trustee-owned house or drive a trustee-owned car. Such situations may mislead a lender into believing the asset in question to be the beneficiary's own property. The lender may then rely on the beneficiary's supposed ownership of a trust asset in extending credit to the beneficiary, only to be surprised in case of default by the beneficiary's non-ownership and the protective techniques blocking the lender's access to the asset.[123]

A final argument critics of protective techniques make is that by discriminating in favor of precisely those debtors lucky enough to enjoy the benefit of a trust, protective techniques entrench and deepen existing socioeconomic inequalities. To the extent that firms and individuals either sustain uncompensated losses and injuries from protected

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121. *See, e.g.*, John Chipman Gray, Restraints on the Alienation of Property § 262 (2d ed. 1895); Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 Wash. U. L.Q. 1 (1995); Kent D. Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 Akron L. Rev. 63 (2012); Sterk, *supra* note 22, at 1067–68, 1073.

122. Scheffel v. Krueger, 782 A.2d 410 (N.H. 2001); *see* Steven J. Oshins & Christopher M. Riser, Report, Scheffel v. Krueger*: The Effectiveness of Statutory Spendthrift Trust Protection*, 140 Tr. & Est. 12 (2001).

123. Adam Hirsch claimed such lender errors are unlikely, since "[t]rust law requires the settlor of any trust to transfer its corpus to the trustee, who thereafter becomes its ostensible owner. The trustee in turn must segregate and earmark the corpus, in order to distinguish it from the trustee's own assets." Adam J. Hirsch, *Fear Not the Asset Protection Trust*, 27 Cardozo L. Rev. 2685, 2688 (2006). Hirsch does not appear to have considered the case of a trustee-owned asset being used or lived in by a debtor/beneficiary.

beneficiaries or obtain insurance to counter this risk, these losses and expenses fall on all with an equal severity, while enjoyment of protected beneficial interests under trusts is concentrated in the wealthier part of society.[124] Any additional interest lenders exact from their borrowers to compensate for the error potential inherent in protective techniques similarly falls on all borrowers. These additional costs are naturally more of a threat for those borrowers not enjoying a protected interest under trust.[125]

Proponents of protective techniques make two principal arguments in response. One is that trust settlors, who are settling their own property, are entitled to mold their gifts as they wish, including by bolstering beneficiaries' entitlements with anti-creditor protection.[126] Proponents' second argument is that given the (alleged) pattern of settling trusts for beneficiaries less able than the average person to provide for themselves, such as minors and reckless young adults, protecting beneficiaries' entitlements from the predatory spirits of the market is often necessary to make sure a trust actually benefits its beneficiaries.[127] Justificatory arguments of this sort were one key to the Supreme Court's early affirmation of spendthrift clauses' validity: The Court assumed in upholding them that many such trusts were created for "improviden[t]" beneficiaries with an "incapacity for self-protection."[128]

The acceptance of spendthrift trusts in the late nineteenth century United States having more recently led to many jurisdictions' legitimization of self-settled spendthrift and/or discretionary trusts, under which settlors name themselves as beneficiaries, effectively immunizing their own property against creditors,[129] debate as to the justifiability of techniques protecting beneficiaries' entitlements under trust from their creditors remains unresolved.[130] The debate can be carried forward by

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124. *See infra* TABLE 4 (showing this to be the case via empirical data).

125. *See, e.g.*, Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV. 179, 193–94 (1993).

126. *In re* Morgan's Estate, 72 A. 498, 499 (Pa. 1909); Broadway Nat'l Bank v. Adams, 133 Mass. 170, 173–74 (1882); Nichols v. Eaton, 91 U.S. 716, 727 (1875).

127. *See, e.g.*, Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1233–50 (1985); Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES L. 355, 375–81 (2009).

128. *Nichols*, 91 U.S. at 727; *see* GRAY, *supra* note 121, at 251–55; ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS 25–31 (2d ed. 1947); Getzler, *supra* note 127, at 375–78.

129. *See, e.g.*, AM. COLL. OF TR. & ESTATE COUNSEL, ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES UPDATED THROUGH APRIL 2014 (David G. Shaftel ed., 2014), http://www.mckan.com/assets/uploads/pdf/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes-Updated-through-April-2014.pdf; ROUNDS, JR. & ROUNDS III, *supra* note 31, § 5.3.3.1(c).

130. For examples, see generally Karen E. Boxx, *Gray's Ghost—A Conversation About the Onshore Trust*, 85 IOWA L. REV. 1195 (2000); John K. Eason, *Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations*, 52 FLA. L. REV. 41 (2000); John K. Eason, *Developing the Asset Protection Dynamic: A Legacy of Federal Concern*, 31 HOFSTRA L. REV. 23 (2002); John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of*

empirical data. First, if use of the anti-creditor techniques in question is rare, their negative impact is likely to be small. While anecdotal data has it that "almost all long-term trusts . . . include spendthrift provisions,"[131] Part III.C of this Article contains the first empirically sound data on the frequency of anti-creditor protections under trust. And further, whatever the frequency of these techniques, their normative assessment differs depending on whether beneficiaries protected are hapless incompetents or schemers looking to evade their duties under law and contract. Part III.C reports empirical findings on this question as well.

E. Settlor Control of Trusts

The final policy debate to which the data I collected contribute concerns trust settlors reserving control over trusts they create. Under traditional trust law, once a settlor created a trust and transferred the property which was to be subjected to that trust to its trustee, the settlor no longer had any rights or powers in the trust property or against the trustee, so long as the settlor was not also a trustee or beneficiary.[132] Many of the advantages of using trusts evolved as expressions of this state of affairs. For example, the creditors of a settlor of an irrevocable trust who is not a beneficiary of the same trust cannot usually recoup his or her debts out of the trust property, subject to the law of fraudulent transfers.[133] Under traditional trust law and practice, one could either enjoy control over assets or enjoy their being protected from his or her creditors, but not both simultaneously.

As is well-known, however, modern trust practice has developed a large variety of powers sometimes granted to trust settlors, including powers to revoke the trust, powers to withdraw assets from the trust,

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Trust Asset Protection, 27 Cardozo L. Rev. 2621 (2006); Randall J. Gingiss, *Putting a Stop to "Asset Protection" Trusts*, 51 Baylor L. Rev. 987 (1999); Eric Henzy, *Offshore and "Other" Shore Asset Protection Trusts*, 32 Vand. J. Transnat'l L. 739 (1999); Hirsch, *supra* note 123; Alastair Hudson, *Asset Protection Trusts*, *in* The International Trust 345 (David Hayton ed., 3rd ed. 2011); Henry J. Lischer, Jr., *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 Real Prop. Prob. & Tr. J. 479 (2000); Lynn M. LoPucki, *The Death of Liability*, 106 Yale L.J. 1, 32–38 (1996); Ronald J. Mann, *A Fresh Look at State Asset Protection Trust Statutes*, 67 Vand. L. Rev. 1741 (2014); Kellsie J. Nienhuser, *Developing Trust in the Self-Settled Spendthrift Trust*, 15 Wyo. L. Rev. 551 (2015); Gideon Rothschild et al., *Self-Settled Spendthrift Trusts: Should a Few Bad Apples Spoil the Bunch?*, 32 Vand. J. Transnat'l L. 763 (1999); Alexander B. Shiffman, *The Domestic Asset Protection Trust and Its Federalism Implications*, 13 Cardozo Pub. L. Pol'y & Ethics J. 853 (2015); Jay A. Soled & Mitchell M. Gans, *Asset Preservation and the Evolving Role of Trusts in the Twenty-First Century*, 72 Wash. & Lee L. Rev. 257 (2015); Sterk, *supra* note 22.

131. Crawford, *supra* note 92, at 88.

132. *See* sources cited *supra* note 36. Where settlors give themselves a beneficial interest under the trust they obtain beneficiaries' powers to control their trustees under general trust law, whether or not augmented in the trust instrument. A settlor who appoints him or herself trustee of his or her trust obtains trustees' large powers to control their trusts. *See* Rounds, Jr. & Rounds III, *supra* note 31, at 246.

133. *See* Scott et al., *supra* note 117, § 15.4 n.12. For the law of fraudulent transfers, see *infra* notes 148–149 and accompanying text.

powers to dictate to the trustee how the trust property is to be distributed, powers to dictate to the trustee how the trust property is to be invested, powers to change the trust's beneficiaries, powers to fire and hire trustees, and other powers. The prevalence of settlor-reserved powers is easily explained even apart from tax issues and creditor protection. Given the uncertainties of the future, deciding to create a trust by transferring your property to another is an easier decision to make if you can retain powers to revoke the trust, direct your trustee in the exercise of its powers, replace that trustee, add or exclude one or more beneficiaries, and otherwise modify the trust according to your future needs and preferences.

Beyond the inherent attraction of settlor power retention, American law has made such retention even more attractive by having retention of several types of powers result in tax savings, and retention of other powers not disturb the trust property's inaccessibility to the settlor's creditors. To start with tax, under the federal income tax regime, a settlor's reservation of many types of powers results in the classification of the trust as a grantor trust for federal income tax purposes. As a consequence, income earned on trust assets will be liable to tax as if earned by the settlor rather than the trustee. The powers which have this effect are, simplifying somewhat, powers of disposition over the trust corpus or income,[134] powers to deal with the trust corpus or income for less than adequate and full consideration,[135] powers to borrow the trust corpus or income without adequate interest or security,[136] nonfiduciary powers to vote securities of a corporation in which the grantor and the trust hold significant voting control or to control the investment of the

134. *See* I.R.C. § 674(a) (West 2012) ("The grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party."). The Code defines an "adverse party" as "any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust." *Id.* at § 672(a). A nonadverse party is defined to mean "any person who is not an adverse party." *Id.* at § 672(b). Sections 674(b)–(d) list settlor-retained dispositive powers which do not render the trust a grantor trust; in general, settlor-retained dispositive powers have to be fairly unlimited to render the trust a grantor trust.

135. *See id.* § 675(1) ("The grantor shall be treated as the owner of any portion of a trust in respect of which . . . [a] power exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party enables the grantor or any person to purchase, exchange, or otherwise deal with or dispose of the corpus or the income therefrom for less than an adequate consideration in money or money's worth.").

136. *See id.* § 675(2) ("The grantor shall be treated as the owner of any portion of a trust in respect of which . . . [a] power exercisable by the grantor or a nonadverse party, or both, enables the grantor to borrow the corpus or income, directly or indirectly, without adequate interest or without adequate security except where a trustee (other than the grantor) is authorized under a general lending power to make loans to any person without regard to interest or security.").

trust fund in such securities,[137] nonfiduciary powers "to reacquire the trust corpus by substituting other property of an equivalent value,"[138] powers to revoke the trust,[139] and powers to distribute income to the grantor or his or her spouse, accumulate income for them, or use it to pay premiums on insurance on their lives.[140] While the grantor trust regime, enacted in 1954, was originally an anti-avoidance measure "enacted to prevent high-bracket taxpayers, during their lifetimes, from avoiding the progressive-rate structure of the federal income tax simply by creating and funding trusts,"[141] its effectiveness as such was dependent on the income tax burden imposed on individual income not being significantly lighter than that imposed on trustee income. Since 1986, however, so-called "complex trusts," meaning non-grantor trusts where income earned on trust assets is not all distributed to beneficiaries in the year it is earned, have been subject to a more compressed tax rate bracket schedule than that imposed on individual income, making the tax burden imposed on complex trusts heavier than that imposed on grantor trusts.[142] With the grantor paying tax on grantor trust income, that income is earned and accumulated in the trust without the trustee paying any income tax.[143] As a result, settlors' reservation of those powers which turn

137. *See id.* § 675(4) ("The grantor shall be treated as the owner of any portion of a trust in respect of which . . . [a] power of administration is exercisable in a nonfiduciary capacity by any person without the approval or consent of any person in a fiduciary capacity. For purposes of this paragraph, the term "power of administration" means any one or more of the following powers: (A) a power to vote or direct the voting of stock or other securities of a corporation in which the holdings of the grantor and the trust are significant from the viewpoint of voting control; (B) a power to control the investment of the trust funds either by directing investments or reinvestments, or by vetoing proposed investments or reinvestments, to the extent that the trust funds consist of stocks or securities of corporations in which the holdings of the grantor and the trust are significant from the viewpoint of voting control.").

138. *See id.* ("The grantor shall be treated as the owner of any portion of a trust in respect of which . . . . (C) a power to reacquire the trust corpus by substituting other property of an equivalent value.").

139. *See id.* § 676(a) ("The grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any other provision of this part, where at any time the power to revest in the grantor title to such portion is exercisable by the grantor or a non-adverse party, or both"). Section 676(b) makes an exception for powers "which can only affect the beneficial enjoyment of the income for a period commencing after the occurrence of an event" such as the death of a lineal descendant of the settlor before age twenty-one (referring to § 673).

140. *See id.* § 677(a)(1)–(3).

141. Mark L. Ascher, *The Grantor Trust Rules Should Be Repealed*, 96 IOWA L. REV. 885, 887 (2011).

142. *Cf.* I.R.C. § 1(a) (imposing the top income tax rate of 39.6% on married individuals filing jointly earning more than $466,950 in 2016); *id.* § 1(b) (imposing the top income tax rate of 39.6% on heads of household earning more than $441,000 in 2016); *id.* § 1(c) (imposing the top income tax rate of 39.6% on unmarried individuals earning more than $415,050 in 2016); *id.* § 1(e) (imposing the top income tax rate of 39.6% on trusts and estates earning more than $12,400 in 2016). For rate tables for 2016, see I.R.B. REV. PROC. 2015-53 § 3.01; *id.* at 2015-44. Income earned on assets in settlor-controlled trusts is not subject to the rate schedule in section 1(e): because such trusts are "grantor trusts" for federal income tax purposes, income earned in them is liable to tax as if earned by the settlor directly, and thus subject to the rate schedules in sections 1(a), 1(b), or 1(c), as applicable. For the grantor trust regime, see I.R.C. §§ 671–679.

143. *See* Ascher, *supra* note 141, at 903–07.

the trust into a grantor trust for income tax purposes has become a tax minimization device.[144]

Settlor-reserved dispositive powers governing the distribution of the trust fund between its beneficiaries may also defer liability to the federal gift tax, as a gift is only liable to gift tax in the year in which the donor has "so parted with dominion and control as to leave in him no power to change its disposition."[145] Settlors who reserve dispositive powers do not therefore need to pay any gift tax on the creation of the trust; the trust assets only become liable to the tax when the donor loses all power to change their disposition, which is likely to occur on the donor's death, on his or her releasing their dispositive powers over the fund, or on the fund being distributed to its beneficiaries, if earlier. Looking at both the income and transfer tax regimes, federal tax law effectively penalizes trusts run on the traditional model, by their trustees for the benefit of all their beneficiaries, with settlors sidelined once the trust is up and running.

