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The Striping of the Trust: A Study in Legal Evolution

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Hebrew University of Jerusalem Legal Studies Research Paper Series No. 15-5

Electronic copy available at: http://ssrn.com/abstract=2441709

THE STRIPPING OF THE TRUST:
A STUDY IN LEGAL EVOLUTION

Adam S. Hofri-Winogradow[*]

The law of trusts has spent the last twenty years rapidly shedding many traditional requirements, forms and restrictions which imposed liability on negligent trustees, protected vulnerable beneficiaries and prevented the use of trusts to avoid the claims of settlors' and beneficiaries' creditors, including their spouses, their children, and their governments. This article studies seven aspects of this "stripping of the trust", examines its consequences from both a distributive justice and a corrective justice point of view, and inquires whether the resulting stripped-down model coheres with the traditional functionality of donative private trusts. I found that most of the current reforms have welfare-reducing distributive consequences, in some cases inflicting externalities on all except the parties to a given trust, in others transferring value from settlors