Moving beyond tax, American law allows settlors to reserve significant powers over their trusts without disturbing the trust property's inaccessibility to the settlor's creditors. This is not true for all reserved powers: The Uniform Trust Code provides that "[d]uring the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors,"[146] noting further that "the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of the property subject to the power."[147] As for other types of settlor-reserved powers, the Uniform Voidable Transactions Act provides that transfers a debtor made are voidable as to a creditor if the debtor made the transfer "with actual intent to hinder, delay or defraud any creditor of the debtor,"[148] further providing that "in determining actual intent . . . consideration may be given, among other factors, to whether . . . the debtor retained possession or control of the property

144. *See id.* But not so for grantors whose personal income puts them in the highest income tax bracket. Such grantors sometimes settle a large number of smaller trusts, each of which earns less than $12,400 annually, and is thus subject to income tax rates lower than those to which the settlor is subject. I thank Richard Kaplan for this comment.

145. 26 C.F.R. § 25.2511-2(b) (1999). To defer liability, settlor-reserved powers have to be substantial. The IRS Office of Chief Counsel has opined that settlor-reserved limited testamentary powers to appoint so much of the trust fund as would still be in the trust at the settlor's death do not prevent the transfers to the trustee from constituting a complete gift of the beneficial term interests, valued at the full value of the transferred property. Memorandum from Curt G. Wilson, Assoc. Chief Counsel, IRS to Frances F. Regan, Area Counsel & Mary P. Hamilton, Senior Attorney (Sept. 28, 2011), https://www.irs.gov/pub/irs-wd/1208026.pdf .

146. UNIF. TRUST CODE § 505(a)(1) (UNIF. LAW COMM'N 2010); *see also* Robert T. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 CARDOZO L. REV. 2551, 2566 (2006); SCOTT ET AL., *supra* note 117, § 15.4.2.

147. UNIF. TRUST CODE § 505(b)(1); *see also* Danforth, *supra* note 146, 2566–68.

148. UNIF. VOIDABLE TRANSACTIONS ACT § 4(a)(1) (UNIF. LAW COMM'N 2014).

transferred after the transfer."[149] While a trust settlor's retention of possession or control over the trust property could thus serve to convince a court to hold the transfer of property on trust voidable, not every power a settlor reserves may amount to control over the trust property, much less to possession. Should a court decline to hold a transfer on trust voidable, the trust property will be inaccessible to the settlor's creditors despite his or her having reserved powers over the trust and/or trustee, other than powers of revocation or withdrawal.[150] The Bankruptcy Code explicitly excepts from the bankruptcy estate "any power that the debtor may exercise solely for the benefit of an entity other than the debtor."[151]

The tax results of settlor power retention have drawn strong criticism for decades.[152] Mark Ascher suggested that the list of settlor-reserved powers which result in grantor trust status should be limited to powers of revocation alone.[153] He explained that as grantor trust status is now a tax minimization device, only fairly complete grantor control over the trust should confer that status. Because revocable trusts are little different in function from brokerage accounts, income earned on them should be taxable to the settlor. The other retained powers which currently confer grantor trust status give the settlor far less control over the trust, and should not, therefore, lead to the conferral of that status.[154] Other commentators have similarly urged the demise of the grantor trust rules.[155] Settlors' ability to reserve significant powers over their trusts without rendering the trust property accessible to their creditors has drawn less criticism; critics have focused on self-settled trusts, under which settlors grant themselves creditor-proof beneficial interests.[156] Still, settlors' reservation of significant powers while keeping the trust

149. *Id.* §§ 4(b), 4(b)(2). Identical provisions to those quoted appeared in the previous version of the Act, the Uniform Fraudulent Transfers Act of 1984. *See* Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 HASTINGS L.J. 287, 326–33 (2002) (analyzing the older law).

150.

> Depending upon the applicable state law governing the matter, trust assets may be protected against the claims of the settlor's creditors notwithstanding the retention of certain powers by the settlor. In the majority of states the settlor's creditors may not reach the trust assets in satisfaction of their claims unless the transfer in trust had been made with an intent to defraud creditors or the settlor retained the income for life and a general power of appointment . . . or unless the trust had been created for the sole benefit of the settlor.

HESS ET AL., *supra* note 29, § 233; *supra* notes 45–49 and accompanying text.

151. 11 U.S.C. § 541(b)(1) (2006).

152. *See, e.g.*, Ascher, *supra* note 141; Joseph M. Dodge, *Simplifying Models for the Income Taxation of Trusts and Estates*, 14 AM. J. TAX POL'Y 127 (1997); Sherwin Kamin, *A Proposal for the Income Taxation of Trusts and Estates, Their Grantors, and Their Beneficiaries*, 13 AM. J. TAX POL'Y 215 (1996); Leo L. Schmolka, Commentary, *FLPs and GRATs: What To Do?*, 86 TAX NOTES 1473, 1490 (2000); Jay A. Soled, *Reforming the Grantor Trust Rules*, 76 NOTRE DAME L. REV. 375, 413–20 (2001).

153. Ascher, *supra* note 141, at 930–36.

154. *Id.*

155. *See, e.g.*, sources cited *supra* note 152.

156. *See* sources cited *supra* note 130.

property creditor-proof contradicts the law's traditional insistence that settlors choose between control and creditor-remoteness.

As with questions addressed elsewhere in this Article, whether the grantor trust regime is as harmful as claimed is an empirical question. If few settlors settle grantor trusts, the extent of harm in the regime is limited. If few settlors reserve powers over their trusts, the concurrence of control and creditor-proofing is rare. Even if settlors reserve few powers expressly, however, they may stay in informal control, either directing the allegedly independent trustee themselves or having a confidante—someone the settlor trusts—convey the settlor's wishes to the trustee. I report empirical findings on the frequency of both formal settlor-reserved powers and informal settlor control in Part III.D.

II. Description of the Data

In this Part, I describe the challenge of conducting empirical research on the use of trusts in practice, review the two research methods I employed (an international survey and a program of interviews), and provide descriptive data on the survey respondents.

A. The Research Challenge

Doing their utmost to exempt themselves from the penetrating gaze of state and society, elites tend to keep their private affairs private, making research into their practices particularly challenging.[157] Given the elite nature of the population using trusts,[158] it is unsurprising that obtaining detailed, accurate information on specific administrative or dispositive characteristics of those trusts currently being administered is challenging. As many trusts are not subject to thorough registration or regulatory reporting requirements, the identities of many trust users—settlors and beneficiaries—are unknown. Even should trust users be identified, many are unlikely to divulge information about their trusts to researchers. While some trustees, such as the U.S. institutional trustees Robert Sitkoff and Max Schanzenbach studied, are subject to registration and/or regulatory reporting requirements, they make an unrepresentative sample of the worldwide as well as of the U.S. trustee population. Further, even where regulatory reporting requirements exist, data reported can be limited. For example, the U.S. institutional trustees

157. On the difficulties of research into elite practices, see, for example, Joseph A. Conti & Moira O'Neil, *Studying Power: Qualitative Methods and the Global Elite*, 7 Qualitative Res. 63 (2007); Brooke Harrington, *Immersion Ethnography of Elites*, *in* Handbook of Qualitative Organizational Research: Innovative Pathways and Methods 134 (Kimberly D. Elsbach & Roderick M. Kramer eds., 2015); Robert Mikecz, *Interviewing Elites: Addressing Methodological Issues*, 18 Qualitative Inquiry 482 (2012); David Richards, *Elite Interviewing: Approaches and Pitfalls*, 16 Pol. 199 (1996).

158. *See infra* Figures 1 and 2 (showing data on the wealth levels of trust service providers' clients).

Sitkoff and Schanzenbach studied report their "trust holdings, including total assets and number of accounts"[159] as well as income earned on their trust and fiduciary holdings, expenses incurred, and any losses suffered, to federal banking regulators,[160] but not the administrative or dispositive characteristics of trusts the assets of which they hold.[161]

While all trustees file tax returns for trusts they administer, those returns only include such data as is useful for tax collection. The IRS collects and makes publicly available data on income earned, deductions taken, and federal tax paid by trusts subject to U.S. taxation,[162] but not data on the administrative or dispositive characteristics of reporting trusts.[163] The IRS' Statistics of Income break down the universe of reporting trusts by state, taxable (or nontaxable) status, and income amount, as well as according to the self-classification of reporting trusts into simple, complex, grantor, split-interest, qualified disability, and qualified funeral trusts. Data published does not cover the parameters at the focus of this study: The duration of reporting trusts and whether they include clauses exonerating trustees from liability, clauses protecting beneficiaries' entitlements from their creditors, and clauses reserving powers to the grantor.[164]

Some jurisdictions have established trust registries independent of their tax regimes and bank regulation. Unfortunately for researchers, these registries are either inaccessible or do not include information on the contents of individual fiduciary structures. Belize, for example, requires registration of the names of the trust, the trustee, and the trust's local agent, as well as the date of the trust's creation; these requirements do not apply to trusts created by residents of Belize.[165] The Belizean trusts registry is not open to the public.[166] Unlike Belize, the Cayman Islands in some cases require a copy of the trust instrument to be

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159. *See* Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 24, at 388.

160. Fed. Deposit Ins. Corp., Uniform Bank Performance Report User's Guide: Fiduciary & Related Services 1–1A (2017) https://cdr.ffiec.gov/public/DownloadUBPRUserGuide.aspx.

161. For data institutions must report to federal banking regulators regarding fiduciary services they provide see *id.*

162. *SOI Tax Stats - Income from Estates and Trusts Statistics*, Internal Revenue Serv., http://www.irs.gov/uac/SOI-Tax-Stats-Income-from-Estates-and-Trusts-Statistics (last updated Dec. 30, 2014).

163. The self-classification of reporting trusts for income tax purposes into simple, complex, grantor, split-interest, qualified disability, and qualified funeral trusts does provide some rough data on the distribution of reporting trusts across these trust types, which each have their administrative and/or dispositive characteristics. *See id.*

164. *Id.*

165. Notice, Gian C. Gandhi, International Financial Services Commission (Belize), Registration of International Trusts (Sept. 1, 2008), http://www.ifsc.gov.bz/international-trust-registry ("No confidential or private information needs to be disclosed to the Registry and it is not necessary that a copy of the Trust Deed be filed with the Registry. . . . The International Trusts Registry is not open to the public. It is a closed Registry. The confidentiality of a trust is fully protected.").

166. *Id.*

deposited with its trusts registry, but do not make these deposited instruments available to the public.[167] France made its trusts registry accessible online to all French taxpayers on July 5, 2016, only to have it taken offline less than three weeks later following a constitutional challenge. The French registry, which is now available to selected public authorities only, is in fact supposed to include the terms of all trusts where at least one settlor or beneficiary has a French tax domicile, as well as trusts which include an asset or right situated in France. The registry also includes personal information on all settlors, trustees, and beneficiaries of the same trusts, the name, as well as the creation and termination dates of each registered trust, and the value of the assets in each trust on January first of each year.[168]

Other recent transparency initiatives concerning trusts similarly focus on the identities of settlors, trustees, and beneficiaries, as well as the value of the trust property, but do not extend to disclosure of the contents of trust instruments. Regimes governing the exchange of tax-relevant information between jurisdictions entail the annual reporting of information concerning trusts. Under both the U.S. Foreign Account Tax Compliance Act ("FATCA") and the OECD Common Reporting Standard ("CRS"), reporting financial institutions must provide, for each reportable person—a class including all trust settlors, trustees, beneficiaries, protectors, and any other natural person who directly or indirectly controls a trust—his or her name, address, jurisdiction of

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167. The Cayman Islands General Registry notes on its website that one of the three types of trusts available under Cayman law, "exempted trusts," "require[s] that a trust deed be delivered to the Registrar of Trusts. The filed trust documents are open to inspection by the trustee and any other person authorized by the trust, but they are not open for public inspection." *Trusts*, GEN. REGISTRY CAYMAN ISLANDS, http://www.ciregistry.gov.ky/portal/page/portal/reghome/trusts (last updated Jan. 22, 2014).

168. The French trusts registry was created in the CODE GÉNÉRAL DES IMPÔTS § 1649AB, as amended in the Loi 2013-1117 du 6 décembre 2013 relative à la lutte contre la fraude fiscale et la grande délinquance économique et financière [Law 2013–1117 of December 6, 2013 on the Fight Against Fiscal Fraud and Large-Scale Economic and Financial Evasion], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Dec. 7, 2013, p. 19941, § 11(2), and implemented in the Décret 2016–567 du 10 mai 2016 relatif au registre public des trusts [Decree 2016-567 of May 10, 2016 on the Public Trusts Registry], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], May 11, 2016. It became available online on July 5, 2016. Frederic Mege, *The French Trust Registry Is Now Online*, GOWLING WLG (July 8, 2016), https://gowlingwlg.com/en/united-kingdom/insights-resources/the-french-trust-registry-is-now-online. On July 22, 2016, a Judge of the French Conseil D'Etat, France's highest administrative court, ordered the suspension of the online registry pending a constitutional challenge, CE, July 22, 2016, 400913, and on October 21, 2016, the French Constitutional Council in fact ruled the publicly available registry an unconstitutional breach of the right to respect for private life, Conseil Constitutionnel [CC] [Constitutional Court] decision No. 2016-591 QPC, Oct. 21, 2016. The new model registry, available to selected public authorities only, was inserted in the CODE GÉNÉRAL DES IMPÔTS by the Ordonnance n° 2016-1635 du 1er décembre 2016 renforçant le dispositif français de lutte contre le blanchiment et le financement du terrorisme [Ordinance 2016-1635 of December 1, 2016 Strengthening the French Anti-Money Laundering and Terrorist Financing Mechanism], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Dec. 2, 2016, § 10.

residence, Taxpayer Identification Number, account number at the reporting institution, either the account value on the last day of the year or the average account value for the year, gross interest, dividends and other income paid into the account, gross proceeds from the sale or redemption of financial assets paid or credited to the account, and the gross amount paid or credited to the account holder with respect to the account.[169] Even the unprecedented extension of trust reporting requirements under FATCA and the CRS does not extend to reporting of data on the administrative or dispositive characteristics of reportable trusts.

B. Research Methods Employed

Given the severely limited nature of publicly available data on private donative trust practice, eliciting additional data on that practice should be a high-priority item on any research agenda concerned with fiduciary services. And given the tendency of trust users to be unknown, or if known, not forthcoming with data about their trust affairs, approaching professional trust service providers appears to be a more promising strategy. Such providers are also likely, due to their professional training and involvement in multiple trusts, to better comprehend the characteristics of trusts with which they have been, and are, involved than trust users. I therefore contacted trust service providers using two complementary research methods: an online survey and face-to-face interviews.

Asking trust practitioners questions about trust practice is itself, however, a difficult undertaking. Three difficulties stand out. One is that for most jurisdictions, complete lists of professional service providers to trusts are neither available nor possible to compile. For complete lists of those providing a given service to be available, the service has to be regulated, tracked by a government agency, or self-organized in a monopolist guild. However, unlike banking, legal practice, accountancy, insurance, and many other services, trust practice remains, in many jurisdictions, unregulated and unorganized per se, with some providers subject to regulation and organization because they are banks, attorneys, accountants, insurers, or suppliers of other regulated, organized services, while other providers remain free of any regulation or organization which could produce complete lists of regulated providers.

169. I.R.C. § 1471(c)(1) (2012); 26 C.F.R. §§ 1.1471-4(d)(3)(ii)–(iv), 1.1471-4(d)(4) (2014) (information required to be reported under FATCA); I.R.C. § 1473(2)(A)(iii) (2012); *id.* § 1.1473-1(b) (defining, in the trusts context, a "substantial United States owner" of an "account holder which is a United States owned foreign entity"; "substantial United States owners" are reportable persons for FATCA purposes); OECD, Standard for Automatic Exchange of Financial Information in Tax Matters: Implementation Handbook 72–75, 77–86 (2015). Reporting requirements under FATCA do not apply to trusts in which no non-U.S. financial institution is involved.

Another difficulty is that like members of other elite groups, many trust service providers will not respond to queries regarding their practice.[170] The secretive nature of trust practice and its being subject to less thorough regulation than alternative economic arrangements are commonly thought to contribute to the demand for trust services.[171] These drivers of non-response exacerbate the more general non-response problem encountered in conventional surveys of the general population.[172] A final difficulty is that even those trust service providers who choose to respond to a survey or agree to be interviewed may not respond truthfully to direct questions about their practice, perhaps looking to convey a certain impression regarding their practice, regardless of its accuracy. Absent a complementary data source such as a publicly accessible registry where trust instruments are deposited, inaccurate survey responses and interview data are likely to remain unidentified.

I addressed all three difficulties by attempting to reach the largest possible number of trust service providers, reasoning that the more responses I obtain, the smaller will the distortionary impact of inaccurate responses be. Having formulated a questionnaire[173] and uploaded it to a dedicated website, I sent, using mass-mailing software, email messages to 26,605 addressees identified as potential trust service providers, inviting them to take the survey. The addressee list was populated with the membership of the three leading organizations of the trust and estate planning profession: the Society of Trusts and Estates Practitioners ("STEP"), the American College of Trust and Estate Counsel ("ACTEC"), and the American Bar Association Section of Real Property, Trust, and Estate Law ("ABA RPTE section"). While the membership of STEP is worldwide, with members in 104 jurisdictions both onshore and off, on every continent except Antarctica and in many island jurisdictions,[174] the membership of both ACTEC and the ABA RPTE section is nearly exclusively U.S.-resident. Given that STEP is comparatively unpopular among U.S. trust practitioners, having grown its global ambit from an English and (non-U.S.) offshore core, when put together the memberships of the three organizations create as balanced a sampling frame as is currently attainable of the global population of professional trust service providers.[175]

170. *See supra* note 157 (discussing the difficulties of research into elite practices).

171. *See* Brooke Harrington, Capital Without Borders: Wealth Managers and the One Percent 22–35 (2016) (discussing the access difficulties characteristic of the wealth management profession).

172. *See* Douglas S. Massey & Roger Tourangeau, *New Challenges to Social Measurement*, 645 Annals Am. Acad. Pol. & Soc. Sci. 6 (2013).

173. The questionnaire is available from the Author upon request.

174. *See* Soc'y of Tr. & Estates Practitioners, Directory and Yearbook 23 (2014) (listing the membership of the Society of Trusts and Estates Practitioners).

175. As of 2014, only five percent of the STEP membership were U.S.-based, with thirty-nine percent based in the United Kingdom and Ireland, fourteen percent in Continental Europe, twelve

The survey yielded the largest, most diverse respondent group ever obtained in survey research targeting trust service providers. The likelihood of significant self-selection bias being present in my results appears small. As I show in Part II.C, the 409 respondents who provided useable survey responses proved a remarkably diverse group, which was not significantly different, regarding each of the characteristics examined (jurisdiction where based, proportion based in the United States, and gender), from the sampling frame of addressees invited to take the survey. The addressee group was itself representative of professional trust service providers worldwide.

To further bolster the reliability of my findings, I followed up the survey with twenty-five interviews with trust service providers in the United States, England, Italy, Switzerland, and Israel. Interview research is a common strategy for researching inaccessible and non-cooperative populations.[176] Interviewees were selected so as to create maximum variability as to their professional expertise (lawyers, accountants, bankers, and trust company employees) and the profile of their client populations. The interviews, more than an hour long on average, were semi-structured, starting from a developed version of the survey questionnaire but departing therefrom as necessary to provide a degree of detail unobtainable through survey research. Professionals interviewed are listed in a confidential codebook and are referred to in this Article using codes.[177]

C. The Survey Respondents Described

My survey data derives from responses by 409 trust service providers. In order not to deter potential respondents, I avoided asking addressees to provide personal descriptors such as their gender, income, or age; I later obtained information about addressees' and most respondents' gender indirectly. I did, however, ask addressees to provide a limited extent of descriptive information more closely connected with their professional activities. One descriptor I asked addressees to provide was the jurisdiction in which each is based. I asked addressees to both name that jurisdiction and classify it as either onshore or offshore. In response, 75.6% of respondents reported being based in onshore jurisdictions, which can be defined for present purposes as jurisdictions

percent in English Crown Dependencies, eleven percent in Canada, and nine percent in Asia and Australasia. *Id.* at 23. Persons serving in trust-related capacities, such as trustee or trust protector, other than as remunerated professionals are, given the professionalization of trusteeship, probably now a minority of those serving in such capacities. *See* Langbein, *supra* note 81, at 52. Contacting even a representative sample of such persons appears to be currently impossible.

176. For Brooke Harrington's use of interview research in her recent work on wealth managers, see Harrington, *supra* note 171.

177. To preserve anonymity, the codebook will not be publicly released.

where local residents consume a large part of trust services supplied. Another 16.4% of respondents reported being based in offshore jurisdictions, which can be defined for present purposes as jurisdictions where nonresidents consume most, and sometimes all, of the trust services supplied in the jurisdiction. Finally, 4.4% of respondents reported being based in one of the two "midshore" jurisdictions, New Hampshire and New Zealand, which maintain both an onshore-type trust practice, serving local resident trust users, and an offshore-type trust practice, serving foreigners attracted to the jurisdiction's trust regime and/or to its resident trust service providers.[178] The distribution of addressees who were invited to take the survey between onshore and offshore jurisdictions was not significantly different from that of respondents: 82.1% of addressees were based in onshore jurisdictions while 16.1% were based offshore ($\chi^2 = 0.53$, $p > 0.1$).

When asked to name the specific jurisdiction where they are based, 4.4% of respondents did not respond while one percent reported being based in multiple jurisdictions. The remaining respondents reported being based in eighty-two different jurisdictions. Fifty-six percent were based in the United States, and the remaining 38.6% in thirty-nine non-U.S. jurisdictions. Once again, data for the population of addressees invited to take the survey were not significantly different: 63.53% of those addressees were based in the U.S. ($\chi^2 = 0.94$, $p > 0.1$).

Tables 1 and 2 list respondents' jurisdictions of operation internationally and among U.S. states, respectively.

178. *See infra* Appendix A (classifying all the jurisdictions respondents mentioned into onshore, offshore, and midshore jurisdictions).

TABLE 1: JURISDICTIONS WHERE RESPONDENTS REPORTED BEING BASED

	N of obs.	Percent		*N* of obs.	Percent
USA	229	56	Mexico	2	0.5
England	22	5.4	Monaco	2	0.5
Canada	20	4.9	Singapore	2	0.5
Switzerland	12	2.9	South Africa	2	0.5
Australia	10	2.4	Argentina	1	0.2
Jersey	9	2.2	Bahamas	1	0.2
Italy	7	1.7	Barbados	1	0.2
			Brunei	1	0.2
New Zealand	7	1.7	Cayman Islands	1	0.2
Israel	6	1.5	Channel Islands	1	0.2
United Arab Emirates	5	1.2	Cyprus	1	0.2
Bermuda	4	1.0	Czech Republic	1	0.2
Brazil	4	1.0	Gibraltar	1	0.2
Guernsey	4	1.0	Hungary	1	0.2
Mauritius	4	1.0	India	1	0.2
Scotland	4	1.0	Ireland	1	0.2
France	3	.7	Puerto Rico	1	0.2
Isle of Man	3	.7	Taiwan	1	0.2
Northern Ireland	3	.7	Vanuatu	1	0.2
Austria	2	.5	Not specified	18	4.4
British Virgin Islands	2	.5	Multiple	4	1.0
Hong Kong	2	.5			
Malta	2	.5			

<u>Table 1:</u> In this TABLE and the Tables and Figures that follow "obs." is used to abbreviate "observations."

TABLE 2: JURISDICTIONS WHERE U.S.-BASED RESPONDENTS REPORTED BEING BASED

	N of obs.	Percent (of U.S.-based total)		*N* of obs.	Percent (of U.S.-based total)
Illinois	15	6.6	Wisconsin	3	1.3
New York	14	6.1	Alaska	2	0.9
Texas	11	4.8	Hawaii	2	0.9
Ohio	10	4.4	Mississippi	2	0.9
Virginia	10	4.4	Utah	2	0.9
Pennsylvania	9	3.9	Washington, D.C.	2	0.9
Georgia	8	3.5	Alabama	1	0.4
Missouri	8	3.5	Arizona	1	0.4
New Jersey	8	3.5	Delaware	1	0.4
Colorado	7	3.1	Idaho	1	0.4
Florida	7	3.1	Indiana	1	0.4
Maryland	7	3.1	Iowa	1	0.4
California	6	2.6	Kansas	1	0.4
Massachusetts	6	2.6	Kentucky	1	0.4
Michigan	6	2.6	Nebraska	1	0.4
New Hampshire	6	2.6	Nevada	1	0.4
Minnesota	6	2.6	New Mexico	1	0.4
North Carolina	5	2.2	Oregon	1	0.4
Tennessee	5	2.2	Virgin Islands	1	0.4
Oklahoma	4	1.7	Washington	1	0.4
South Carolina	4	1.7	Multiple States	3	1.3
Louisiana	3	1.3	State Unspecified	31	13.5
South Dakota	3	1.3			

To further examine whether respondents were significantly different from the population of addressees invited to take the survey, I identified the gender of each addressee, as well as that of the majority of respondents who chose to identify themselves.[179] The gender ratios of the two populations were strikingly similar: Among addressees, there was one woman for every 2.009 men, while among respondents who chose to identify themselves and whose gender I was able to ascertain, there was one woman for every 1.97 men.

The extent of respondents' experience and acquaintance with trusts can be approximated by the number of trusts regarding which they and their firm provide services in a typical year. As TABLE 3 demonstrates, most survey participants provide services concerning between ten and one hundred trusts annually. Those respondents based in offshore jurisdictions appear to provide services concerning significantly fewer

179. While addressees were not required to identify themselves, 313 respondents gave their e-mail addresses and could thus be identified. I was only able, however, to ascertain the gender of 282 respondents; it is the gender ratio for this group which is given above.

trusts per year than other respondents. Respondents based in the United States appear to provide services concerning significantly more trusts per year than other respondents.

TABLE 3: NUMBER OF TRUSTS SERVICED PER YEAR

	N of obs.	Percent
Number of trusts serviced by respondent in a typical year :		
1–10	133	32.5
10–100	213	52.1
100–200	40	9.8
200–500	12	2.9
>500	4	1.0
No response	7	1.7
Number of trusts serviced by respondents' firms in a typical year:		
1–10	77	18.8
10–100	137	33.5
100–200	57	13.9
200–500	54	13.2
500–1000	23	5.6
1000–2000	13	3.2
2000–5000	8	2.0
>5000	6	1.5
No response	34	8.3

To provide a rudimentary characterization of the population making use of trusts, I asked respondents to estimate the overall wealth, both under trust and free of trust, of their typical trust client. Given the property sharing arrangements common to many families, not to mention their use of trusts, clients could enjoy, and even control, property owned by other family members. I therefore asked respondents to also estimate the overall wealth, in and out of any trusts, of the entire family of their typical trust client. Responses received, detailed in TABLE 4, reveal that most respondents do much of their trust-related work for clients worth between one and ten million dollars.

For U.S.-based respondents, the number of trusts the firm they work at services in a typical year is positively correlated with both the wealth of their typical trust client ($r_s = 0.28$, $p < 0.001$) and that of their typical trust client's family ($r_s = 0.24$, $p < 0.001$). Such correlations were not found for respondents based outside the United States. Given that most U.S.-based respondents, being members of ACTEC and the ABA, are lawyers, while respondents based elsewhere, being members of STEP, are more varied in professional background, a possible conclusion is that wealthy clients prefer law firms with large trusts and estates departments for work in this practice area, but are more willing to work with trustees, accountants, and bankers working at smaller firms. At the same time, respondents based in offshore jurisdictions attract wealthier clients than other respondents. This result holds both in regard to each client's own wealth, and that of his or her family.

TABLE 4: THE WEALTH OF A TYPICAL CLIENT AND A TYPICAL CLIENT'S ENTIRE FAMILY

	A typical client's wealth		***A typical client's entire family's wealth***	
U.S. Dollars	***N* of obs.**	**Percent**	***N* of obs.**	**Percent**
500,000–1M	49	12	30	7.3
1M–2M	60	14.7	33	8.1
2M–5M	88	21.5	78	19.1
5M–10M	73	17.8	81	19.8
10M–20M	47	11.5	41	10
20M–50M	38	9.3	52	12.7
50M–100M	14	3.4	24	5.9
100M–200M	13	3.2	19	4.6
200M–500M	6	1.5	11	2.7
500M–1BN	7	1.7	8	2
1BN–2BN	0	0	4	1.0
2BN–5BN	1	0.2	1	0.2
No response	13	3.2	27	6.6

Finally, I asked respondents to name the five jurisdictions the law of which is most commonly used to govern trusts. This question was left unanswered by 28.9% of respondents. Of the remainder, 58.8% said practitioners use the trust regime of their jurisdiction of residence, and 16.8% said practitioners use the trust regime of their clients'—settlors' or beneficiaries'—jurisdiction of residence. The wealthier a respondent's clients, the higher his or her estimate of the proportion of settlors who create trusts subject to governing laws other than those of their or their beneficiaries' jurisdictions of residence: $r_s = 0.415$, $p < 0.001$ (wealth of typical trust client); $r_s = 0.46$, $p < 0.001$ (wealth of typical trust client's family). Practitioners interviewed confirmed that the use of governing laws other than those of clients' jurisdictions of residence increases with clients' wealth.[180] Illustrating the point, one English practitioner who mostly serves "mass affluent" English professionals worth approximately two million British pounds, rather than higher net worth clients, noted that "almost all of our . . . [trusts] are English law trusts."[181]

Those among survey respondents based in onshore jurisdictions who mentioned only the law of onshore jurisdictions typically serve clients who are significantly less wealthy than those served by onshore-based respondents who mentioned the law of *both* onshore and offshore

180. US5, EN2, SW1 (Codes representing practitioners I interviewed. The codebook is confidential).
181. EN2.

jurisdictions as commonly used to govern trusts. This finding is demonstrated in FIGURES 1 and 2.

FIGURE 1:

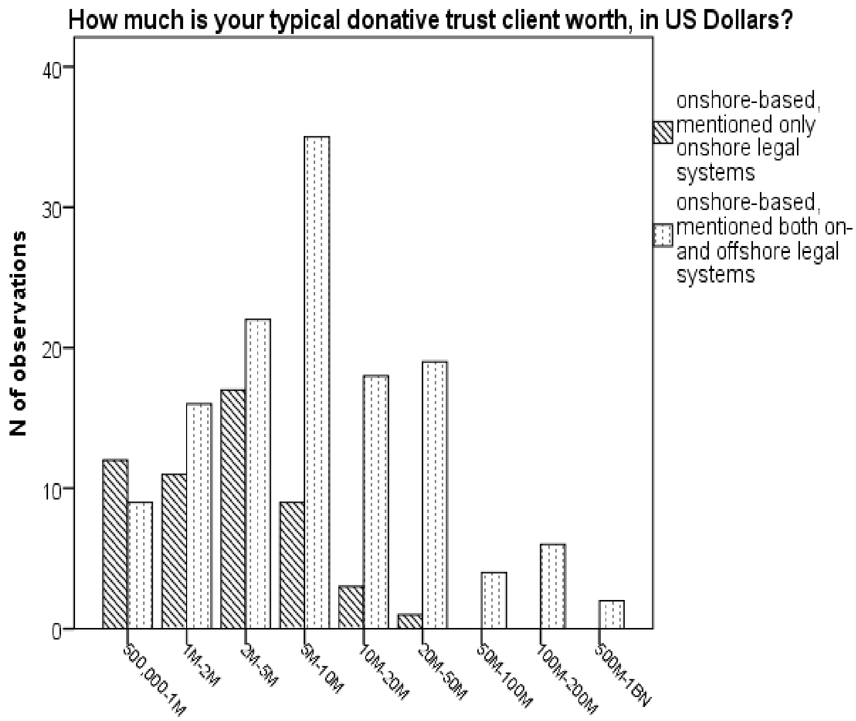
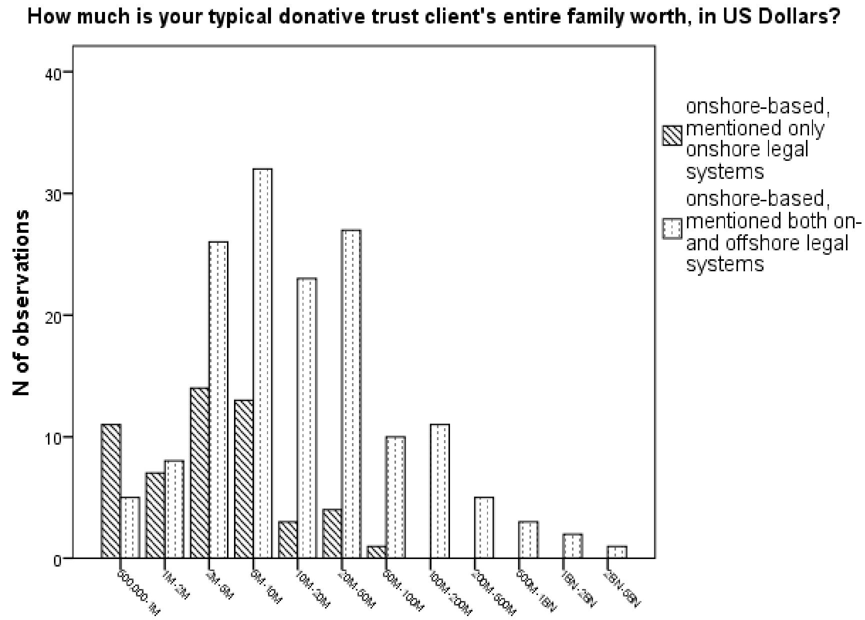


Figure 1. Onshore-based respondents' estimates of their typical trust client's net worth by type of jurisdictions the law of which each respondent mentioned as commonly used to govern trusts (onshore only or both onshore and offshore).

FIGURE 2:



<u>Figure 2</u>. Onshore-based respondents' estimates of the net worth of their typical trust client's entire family by type of jurisdictions the law of which each respondent mentioned as commonly used to govern trusts (onshore only or both onshore and offshore).

Settlors who settle trusts governed by the law of a jurisdiction other than their or their beneficiaries' jurisdictions of residence allow the jurisdiction where their trusts are administered to be changed more easily than other settlors: Respondents' estimates of the proportion of settlors who choose a governing law unconnected to their or their beneficiaries' jurisdictions of residence were correlated with their estimates of the prevalence of "flee clauses," which provide for the trusteeship to be transferred to new trustees in a different jurisdiction ($r_s = 0.432$, $p < 0.001$).

TABLE 5 presents the jurisdictions the law of which respondents mentioned as most commonly used to govern trusts, in descending order, starting with the jurisdiction respondents mentioned more than any other: Delaware. For each jurisdiction, I give the number of respondents who mentioned its law as commonly used to govern trusts, both absolutely and in percentage terms. As many respondents mentioned more than one jurisdiction, the sum of percentages exceeds one hundred percent.

TABLE 5: LEGAL SYSTEMS COMMONLY USED TO GOVERN TRUSTS

	N of obs.	Percent		*N* of obs.	Percent
Delaware	89	21.76	Illinois	7	1.71
England	75	18.34	Mauritius	7	1.71
Jersey	73	17.84	North Carolina	7	1.71
Cayman Islands	49	11.98	Cyprus	6	1.47
Nevada	49	11.98	Gibraltar	6	1.47
Guernsey	46	11.25	Hong Kong	6	1.47
Florida	44	10.76	Maryland	6	1.47
British Virgin Islands	42	10.27	Pennsylvania	6	1.47
South Dakota	41	10.02	Scotland	6	1.47
Alaska	39	9.53	Tennessee	6	1.47
New Zealand	37	9.05	Texas	6	1.47
"USA" (state unspecified)	33	8.07	"Channel Islands" (island unspecified)	5	1.22
Isle of Man	25	6.11	Massachusetts	5	1.22
Bahamas	24	5.87	Missouri	5	1.22
New York	24	5.87	Nevis	5	1.22
Australia	19	4.64	Ohio	5	1.22
Bermuda	17	4.15	San Marino	5	1.22
Singapore	16	3.91	Arizona	4	0.98
Canada	12	2.93	Belize	4	0.98
New Hampshire	11	2.69	Ireland	4	0.98
California	9	2.2	Virginia	4	0.98
Liechtenstein	9	2.2	Barbados	3	0.73
Malta	9	2.2	Colorado	3	0.73
Switzerland	9	2.2	Israel	3	0.73
Wyoming	9	2.2	Luxembourg	3	0.73
New Jersey	8	1.95	"Offshore" (jurisdiction unspecified)	3	0.73
Cook Islands	7	1.71	Panama	3	0.73

TABLE 5 (CONTINUED): LEGAL SYSTEMS COMMONLY USED TO GOVERN TRUSTS

	N of obs.	Percent		*N* of obs.	Percent
Seychelles	3	0.73	Hawaii	1	0.24
District of Columbia	2	0.49	India	1	0.24
Michigan	2	0.49	Kansas	1	0.24
Mississippi	2	0.49	Kentucky	1	0.24
North Dakota	2	0.49	Labuan	1	0.24
Northern Ireland	2	0.49	Louisiana	1	0.24
South Africa	2	0.49	Maine	1	0.24
South Carolina	2	0.49	Manitoba	1	0.24
Spain	2	0.49	Mexico	1	0.24
Alabama	1	0.24	Netherlands	1	0.24
Alberta	1	0.24	New Mexico	1	0.24
"British Channel Islands" (island unspecified)	1	0.24	Oklahoma	1	0.24
Brunei	1	0.24	Puerto Rico	1	0.24
"Caribbean" (jurisdiction unspecified)	1	0.24	"Rest of the world" (jurisdiction unspecified)	1	0.24
"Dakotas" (jurisdiction unspecified)	1	0.24	"South Pacific" (jurisdiction unspecified)	1	0.24
United Arab Emirates	1	0.24	Turks and Caicos Islands	1	0.24
"Europe" (jurisdiction unspecified)	1	0.24	"Virgin Islands" (jurisdiction unspecified)	1	0.24
"Foreign" (jurisdiction unspecified)	1	0.24	Washington	1	0.24
France	1	0.24	Wisconsin	1	0.24
Georgia	1	0.24			

Sanga's recent data on choice of law in commercial contracts disclosed to the S.E.C. between 1996–2012 is not strictly comparable, because it is limited to a choice between U.S. legal systems.[182] Notably, however, while New York leads Sanga's list with 27.3% of contracts examined governed by its law, New York law is merely the sixth most popular U.S. legal system to govern trusts. Among U.S. jurisdictions the law of which governs trusts, New York is preceded by Delaware, a distant second place in Sanga's list with 12.4% of contracts examined, as well as by Florida, Nevada, South Dakota, and Alaska.

Taking a page from Sanga,[183] I calculated the relative use for each jurisdiction respondents mentioned. The relative use is obtained by taking the natural logarithm of the quotient of the likelihood that a respondent mentioned the law of a certain jurisdiction as commonly used to govern trusts, divided by the likelihood of that respondent being based in that jurisdiction. As Sanga explains, "[p]ositive values . . . indicate that a state's laws are disproportionally overused," while negative values indicate that they are underused.[184] TABLE 6 presents the jurisdictions respondents mentioned the laws of which are commonly used to govern trusts, in descending order of their relative use. I include only those jurisdictions reported by at least one respondent as his or her jurisdiction of residence, as well as by at least one respondent, not necessarily the same one, as commonly used to govern trusts.

182. *See* Sanga, *supra* note 15, at 906.
183. *Id.* at 899.
184. *Id.* at 896, 908 tbl.3.

TABLE 6. JURISDICTIONS COMMONLY USED TO GOVERN TRUSTS, BY RELATIVE USE

	Relative Use		Relative Use
Delaware	4.49	India	0.00
Cayman	3.89	Kansas	0.00
Nevada	3.89	Kentucky	0.00
Bahamas	3.18	Mississippi	0.00
British Virgin Islands	3.04	New Jersey	0.00
Alaska	2.97	New Mexico	0.00
South Dakota	2.61	Puerto Rico	0.00
Guernsey	2.44	Virgin Islands	0.00
Jersey	2.21	USA	-0.03
Isle of Man	2.12	Maryland	-0.15
Singapore	2.08	Massachusetts	-0.18
Florida	1.84	Switzerland	-0.29
Cyprus	1.79	Pennsylvania	-0.41
Gibraltar	1.79	Northern Ireland	-0.41
New Zealand	1.67	South Africa	-0.41
Channel Islands	1.61	Missouri	-0.47
Malta	1.50	Canada	-0.51
Bermuda	1.45	Israel	-0.51
Arizona	1.39	Texas	-0.61
Ireland	1.39	Hawaii	-0.69
England	1.23	Mexico	-0.69
Barbados	1.10	Ohio	-0.69
Hong Kong	1.10	South Carolina	-0.69
New Hampshire	0.61	Washington	-0.69
Mauritius	0.56	Illinois	-0.76
Australia	0.55	Colorado	-0.85
New York	0.54	Virginia	-0.92
Scotland	0.41	France	-1.10
California	0.41	Louisiana	-1.10
North Carolina	0.34	Michigan	-1.10
Tennessee	0.18	Wisconsin	-1.10
Alabama	0.00	Oklahoma	-1.39
Brunei	0.00	Georgia	-2.08

Unsurprisingly, given the nature of Sanga's relative use measure, offshore jurisdictions, the laws of which commonly govern trusts despite their small resident populations, lead TABLE 6. U.S. States which qualify as offshore jurisdictions under my definition, such as Delaware and Nevada, share the honors with Caribbean islands, the islands of the British Channel, and one South Asian island—Singapore. The leading onshore jurisdiction is Florida, in twelfth place.

The above description of survey respondents highlights the extreme diversity of the respondent group. Respondents differ along several dimensions. They are distributed between onshore and offshore jurisdictions. They serve a variety of different client bases, some focused on the middle class while others concentrate on the wealthy. The extent of their experience with trusts ranges from servicing a few trusts each year to servicing more than a hundred trusts each year. Respondents work under a variety of trust regimes, some using the regimes of their own, or their clients', various jurisdictions of residence, while others use a fluctuating global selection of regimes. Respondents were not significantly different from the population of trust service providers I invited to take the survey respecting any of the descriptive parameters I examined.

III. Empirical Analysis

In this Part, I describe and analyze the data my survey respondents and interviewees provided concerning the four controversial trust features discussed in Part I.[185] I start with findings regarding the frequency with which perpetual and other extreme long-term trusts are used, and the proportion, out of trusts supposed, according to the trust instrument, to last beyond a century, of trusts which are in practice likely to last that long. Next I discuss the frequency with which terms exculpating trustees from liability for loss they caused their beneficiaries are used, and whether settlors of trusts which include such terms demand and receive some quid pro quo for their inclusion. I then discuss the frequency with which trusts include features protecting beneficiaries' entitlements from their creditors, and whether where such features are present the beneficiaries protected are in fact less able than the average person to take care of their financial affairs. I conclude with findings regarding the frequency with which trust settlors retain powers over their trusts.

A. Perpetual and Extreme Long-Term Trusts

The survey results show that trusts likely, according to the trust instrument, to last more than a century are, while a minority of all trusts, fairly common. Respondents' mean estimate of the proportion of trusts supposed, according to the trust instrument, to last more than a century was 35.9%, though 38.7% of respondents believed that only ten percent or fewer of trusts are supposed to last that long. Respondents' mean estimate of the proportion of trusts which are supposed, according to the trust instrument, to last in perpetuity was 25.7%, though 52.3% of respondents

185. The four controversial trust features discussed *supra* in Part I include: (1) perpetual trusts; (2) trust instrument clauses exonerating trustees from liability for loss they inflict on beneficiaries; (3) techniques protecting beneficiaries' entitlements under trust from their creditors; and (4) settlor control of trusts.

said that only ten percent or fewer of trusts are supposed to last forever, with 33.7% saying that no trusts are supposed to last that long.[186]

With 75.6% of respondents based onshore, these overall data largely reflect onshore practice. Responses by onshore-based respondents, having been isolated, reinforce the resulting impression that a substantial minority of trusts are supposed, on paper, to last in the extreme long-term.[187] The interviews I held further reinforce that impression: Seven of the twenty-five practitioners I interviewed confirmed that they see frequent use of extreme long-term trusts,[188] while eleven others said that client interest in such trusts is rare.[189] Three Israeli practitioners interviewed, who reported frequent use of extreme long-term trusts, noted that in lieu of a limit on trust duration, many trusts include clauses directing termination when the trust corpus drops to a given amount, which in some cases is likely to take more than a century.[190] Two of the three commented that such minimum value clauses are the default position in trusts with which they are concerned, adding that perpetuity-style limitations are ineffective even where they exist: When the end of the applicable perpetuity period draws near means will be found for the trust to continue.[191] Use of extreme long-term trusts appears more frequent for "international" clients, those using service providers residing outside the settlor's jurisdiction of residence, and/or governing laws other than the law of that jurisdiction, than for more domestic

186. These results appear to contradict James Hines' finding, based on the IRS' Statistics of Income data for 2010, that perpetual trusts do not appear to "represent a significant portion of US trusts." Hines Jr., *supra* note 24, at 122. While Hines' findings were limited to U.S.-resident trusts, and mine reflect trust practice both domestically and abroad, my U.S.-based respondents' estimates of the frequency of perpetual and other extreme long-term trusts were not significantly different from those by my non-U.S.-based respondents. The contradiction is more apparent than real, however, since Hines' finding was based on the number of reporting trusts per state: He found that states which abolished their rules against perpetuities reported twenty-four percent more complex trusts "than would be predicted on the basis of population and per capita income." *Id.* at 116. As many states which repealed their rules against perpetuities by 2010 have small populations, this did not make for large numbers of reporting complex trusts. Hines' results are reconcilable with mine, as trusts reporting to the IRS note their state of residence, not the state the law of which governs them. Many trusts drafted as perpetual or extreme long-term and governed by the law of a state which abolished its rule against perpetuities may thus be resident in a non-abolition state and classified by the IRS under that state. As a result, U.S.-resident perpetual and other extreme long-term trusts could well be significantly more numerous than Hines believed.

187. One U.S. practitioner told me of a practice where a client creates one dynasty (perpetual or extreme long-term) trust along with a large number of shorter-term trusts directed at using the annual exclusion under I.R.C. § 2503(b) (2011), currently $14,000 annually per donee, Rev. Proc. 2015-53 § 3.35(1), 2015-44 I.R.B. 615, 623, so that while dynasty trusts make a small proportion of all trusts the client creates, they are much higher in value than all others. I hope to investigate the relative value of perpetual and other trusts in future work.

188. US3, EN1, EN3, EN4, IS4, IS5, SW1.

189. US1, US2, US4, US5, US6, IT2, IT3, IT4, IT5, IT6, SW2.

190. IS4, IS5 (IS5 was an interview with two practitioners, interviewed simultaneously).

191. IS5.

clients: Those practitioners who reported a wholly or partly "international" practice described the use of extreme long-term trusts as frequent,[192] while those who focus on domestic practice, notably six of the seven Italian practitioners interviewed, reported no use of such trusts.[193]

Offshore trust practitioners appear considerably more familiar than other practitioners with trusts supposed, according to their terms, to last in the extreme long-term: Their mean estimate of the proportion of trusts supposed to last for more than a century was 53.1%, and that of the proportion of trusts supposed to last forever, 40.1%. Having calculated an averaged measure of respondents' estimates of the frequency of trusts supposed to last for more than a century and those supposed to last forever, I found that half of offshore-based respondents estimated that fifty percent or more of trusts are supposed, according to the trust instrument, to last for a century or more, while only 24.6% of onshore-based respondents reported a similar estimate. I found correlations between respondents' estimate of the proportion of trusts which, according to the trust instrument, are supposed to last more than a century and the wealth of their typical trust client ($r_s = 0.284$, $p < 0.001$), as well as between that same estimate and the number of trusts they service in a typical year ($r_s = 0.183$, p < 0.001). As trust practitioners providing services concerning large numbers of trusts annually are few, the latter correlation implies that service provision concerning extreme long-term trusts is concentrated among fewer practitioners than service provision concerning all trusts, while the former offers some support for the commonsensical hypothesis that the client base for so-called "dynastic," extreme long-term trusts is wealthier, on average, than the client base for all trusts.

Onshore- and offshore-based respondents also differ in their estimates of the frequency among trusts which, according to their terms, are perpetual or extreme long-term, of trusts which are in fact unlikely to last longer than a century because, for instance, beneficiaries have powers of appointment over the trust corpus and are likely to use them and empty the trust before it turns one hundred years old. Looking at the entire response pool, responses to this question ran the gamut from all trusts which are perpetual or extreme long-term on paper also being in fact likely to last for more than a century (17.3% of respondents) to eighty percent or more of those trusts being unlikely to last for more than a century (36.8% of respondents). 11.8% of respondents chose the 50-50% option.

Offshore-based respondents, who believe, more than onshore-based respondents, extreme long-term trusts to be a common phenomenon,

192. US3, EN1, EN3, EN4, IS5, SW1.

193. IT1, IT2, IT3, IT4, IT5, IT6. Practitioner IT7 did not discuss extreme long-term or perpetual trusts at all, and therefore does not serve as a counter-indication.

also seem more familiar than their onshore brethren with trusts which are extreme long-term on their face but not in fact likely to last more than a century. Offshore-based respondents' mean estimate of the frequency of such trusts among trusts which are extreme long-term on paper was 56.6%, while for onshore-based respondents the mean estimate was 50.6%.[194] It may not be the beneficiaries of perpetual-on-paper trusts who bring them to a premature end: Respondents' estimates of the frequency of perpetual and extreme long-term trusts were correlated with their estimates of the frequency of decanting powers, which enable trustees to decant the trust property into another trust with shorter duration: $r_s = 0.194$, $p < 0.001$ (trusts supposed to last more than a century), $r_s = 0.202$, $p < 0.001$ (perpetual trusts). Some of these results are summarized in TABLE 7.

TABLE 7. THE FREQUENCY OF EXTREME LONG-TERM TRUSTS

	Mean	***SD***	***Mode***
What share of trusts are supposed, according to the trust instrument, to last more than 100 years?			
Respondent Population	35.9	32.9	0
Onshore-based respondents	32.2	31.1	0
Offshore-based respondents	53.1	34.1	100
What share of trusts are supposed, according to the trust instrument, to last in perpetuity?			
Respondent Population	25.7	29.9	0
Onshore-based respondents	22.2	27.4	0
Offshore-based respondents	40.1	34	0
Average of responses to the above two questions:			
Respondent Population	30.7	27.2	0
Onshore-based respondents	27.1	25.2	0
Offshore-based respondents	46.6	28.8	50
Of those trusts which, according to the trust instrument, are perpetual or very long-term, how many are in practice unlikely to last longer than 100 years?			
Respondent Population	51.1	36.1	0
Onshore-based respondents	50.6	36	0
Offshore-based respondents	56.6	35.2	90

194. This difference failed to reach statistical significance.

I found a correlation between the averaged measure of respondents' estimates of the frequency of trusts that are supposed, according to the trust instrument, to last in the extreme long-term and their estimates of the frequency, among trusts drafted to last in the extreme long-term, of trusts which are in fact unlikely to last longer than a century ($r_s = 0.221$, $p < 0.001$).[195] Thus, the higher a respondent's estimate of the proportion of trusts supposed, according to the trust instrument, to last in the extreme long-term, the higher his or her estimate of the proportion, out of trusts supposed, on paper, to last that long, of trusts which are not in fact likely to do so. This conclusion is reinforced by comments made by two of the three English practitioners I interviewed who reported perpetual trusts to be frequently used and further commented that there is always a way to terminate a perpetual trust, whether by exercising an expressly reserved power of termination or, in the absence of such a power, by an application to the court, asking it to terminate the trust. The two noted that a key advantage clients see in "perpetual" trusts is that their actual duration is completely flexible given the ever-present option of terminating them, while the maximum possible duration of trusts subject to a perpetuity period is fixed.[196] One Swiss practitioner I interviewed noted that trusts for international clients, while often drafted to last for a very long time, in fact only last a single generation, serving as a succession instrument for the settlor, and are modified fairly frequently throughout this truncated lifetime as pertinent tax rules change and beneficiaries move.[197]

TABLE 8 presents the results of regression analysis, confirming that the positive correlation between respondents' estimates of the proportion of trusts which are extreme long-term on paper and their estimates of the proportion of trusts which despite being extreme long-term on paper are unlikely to last longer than a century remains reliable even once confounds found to affect either (or both) of these estimates are incorporated. I regress (1) a log-transformed version of my averaged measure of respondents' estimates of the proportion of trusts that are supposed, according to the trust instrument, to last in the extreme long-term, (2) the number of trusts a respondent and (3) his or her firm service in a typical year, (4) the wealth of each respondent's typical trust client, and (5) a dummy indicating whether each respondent is or is not

195. Respondents' estimates of the frequency, among trusts drafted to last in the extreme long-term, of trusts which are in fact unlikely to last longer than a century were also separately correlated with their estimates of the frequency of trusts drafted to last more than a century and with their estimates of the frequency of trusts drafted to last in perpetuity.

196. EN1, EN4.

197. SW1. The interview data reported in the text to this and the previous note should relax fears that the correlation reported in the immediately preceding text may result from "consistency bias," which is survey respondents' tendency to give similar answers to consecutive questions. I thank Bob Lawless for drawing my attention to this fear.

based offshore (the default being onshore practice), on a log-transformed version of respondents' estimates of the proportion of trusts which despite being extreme long-term on paper are unlikely to last longer than a century.

TABLE 8: REGRESSION RESULTS:
PROPORTION OF TRUSTS DRAFTED AS EXTREME
LONG-TERM BUT IN FACT UNLIKELY TO LAST BEYOND A CENTURY

	(1)	(2)	(3)
Proportion of trusts supposed to last in the extreme long-term	0.334** (0.051)	0.311** (0.053)	0.317** (0.055)
Number of trusts serviced by respondent annually		0.015 (0.067)	0.011 (0.067)
Number of trusts serviced by respondents' firm annually		0.027 (0.067)	0.027 (0.067)
Wealth of respondent's typical client		0.058 (0.053)	0.060 (0.054)
Respondent offshore- or onshore-based			-0.023 (0.053)
Obs.	349	349	349

* Significant at the five percent level.

** Significant at the one percent level.

It thus appears that the use of trusts drafted to exist for more than a century is, while a minority practice, fairly common. The use of such "dynasty" trusts is concentrated in the hands of experienced service providers with relatively wealthy clients. It is also concentrated in the hands of service providers to "international" clients, those using service providers resident outside the settlor's jurisdiction of residence, and/or governing laws other than the law of that jurisdiction. Many trusts that appear extreme long-term on paper are, however, in practice unlikely to outlast a century.[198] Greater use is made of extreme long-term trusts in the offshore than onshore. The more frequent a practitioner estimates such trusts to be, the more he or she estimates them not to be in practice likely to outlast a century.

198. For commentators who opined that extreme long-term trusts are unlikely to last longer than a century, see sources cited *supra* at note 92.

B. Trustee Exculpatory Terms

Survey results regarding trustee exculpatory terms are straightforward. Respondents believe, on average, that 71.1% of trusts include a trustee exculpatory term of some kind. Half the respondents estimated the proportion of trusts that include such a term as ninety percent or more, and thirty-three percent of respondents believe all trusts include trustee exculpatory terms. My interview results confirm the popularity of such terms. Nineteen of the twenty-five practitioners I interviewed provided useful information on the subject.[199] Of these nineteen, thirteen said trustee exculpatory terms are always present in trusts they see in their practice.[200] Two said such terms are sometimes used.[201] Another two implied that they are only rarely used: One Italian lawyer said that as an advisor to settlors, she does not include trustee exculpatory terms in trusts she drafts.[202] Another practitioner, a veteran Boston-based trust expert, reported that Massachusetts institutional trustees do not ask for the inclusion of exculpatory terms in trusts unless the trust involves a higher than average risk of liability.[203] It may be that this view reflects the practices of some years ago; it does not reflect a reality unique to the Boston market, as other Boston-based trust service providers said that exculpatory terms are always used or sometimes used.[204]

Of the survey respondents, 63.6% believe no settlors of trusts which include a trustee exculpatory term demand and receive any quid pro quo for the inclusion of that term. Respondents' mean estimate of the proportion of settlors of such trusts who demand and receive some quid pro quo for the inclusion of an exculpatory term was 10.4%. Of the respondents, 25.18% believed both that all trusts include an exculpatory term of some kind *and* that no settlors demand and receive any quid pro quo for the inclusion of these terms. These survey results confirm Dunn's English data of 2002, according to which exculpatory terms are very common in trusts serviced by professional trustees, without settlors asking for any quid pro quo.[205] A minority of practitioners reported that practitioners demand the incorporation of exculpatory terms in trust deeds as quid pro quo for serving as trustees of trusts with a higher than usual perceived risk of loss, as where the trustee holds a family business rather than a diversified portfolio of investments, or where the trustee is to be directed by others, such as a trust protector.

199. US1, US2, US5, US6, EN1, EN2, EN3, EN4, EN5, IS1, IS2, IS4, IS5, IT3, IT4, IT5, IT6, SW1, SW2.
200. US2, US5, EN1, EN2, EN3, IS1, IS2, IS4, IS5, IT4, IT5, SW1, SW2.
201. US6, EN4.
202. IT3.
203. US1.
204. US2, US6.
205. The Law Comm'n, *supra* note 26, at 33, 36–37.

I found both the wealth of each respondent's typical trust client and that of that client's family to be positively correlated with that respondent's estimate of the proportion of trusts which include exculpatory terms: $r_s = 0.167$, $p = 0.001$ and $r_s = 0.158$, $p = 0.002$ respectively. It appears that the wealthier a service provider's trust clients, the more he or she believes exculpatory terms to be standard features of trusts. And what is more, the number of trusts a respondent and his or her firm service annually appears to be *negatively* correlated with his or her estimate of the proportion of settlors who demand and receive some quid pro quo for the inclusion of an exculpatory term: $r_s = -0.18$, $p = 0.001$ in both cases. Thus, the more trusts a practitioner services, the lower his or her estimate of the likelihood of settlors demanding and receiving quid pro quo for the inclusion of exculpatory terms.[206]

It thus appears that exculpatory terms, without settlors demanding and receiving any quid pro quo for their inclusion, are now a conventional standard in trusts serviced by professionals. This reality is especially clear regarding practitioners serving wealthy clients and those handling a large number of trusts.

C. Anti-Creditor Techniques Protecting Beneficiaries' Entitlements

Survey responses show that anti-creditor techniques protecting beneficiaries' entitlements are even more ubiquitous than trustee exculpatory terms: Thirty-nine percent of respondents believe all trusts to include such techniques. Respondents' median estimate of the proportion of trusts to include such techniques was ninety percent, and their mean estimate 73.8%. This striking finding is almost entirely based on responses by U.S.-based respondents, 59.5% of whom believe all trusts provide one or more beneficiaries with anti-creditor protection. U.S.-based respondents' mean estimate of the frequency of such beneficiary protection was 89.7%. Not one U.S.-based respondent said that no trusts include such protection. Responses by non-U.S.-based respondents were spread across the scale, with only 13.6% believing that all trusts provide one or more beneficiaries with anti-creditor protection. Figure 3 illustrates estimates by U.S.-based and other respondents of the proportion of trusts which include techniques protecting beneficiaries' entitlements from their creditors.

206. Whether a respondent was based onshore or offshore does not appear to make a difference regarding either her estimate of the frequency with which exculpatory terms are used or her estimate of the frequency with which settlors of trusts which include such a term demand and receive some quid pro quo for its inclusion.

FIGURE 3:

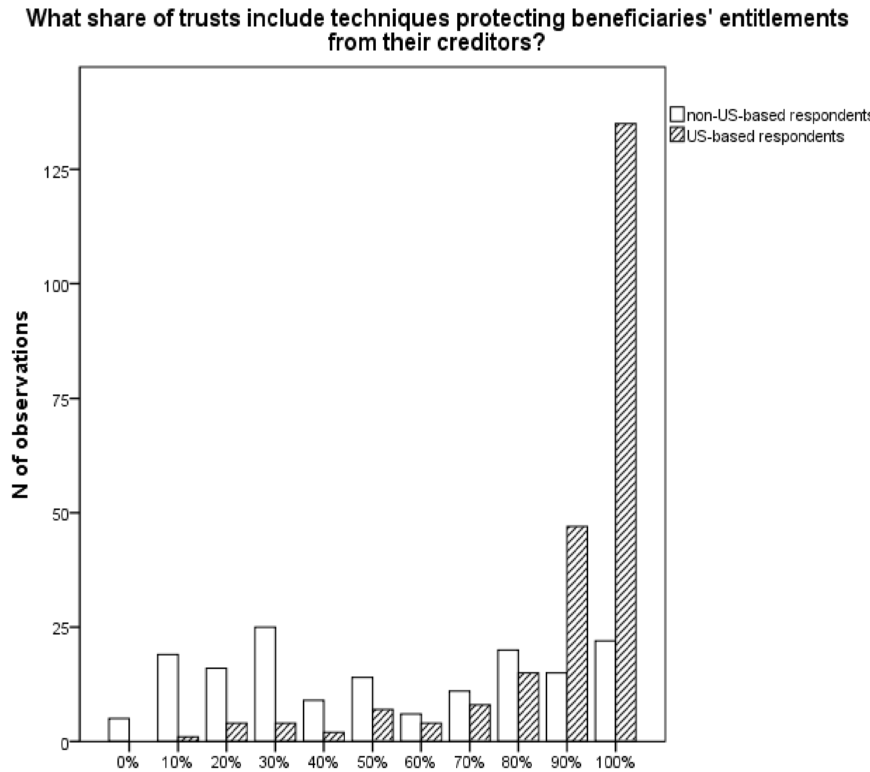


Figure 3. U.S.-based and other respondents' estimates of the proportion of trusts which include techniques protecting beneficiaries' entitlements from their creditors.

A similar divergence between U.S.-based and other trust practitioners in their estimates of the frequency of anti-creditor protective techniques was apparent in interviews I conducted, with Italy, surprisingly, joining the United States as another jurisdiction where use of such techniques is ubiquitous. One Boston lawyer I interviewed commented that "every single one" of the trusts in which he is involved contains a spendthrift clause.[207] Another Bostonian commented that "almost all of our trusts that are revocable have a spendthrift provision."[208] A third U.S. practitioner I interviewed is a leading New York City expert on self-settled spendthrift trusts.[209] Across the Atlantic, all seven Italian trust service providers I

207. US2.
208. US6.
209. US3.

interviewed reported frequent use of anti-creditor techniques. Five Italians said they use the English technique nicknamed "protective trusts," providing that beneficiaries' interests shall terminate or be replaced by a mere expectation of benefit subject to trustee discretion upon an attempt by beneficiaries to alienate their interests, by their creditors to reach them, or upon the bankruptcy of a beneficiary.[210] Two Italian service providers said the usual Italian protective technique is defining a trust's beneficiaries as those members of a pre-defined class who will be alive when the trust terminates, so that their identity is, throughout the life of the trust, neither known nor subject to trustee discretion.[211] One Italian said he keeps beneficiaries protected by drafting his trusts as discretionary.[212] I found a sharp contrast with the U.S. and Italian ubiquity of anti-creditor techniques in England: Only one of the English trust service providers I interviewed, a senior bank officer, commented that some testators recognize the need to protect their children's beneficial entitlements under trust from those children's creditors, adding that such protection is normally obtained in England by use of discretionary trusts.[213] Israeli practitioners appear to occupy a middle ground between the United States and England as regards the use of anti-creditor protective techniques: Two of the five Israeli practitioners I interviewed, one trust company officer and one lawyer, noted their familiarity with attempts to use trusts to create beneficial entitlements beneficiaries' creditors cannot access.[214] The trust company officer noted that trust documents provide that no security interests may be created in the trust property,[215] while the lawyer noted that effective protection rules out settlor influence over the trustee or the trust protector.[216]

In order to assess the only empirically testable argument proponents of anti-creditor techniques make to justify them—that protected beneficiaries are less able than the average person to provide for themselves without protection—I asked respondents to estimate the proportion of protected beneficiaries who are in fact less able than the average person to take care of their financial affairs because they are minors, young adults, financially imprudent, or for other reasons. The distribution of responses received resembles a normal distribution, with the mean response at 47.4% and both the median and mode at fifty percent. Respondents shied away from extremes: A mere 10% believed

210. IT1, IT2, IT3, IT4, IT5. For "protective trusts," see sources cited *supra* note 119.
211. IT6, IT7.
212. IT2.
213. EN3.
214. IS4, IS5.
215. IS4.
216. IS5.

that 10% or fewer of protected beneficiaries are incapable, while 9.3% believed ninety percent or more of protected beneficiaries to be so, and 18.6% of respondents chose the 50-50% option.

Onshore-based respondents believed more protected beneficiaries to be incapable (on average, 49.6%) than did respondents based offshore (on average, 38.8%). Two U.S. practitioners I interviewed said spendthrift protections are used for all beneficiaries, capable or not.[217] One Israeli lawyer similarly noted anti-creditor proofing is used for both incapable and other beneficiaries.[218] Estimates of the frequency of techniques protecting beneficiaries from their creditors were correlated with estimates of the frequency of clauses reserving powers to the settlor (of which more in subpart III.D; $r_s = 0.379$, $p < 0.001$). The presence of settlor-reserved powers clauses may reflect settlors' expectations that beneficiaries will not be able to monitor their trustees effectively, possibly due to the same deficiencies which necessitate the use of anti-creditor protections. This correlation could also result, however, from the mere presence of both techniques on templates used by some, but not all, trustees.

D. Settlor Control of Trusts

Survey respondents believe, on average, that 55.1% of trusts include clauses reserving some power to the settlor, while 45.7% of trusts include, more specifically, powers of revocation reserved to the settlor or a nonadverse party. 35.4% of respondents believe that 70% or more of trusts include such powers of revocation. Most respondents thus clearly believe that a substantial fraction of trusts include such powers of revocation as would, for trusts subject to the federal income tax, render the settlor subject to tax on trust income. Most of the data pointing to the popularity of settlor-reserved powers generally, and powers of revocation specifically, was contributed by U.S.-based respondents. Those U.S.-based respondents believe, on average, that 68.7% of trusts include settlor-reserved powers of some kind, while 58.5% include powers of revocation reserved to the settlor or a nonadverse party. Half of U.S.-based respondents believe that at least seventy percent of trusts include powers of revocation reserved to the settlor or a nonadverse party. Non-U.S. respondents, on the other hand, believe, on average, that 39% of trusts include settlor-reserved powers of some kind, while only 29.7% include powers of revocation reserved to the settlor or a nonadverse party. Half of non-U.S. respondents believe that only thirty percent of trusts or fewer include settlor-reserved powers clauses of any kind, and that at most twenty percent of trusts include powers of

217. US2, US6.
218. IS5.

revocation reserved to the settlor or a nonadverse party. These results are illustrated in FIGURES 4 and 5.

FIGURE 4:

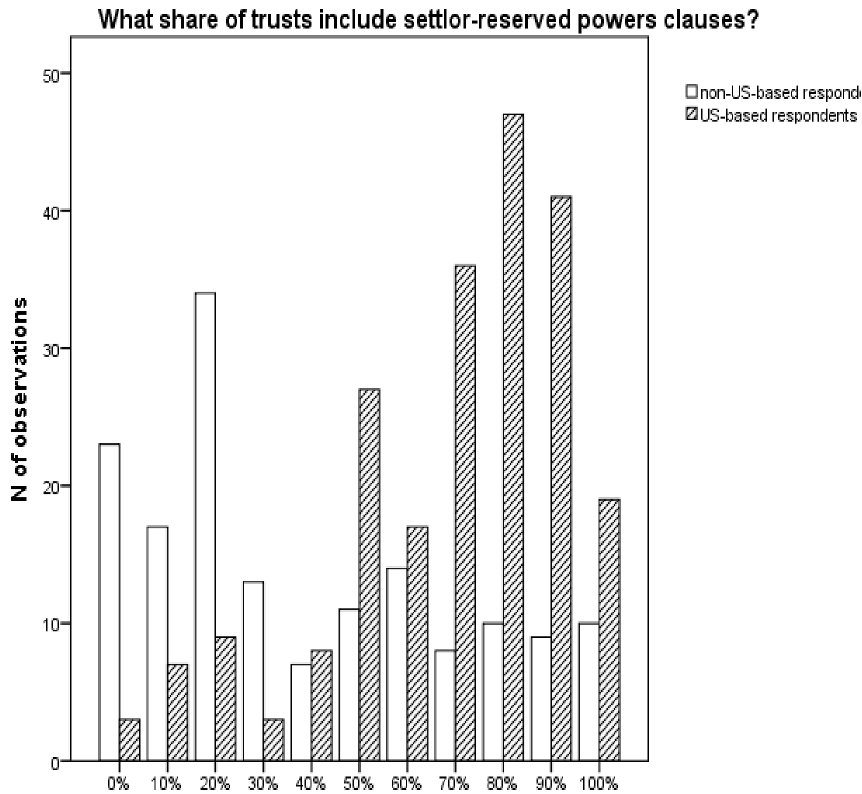


Figure 4. Respondents based in the United States and other respondents' estimates of the frequency of settlor-reserved powers.

FIGURE 5:

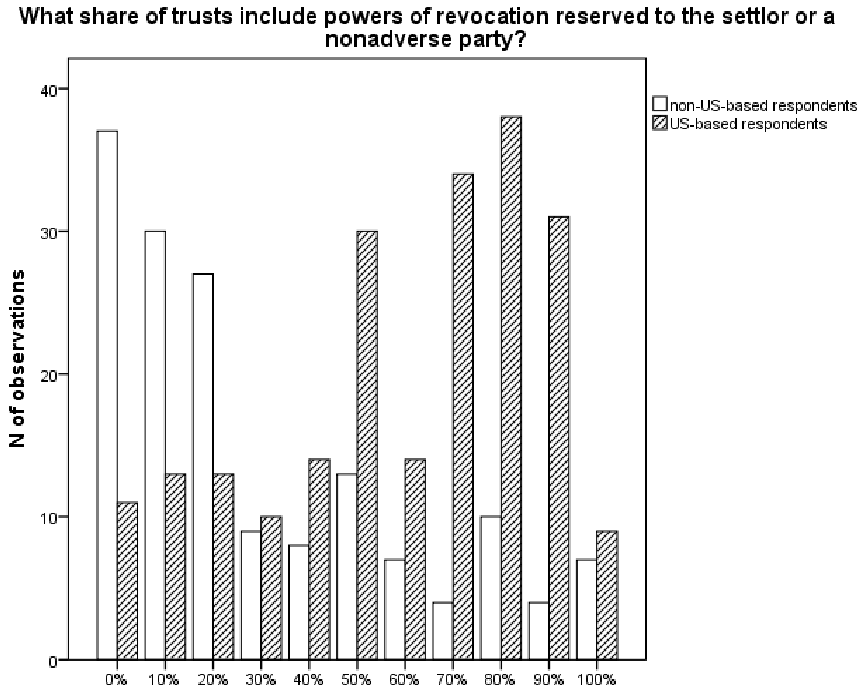


Figure 5. Respondents based in the United States and other respondents' estimates of the frequency of powers of revocation reserved to the settlor or a nonadverse party.

The difference between U.S.-based and other trust practitioners in their estimates of the popularity of settlor-reserved powers was confirmed in the interviews I conducted. Four of the six U.S. practitioners I interviewed confirmed that the use of such powers, particularly powers of revocation, is very common.[219] Across the Atlantic, one London-based attorney noted that he does not see client enthusiasm for settlor-reserved powers, "largely because most of my clients are domestic U.K. . . . [that] understand [the traditional trust form, under which settlors do not reserve powers] as a concept."[220] Occupying an intermediate position between the two extremes was another English practitioner, who advises an international clientele, much of which is composed of Russian, Middle Eastern, and African families. This practitioner noted that whereas "we used to steer clear of revocable trusts wherever possible . . . default would be irrevocable," the popularity of revocable trusts had increased:

219. US1, US2, US5, US6.
220. EN5.

Clients tend to prefer them when offered the choice, and banks are happy to oblige since the less independent judgment they are asked to exercise as trustees, the less liability they will have for any loss resulting.[221] Israeli practitioners I interviewed said use of settlor-reserved powers depends on the purposes the trust is intended to further: Such powers are often used where trusts are created to enable streamlined management of the settlor's property should he or she become legally, physically, or mentally incapacitated, with settlors' reserved powers ending at the onset of disability.[222] Other contexts where these Israeli practitioners see powers being reserved to settlors are inter vivos trusts of family businesses and trusts created on divorce.[223] The same practitioners underlined the importance of avoiding such powers where trusts are used to avoid estate or inheritance taxation.[224] Italian practitioners said that settlor power retention is likely to be seen by the Italian tax and anti-money laundering authorities as a sign of a trust being a sham, and as a result is rare in Italy. Italian settlors retain influence in other ways: They are made trust beneficiaries, become or appoint trust protectors to convey their wishes to the trustee, or retain the voting rights element of shares while the title and right to enjoy dividends are settled on trust.[225] Swiss practitioners said that a majority of clients want to retain control over the trust fund and trustee, but most relent when professionals explain that too much retained control could make tax authorities or courts conclude that no trust has in fact been created, leading to the attribution of the trust assets and income to the settlor for tax purposes—an undesirable result under the law of jurisdictions other than the United States.[226]

Settlors can control their trustees informally, without having formally retained any powers. Survey respondents believe, on average, that 42.2% of trusts are in fact run by their settlors or under their direction, whether they have expressly reserved any powers or not. Respondents believe, on average, that once trusts the settlors of which are also among their beneficiaries and trusts where settlors retain powers of revocation are excluded, 31.1% of the remaining trusts are run by their settlors or under their direction, regardless of whether they have expressly reserved any powers. As with express reserved powers clauses, U.S.-based respondents reported significantly more actual settlor control than other respondents. U.S.-based respondents believe, on average, that 50.3% of trusts are run by their settlors or under their direction,

221. EN1.
222. IS1.
223. IS2, IS4.
224. IS2, IS4.
225. IT1, IT2, IT4, IT5, IT7. One Italian notary (IT6) said settlor-retained powers are sometimes used.
226. SW1, SW2.

regardless of whether they have expressly reserved any powers, and that 34.1% of irrevocable trusts, the settlors of which are not also beneficiaries, are in fact run by their settlors or under their direction, regardless of whether they have expressly reserved any powers. Non-U.S.-based respondents believe that fewer trusts are run by their settlors. They believe, on average, that only 31.4% of all trusts and only 26.7% of irrevocable trusts, the settlors of which are not also beneficiaries, are in fact run by their settlors or under their direction, regardless of whether they have expressly reserved any powers. These results are illustrated in FIGURES 6 and 7.[227]

FIGURE 6:

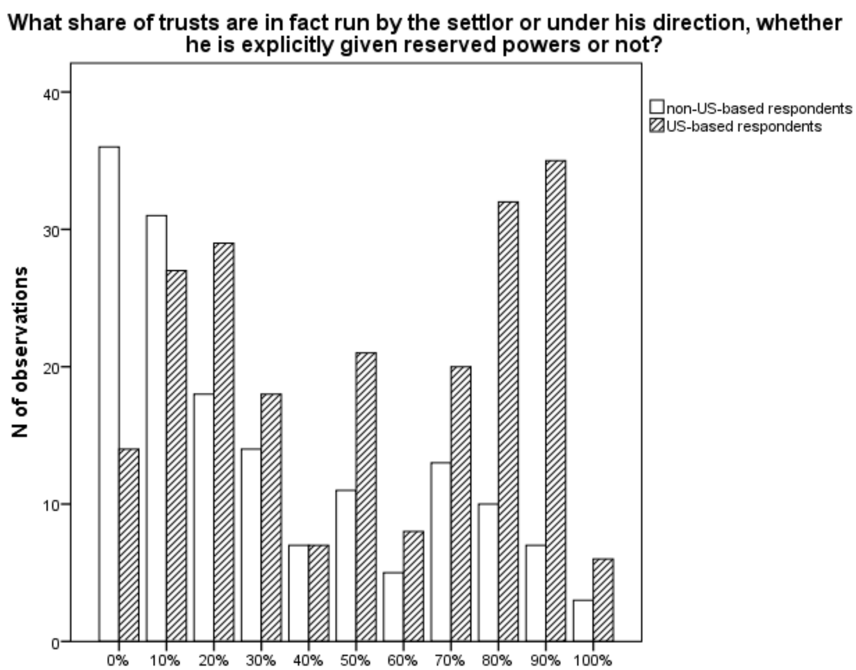


Figure 6. Respondents based in the United States and other respondents' estimates of the frequency of trusts which are in fact run by their settlors or under their direction, regardless of whether they have expressly reserved any powers.

227. The existence of informal settlor control outside the U.S. market was confirmed by one Swiss practitioner I interviewed (SW1), who reported cases of settlors, not having formally retained any powers, directing their trustees to pay them some of the trust fund. Such directions, effectively asking the trustee to breach his or her trust, are coupled with an express indemnity to the trustee, his heirs, and successors in title.

FIGURE 7:

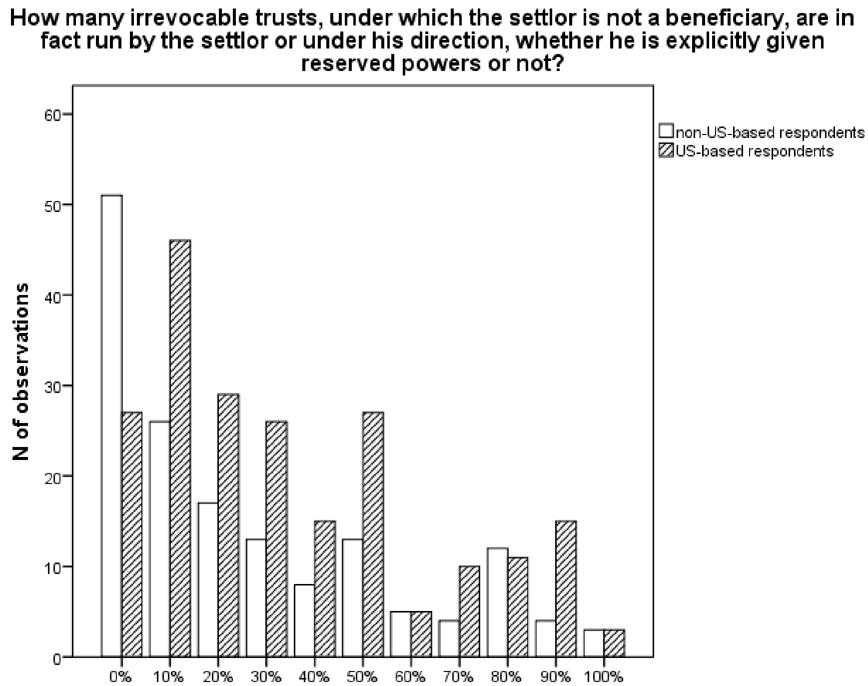


Figure 7. Respondents based in the United States and other respondents' estimates of the frequency of irrevocable trusts, the settlors of which are not also beneficiaries, which are in fact run by their settlors or under their direction, whether they have expressly reserved any powers or not.

The number of trusts serviced annually by a respondent's firm is *negatively* correlated with his or her estimate of the proportion of trusts that are in fact run by the settlor or under his or her direction, whether the settlor is explicitly given reserved powers or not: $r_s = -0.153$, $p = 0.004$. I interpret this correlation as indicating that service providers working at firms providing services to larger numbers of trusts are more familiar than other service providers with trusts which are in fact run by the professionals involved. It may be that firms servicing large numbers of trusts are the principal repositories of trust management know-how, with sole practitioners and members of firms having less of a trusts and estates practice deferring to settlors and thus accumulating less experience in the independent management of trusts.

In sum, the responses show that with respect to settlor control of trusts, U.S.-based trust practice is very different from trust practice outside the United States. Both the express reservation of powers to the settlor and actual settlor control of trusts are much more common in the

United States than elsewhere. TABLE 9 summarizes the survey results regarding settlor control for the entire respondent population, for U.S.-based respondents and for non-U.S.-based respondents.

TABLE 9. SETTLOR-RESERVED POWERS AND SETTLOR CONTROL OF TRUSTS

	Mean	***Median***	***SD***
What share of trusts include settlor-reserved powers clauses?			
Respondent Population	55.1	60	31.4
U.S.-Based	68.7	70	24
Not U.S.-Based	39	30	31.6
What share of trusts include powers of revocation reserved to the settlor or a nonadverse party?			
Respondent Population	45.7	50	32
U.S.-Based	58.5	70	28.1
Not U.S.-Based	29.7	20	30.1
What share of trusts are in fact run by the settlor or under his or her direction, whether he is explicitly given reserved powers or not?			
Respondent Population	42.2	35	32.5
U.S.-Based	50.3	50	32
Not U.S.-Based	31.4	20	30.3
How many irrevocable trusts, under which the settlor is not a beneficiary, are in fact run by the settlor or under his or her direction, regardless of whether he is explicitly given reserved powers?			
Respondent Population	31.1	20	28.9
U.S.-Based	34.1	30	28.3
Not U.S.-Based	26.7	20	29.2

IV. Policy Implications

A. Perpetual and Extreme Long-Term Trusts

My results show that perpetual and other extreme long-term trusts are now fairly common, making up a large minority of the trusts that service providers based in onshore jurisdictions see in practice. Trust service providers working from offshore jurisdictions report that a small majority of the trusts they see are supposed to last more than a century. The more familiar a service provider is with such trusts being used, however, the higher her estimate of the proportion of such trusts which are not in practice likely to last more than a century because they are likely to be emptied during their first century of existence. These findings confirm anecdotal reports that many perpetual and extreme long-term trusts contain mechanisms enabling an early termination.[228] Some practitioners I interviewed commented that it is the flexibility of perpetual trusts regarding duration—perpetual in principle, but capable of being terminated at any time—that accounts for their popularity.[229]

Because we now know, given my results, that many—perhaps most—of the perpetual and extreme long-term trusts in existence are likely to be emptied before even the traditional perpetuity period runs out, the number of perpetual and extreme long-term trusts which raise the normative concerns highlighted in Part I.B is much smaller than the number of perpetual and extreme long-term trusts overall. Given the popularity of perpetual and extreme long-term trusts, however, even a minority of these trusts is significant enough to warrant legislative attention. State legislatures may therefore wish to make the validity of trusts drafted to last longer than the traditional perpetuity period conditional on the availability of mechanisms for early termination. Because existing statutory doctrine only permits the early termination of trusts where such termination is seen to further the purposes of the trust,[230] trusts drafted to last longer than the traditional perpetuity period will need to include a provision allowing early termination once a trust has outlasted the traditional perpetuity period in order to abide by the proposed condition.

B. Trustee Exculpatory Terms

My results make clear that trustee exculpatory terms, without settlors demanding and receiving express quid pro quo for their inclusion, are now a conventional standard in trusts serviced by professionals. Whether

228. *See* Sitkoff & Schanzenbach, *Jurisdictional Competition*, *supra* note 24, at 413–14; *see also* sources cited *supra* at notes 92–94.

229. EN1, EN4.

230. *See* Unif. Trust Code § 412(a) (Unif. Law Comm'n 2010).

this state of affairs harms beneficiaries is unclear. Some trustees will apparently simply not serve without exculpatory terms, arguing, as one English practitioner I interviewed put it, that "if you want me as a professional to advise you, if you want to attract the high level caliber of professional trustees, you have to give them an element of protection, an element of security."[231] Other trustees appear to be prepared to take on trusts of diversified portfolios without an exculpatory term, but demand such a term when taking on a less diversified trust fund, such as a trust of a family business. Yet other trustees say that without exculpatory terms, trust funds will be wasted in defending lawsuits filed by beneficiaries disappointed by the results of trustees' exercise of their dispositive discretions. Whether what service providers are currently prepared to offer is seen as beneficial or harmful for beneficiaries depends on the alternative we compare it to. If trust services offered are themselves beneficial, enjoying them subject to an exculpatory term is preferable to not enjoying them at all. Compared to the self-denying services of Judge Cardozo's ideal trustee, on the other hand, fiduciary services with trustee exculpation appear less attractive. Whether the status quo I found is seen as harming beneficiaries depends also on our understanding of beneficiaries' interests. Where exculpatory terms prevent trustees from spending the trust fund on defending what they see as harassment actions by beneficiaries, would-be plaintiff beneficiaries are likely to see the terms as harmful, while other beneficiaries may be thankful for their existence.

The law and practice of trustee exculpatory terms are in clear need of rationalization. Currently, while the common law imposes an elevated liability standard on trustees, holding them to "the punctilio of an honor the most sensitive,"[232] this standard mostly applies to the most unsophisticated of trustees, who are unaware of the possibility of releasing themselves from it. Sophisticated, professional trustees usually make use of many jurisdictions' facilitation of exculpatory terms, securing themselves freedom to treat their beneficiaries according to "the morals of the market place"[233] rather than anything more demanding. In practice, however, some professional trustees voluntarily refrain from fully exploiting this freedom, choosing to pay some compensation even for negligent actions liability for which is negatived by an exculpatory term. This leaves beneficiaries of trusts run by professional service providers at the mercy of their trustees.

Trust service providers' refusal to serve without exculpatory terms is dependent on many jurisdictions' express approval of such terms. Should

231. EN2.
232. Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928).
233. *Id.*

a jurisdiction adopt a less facilitative approach, service providers may either increase the price they charge for their services, stop supplying trust services, or insist on having trusts on which they serve governed by the law of a jurisdiction which allows exculpatory terms. Legislation setting a mandatory minimal liability standard for trustees, higher than good faith, and stating that drafted attempts to provide lower liability thresholds shall be void, is vulnerable both to interjurisdictional competition and to enforcement difficulties. It may be, however, that given a less accommodating approach on the part of enough state legislatures, some trust service providers will agree to bear more of the risk of loss through trustee negligence than they currently bear. After all, the law of New York is commonly used to govern trusts despite its holding trustee exculpatory terms void.[234] While New York trust practice may, as a result of the in-state presence of many trust service providers and trust clients, enjoy more resilience to interjurisdictional competition than the trust practice of most other states, practitioners using the law of jurisdictions which restrict or ban exculpatory terms could use this fact to their marketing advantage, painting trustee assumption of risk as the mark of higher quality service. Trust practice subject to the law of permissive states could be portrayed as riskier, lower quality service. Should enough states retain or adopt a restrictive approach to trustee exculpation, a "race to the top" could develop, with those states which retain a permissive approach forced to change tack or face outward trust migration in search of higher liability standards.[235]

Absent legislation restraining the use of trustee exculpatory terms, beneficiaries whose trustees insist on exploiting such terms to the full may turn to courts, asking them to use their equitable powers to protect beneficiaries by disregarding exculpatory terms or construing them so as to protect beneficiaries' interests. Courts often use their equitable powers to protect vulnerable parties to private law relationships by either disregarding those aspects of the relationship which exploit vulnerabilities or permit their exploitation, or interpreting them in a far from literal manner so as to curtail their exploitative potential. It was such action by

234. For New York law being commonly used to govern trusts, see *supra* TABLE 5. For its holding trustee exculpatory terms void, see N.Y. ESTATES, POWERS & TRUSTS LAW § 11-1.7 (McKinney 1967) (providing that the attempted grant to an executor or testamentary trustee of an exoneration from liability for failure to exercise reasonable care, diligence, and prudence is contrary to public policy and, when attempted to be granted in a will, shall be void); *In re* Shore, 854 N.Y.S.2d 293, 296 (2008) (holding that the section "applies equally to inter vivos trusts where by [their] terms there is no one in a position to protect the beneficiaries from the actions of the trustee."). For discussion of New York law on point prior to *In re* Shore, see Leslie, *supra* note 10, at 104–06.

235. For the "race to the top" hypothesis in corporate law, see generally Ralph K. Winter, Jr., *State Law, Shareholder Protection, and the Theory of the Corporation*, 6 J. LEGAL STUD. 251 (1977).

courts of equity that created the law of trusts.[236] The availability of such judicial remedies is, however, highly uncertain, introducing uncertainty into trust practice itself. Reliance on ex post judicial relaxation of exculpatory terms means neither trustees nor beneficiaries can know in advance to what liability standard trustees will be held. Judicial remedies are also only awarded at the end of lengthy, costly proceedings.

C. Anti-Creditor Techniques Protecting Beneficiaries' Entitlements

My results show anti-creditor techniques protecting beneficiaries' entitlements to be ubiquitous, and particularly so in trusts serviced by U.S.-resident trust service providers. When I inquired whether beneficiaries of such techniques are in fact less able than the average person to take care of their financial affairs, responses resembled a normal distribution. Such a distribution is typical of random data. It can be evidence for two states of affairs. One is that the profile of protected beneficiaries varies, with some such beneficiaries truly incapable or imprudent while others are perfectly capable adults making calculated use of available protections under the law of trusts. Alternatively, service providers may not know whether protected beneficiaries are capable of self-protection, their responses expressing guesswork rather than any informed belief. Service providers may well be ignorant of beneficiaries' capacities (or lack thereof), having been in touch with the settlor and/or his advisors rather than the beneficiaries. Respondents' possible ignorance concerning beneficiaries' capacities may also derive from beneficiaries having not yet been selected; modern trusts often refrain from naming their beneficiaries, granting some party a power to select them, which may remain unexercised for a long time. The two states of affairs may also coexist: Service providers could be informed about the capacities of some beneficiaries while guessing about those of others.

Whichever state of affairs obtains, my results cast substantial doubt on a key justification for protective techniques: the portrayal of the typical protected beneficiary as incapable of self-protection. Given my results, it is hardly likely that all or a large majority of protected beneficiaries are incapable. Was this the case, respondents' estimates of the proportion of protected beneficiaries who are incapable would not have varied so dramatically. Practitioners confirmed that protections are used for all beneficiaries, capable or not. It thus appears that the extent

236. For the early history of trust enforcement by courts of equity, see S.F.C. Milsom, Historical Foundations of the Common Law 200–39 (2d ed. 1981); N. G. Jones, *The Use Upon a Use in Equity Revisited*, 33 Cambrian L. Rev. 67 (2002).

of beneficiary protection available under the law of most U.S. states[237] exceeds the extent truly justifiable under the improvident or incapable beneficiary rationale. The other rationale traditionally mentioned as a justification for spendthrift protection is settlors' right to mold their gifts as they wish. While leading scholars describe facilitating settlors' freedom of disposition as the overarching rationale of the law of trusts,[238] that rationale cannot justify the undermining of civil liability affected by the common use of protective strategies, nor the resulting redistribution of wealth from the general public to protected debtors. Property rights do not entail the power to inflict harm on others in contexts unrelated to the protection of the rightholder's (here, the settlor's) entitlement.

As a matter of legal policy, given that protection of vulnerable persons is the principal theoretically valid basis for the law's recognition and enforcement of strategies protecting beneficial entitlements under trust from beneficiaries' creditors, it appears, considering my results, that the law should curtail its recognition and enforcement of these strategies. Their beneficiaries include a large number of non-vulnerable persons, while the basic livelihoods of truly incapable, vulnerable persons can and should be protected by such more precisely tailored legal techniques as guardianship, conservatorship, and the available exemptions under the law of bankruptcy, which do not provide unlimited protection to perfectly capable people.[239]

The recognition of spendthrift protection does have its limits even under current law: Many states exempt from spendthrift protection claims for child support, alimony, property division on divorce, taxes, and claims by persons who have provided a protected beneficiary with necessary services or supplies or acted to preserve the beneficiary's protected interest.[240] A few states exempt tort claims against the protected beneficiary.[241] Given my results, these exceptions should be adopted by all states. Jurisdictions can also limit the availability of anti-creditor techniques in other ways: They can set a ceiling on value protected, limit protection to vulnerable individuals such as minors and those lacking

237. For that extent, see RESTATEMENT (THIRD) OF TRUSTS §§ 57–60 reporter's notes (AM. LAW INST. 2001); AM. COLL. OF TR. & ESTATE COUNSEL, *supra* note 129. *But see* RESTATEMENT (THIRD) OF TRUSTS § 58(2) (holding self-settled spendthrift trusts invalid is no longer the law in sixteen states).

238. *Compare* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643 (2014), *with* Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 216 (2011) ("American trust law, after decades of favoring the settlor, is moving in a new direction, with a reassertion of the interests and rights of the beneficiaries.").

239. For the protection of protected persons' property, see UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT §§ 401–433 (UNIF. LAW COMM'N 1997); UNIF. PROB. CODE §§ 5-401–5-433 (UNIF. LAW COMM'N 2010). For exemptions in bankruptcy, see 11 U.S.C. § 522 (2012).

240. For discussion and references to each state's statutes and case law on point, see SCOTT ET AL., *supra* note 117, §§ 15.5.1–15.5.4.

241. For discussion and references to each state's statutes and case law on point, see *id.* § 15.5.5.

capacity, or make protection conditional on protected beneficiaries informing prospective lenders, commercial counterparties, and spouses of the existence and extent of protection.[242] Beneficiaries enjoying protected entitlements under trust worth more than a certain threshold amount could also be prevented from obtaining a discharge in bankruptcy.[243]

To the extent that law reform curtailing the recognition and enforcement of anti-creditor techniques appears unlikely, courts should use their equitable powers to deny such protection where unmerited. While courts have often used their equitable powers to protect beneficiaries, where beneficiaries enjoy unjustified protection courts can and should use the same powers to restrict or deny it. Equity should not be made a tool of debt avoidance.

D. Settlor Control of Trusts

Finally, my results show that U.S. trust practice differs from trust practice elsewhere regarding settlor control of trusts. Data collected show the express reservation of powers to trust settlors to be a majority phenomenon in the United States, but a minority one elsewhere. The actual control of trusts by their settlors, whether in the exercise of settlor-reserved powers or otherwise, is likewise far more common in the United States than elsewhere. Trust practice in the United States appears to have abandoned the expectation that settlors be powerless once a trust has been constituted, adopting instead a vision of inter vivos trusts under which most settlors hold powers to intervene in or revoke trusts they have created, and about half of all settlors in fact control their trusts, directly or indirectly. Even absent the actual exercise of powers settlors reserve, trustees of revocable trusts conduct the trusteeship for the benefit of the settlor exclusively.[244] Most professional trust service providers outside the United States, contrastingly, describe a reality where the traditional trust model, leaving settlors powerless once a trust has been launched, remains a majority phenomenon.

Given the extent of U.S. settlor power retention exposed by my results, the grantor trust regime is clearly costing the nation dearly in potential tax revenues lost. Ascher's proposed solution for the abuse of the grantor trust rules—restricting their application to revocable trusts alone—is unlikely to significantly restrain that abuse: Revocable trusts are already numerous, and are likely to increase in number if reserving a power to revoke the trust becomes the only way to enjoy grantor trust status. An alternative solution, which could be adopted simultaneously

242. For this suggestion, see Danforth, *supra* note 149, at 364–66.

243. For this suggestion, see Hirsch, *supra* note 123, at 2706.

244. Unif. Trust Code § 603(a) (Unif. Law Comm'n 2010) ("While a trust is revocable, rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor.").

with Ascher's, is decompressing the tax rate bracket schedule applicable to income earned in "complex" trusts, aligning it with the rate bracket schedule applicable to individual income. Any resurgent fear of settlors evading the progressive income tax by settling numerous small complex trusts should be tackled with a targeted surtax imposed on persons who create more than a few complex trusts, the income of which is subject to tax rates below the maximal rate. Once settlors pass away, the current compressed tax rate bracket schedule applicable to complex trusts acts as a distribution incentive. If we want to maintain this incentive, the compressed bracket schedule could take effect on the settlor's death.

Moving from tax minimization to creditor protection, my results show that settlors' reservation of powers other than of revocation is popular in U.S. trust practice, leading the rest of the world by a large margin. As shown, many such powers give settlors control over their trusts while keeping the trust property inaccessible to their creditors. Such creditor protection benefits debtors wealthy enough to settle trusts at the expense of other debtors, who sustain the added cost of credit that creditors charge to compensate themselves for the loss they sustain from creditor protection. A potential solution is reforming the law of trusts to include a rule making the property in trusts subject to settlor-reserved powers, above a low threshold of powers reserved, subject to claims of those settlors' creditors.

Conclusion

This Article reported and analyzed the results of the first global survey of professional service providers to trusts and of a series of domestic and international interviews with trust service providers. Data contributed by 434 trust service providers, the largest, most diverse source pool ever obtained in research targeting donative trusts, enabled me to provide answers to a series of long pending empirical questions about trust practice.

I found that trusts likely, according to the trust instrument, subsist for more than a century are fairly common, especially offshore; however, the more frequent a practitioner estimates such trusts to be, the more he or she believes them not to be in practice likely to outlast a century. Because significant normative concerns arise even if only a minority of trusts drafted to last beyond a century are in fact likely to last that long, I suggest that state legislatures make the validity of trusts drafted to last longer than the traditional perpetuity period conditional on the availability of mechanisms for early termination.

I found that trustee exculpatory terms are now standard in trusts serviced by professionals, with most settlors neither demanding nor receiving any express quid pro quo for their inclusion. If jurisdictions wish to recalibrate their trust services markets based on a threshold of trustee liability higher than bad faith, they should enact legislation setting a higher mandatory minimal liability standard for trustees and stating that drafted attempts to provide liability thresholds lower than that standard shall be void. While such legislation is vulnerable both to interjurisdictional competition and to enforcement difficulties, the higher standards it creates could be used as a marketing tool, leading to a beneficial, interjurisdictional "race to the top." Alternatively, courts should use their equitable powers to protect beneficiaries by disregarding exculpatory terms or construing them so as to protect beneficiaries' interests.

I found anti-creditor techniques protecting beneficiaries' entitlements to be ubiquitous, particularly so in trusts serviced by U.S.-resident providers. Because many protected beneficiaries are not in fact any less able than the average person to take care of their financial affairs, the extent of protection available under the law of many U.S. jurisdictions is excessive. I conclude that the law should curtail its recognition and enforcement of these techniques, and suggest ways for doing so. Alternatively, courts should use their equitable powers to deny such protection where unmerited.

Finally, I found the express reservation of powers to trust settlors to be a majority phenomenon in the United States, but a minority one elsewhere. The actual control of trusts by their settlors, whether in the exercise of settlor-reserved powers or otherwise, is likewise far more common in the United States than elsewhere. The popularity of settlor power retention in the United States is largely a result of the income tax savings resulting from such retention. These savings are largely unmerited, and I suggest ways for curtailing them. American settlors' tendency to retain powers over their trusts also serves as a creditor protection strategy, imposing costs on debtors who do not settle trusts. I suggest means for eliminating the perverse incentives American law creates for settlors to retain powers.

My research on the market in private donative trusts largely corroborates fears that the demand for fiduciary services is partly directed at services which benefit the clients purchasing them at society's expense, whether by shrinking the amount of tax clients pay far below the amount they would otherwise have paid or by making their property inaccessible to their creditors. I found less evidence that services consumed benefit the professionals supplying them more than they benefit their clients. Harmful fiduciary services are supplied and consumed in large quantities, helped along by perverse incentives created by tax law and the law of debtor and creditor. While some fiduciary services are beneficial, the incentives to which service providers and their clients are subject need to be aligned with the general interest in individuals and entities paying their taxes and their debts under contract, tort, and family law.

Appendix A: Classification of Jurisdictions: Onshore, Offshore, and Midshore

Note on Classification:

I classify jurisdictions as onshore, offshore, or midshore for trust law purposes.

The United States could not be classified in its entirety since it is composed of both onshore and offshore jurisdictions. Other federations, such as Canada and Australia, are classifiable since all of their component jurisdictions are onshore in nature.

Definitions:

- **Onshore:** I define an *onshore jurisdiction* as one where a large part of trust services supplied in the jurisdiction are consumed by local residents.
- **Offshore:** I define an *offshore jurisdiction* as one where most, and sometimes all, trust services supplied in the jurisdiction are consumed by nonresidents.
- **Midshore:** I define a *midshore jurisdiction* as one where a significant quantity of trust services is locally supplied for consumption by local residents simultaneously with the provision of such services to nonresidents on the offshore pattern.

Onshore Jurisdictions:

Alabama, Alberta, Argentina, Arizona, Australia, Austria, Brazil, California, Canada, Colorado, Czech Republic, England, Florida, France, Georgia, Hawaii, Hungary, Idaho, Illinois, India, Indiana, Iowa, Ireland, Israel, Italy, Kansas, Kentucky, Louisiana, Maine, Manitoba, Maryland, Massachusetts, Mexico, Michigan, Minnesota, Mississippi, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, North Dakota, Northern Ireland, Ohio, Oklahoma, Oregon, Pennsylvania, Scotland, South Africa, South Carolina, Spain, Taiwan, Tennessee, Texas, U.S. Virgin Islands, Utah, Virginia, Washington, D.C., Washington State, and Wisconsin.

Offshore Jurisdictions:

Alaska, Bahamas, Barbados, Belize, Bermuda, British Virgin Islands, Brunei, Cayman Islands, Cook Islands, Cyprus, Delaware, Gibraltar, Guernsey, Hong Kong, Isle of Man, Jersey, Labuan, Liechtenstein, Luxembourg, Malta, Mauritius, Monaco, Netherlands, Nevada, Nevis, Panama, Puerto Rico, San Marino, Seychelles, Singapore, South Dakota, Switzerland, Turks and Caicos Islands, United Arab Emirates, Vanuatu, and Wyoming.

Midshore Jurisdictions:

New Hampshire and New Zealand.

Appendix B: Data Limitations

One limitation on the validity of the data obtained is that it describes trust service providers' perceptions of the market in which they are active. As each provider is only familiar with some part, rather than the whole of the market, providers' perceptions may differ from reality. Still, given the lack of publicly available data on the contents of donative trusts, described in Part II.A, providers' perceptions are the best data source available on these contents.

Another limitation is that I obtained a nominal survey response rate of 1.7%, with 409 of the 24,096 addressees for whom I had correct email addresses providing usable survey responses. This nominal response rate is, however, in line with survey experts Roger Tourangeau, Frederick Conrad, Mick Couper, and Michael Bosnjak's experience of declining response rates to web surveys: response rates to their web surveys of U.S. population samples declined from 20% in 2002 to three percent in 2006, 1.9% in 2008, and one percent in 2010.[245] Nonresponse to the present survey is likely to have been driven by several factors, including trust service providers' powerful culture of confidentiality, their and their clients' interest in keeping information about the services they provide secret, and the over-inclusive character of the addressee population. Unlike in conventional household surveys, where each person contacted has the sought-after data, such as their age, weight, or educational attainments in their possession, whether or not they choose to share that data with researchers, many of my addressees had no knowledge of the aspects of current donative trust practice on which the survey was focused.

As the ABA Real Property, Trusts, and Estate Law section does not require its members to self-identify as either real estate or estate planning lawyers, I was not able to isolate the part of the section membership concerned with estate planning. As a result, my 24,096 addressees included a large number of real estate lawyers, many of whom wrote back to say that they specialized in real estate rather than estate planning and so did not have the information necessary to helpfully participate. Some addressees wrote to explain that they have retired and so could not provide correct information on the current state of trust practice. Others wrote back to explain that they dealt exclusively with types of trusts to which the survey was largely inapplicable, such as foundations holding land in trust in order to conserve it, its flora, and its fauna. Even of those addressees who currently service donative trusts, many found parts of my questionnaire to refer to aspects of trust practice

245. *See* Mick P. Couper & Michael Bosnjak, *Internet Surveys*, *in* Handbook of Survey Research 527, 537 (Peter V. Marsden & James D. Wright eds., 2d ed. 2010); Roger Tourangeau et al., The Science of Web Surveys 43 (2013).

of which they had little experience. The real response rate was therefore significantly higher than the nominal rate.

To the extent that respondents provided misleading responses or were unrepresentative of the population of service providers to private donative trusts, these problems are likely to have resulted in an underestimate, not an overestimate, of the frequency of such controversial phenomena as perpetual trusts and terms exculpating trustees from liability for loss they caused to their beneficiaries. Since professional trust service providers are generally well aware of the negative publicity attending such phenomena, those service providers who make frequent use of such phenomena were especially unlikely to respond truthfully to my survey, or to respond at all. Service providers who make little or no use of controversial trust features were more likely than others to respond and to respond truthfully. That despite these incentives, my resulting estimates of the frequency of the controversial trust features in question are quite high is a significant finding: it provides a lower bound for their true frequency, since they must be used at least as frequently as my respondents reported them to be used.

Finally, I sought to remedy any remaining validity concerns by conducting a series of twenty-five interviews with a varied group of trust service providers, distributed between five different countries, as well as between the diverse professional groups which make up the universe of trust service providers. None of the practitioners interviewed responded to my survey, yet the interview data I obtained confirms the survey results.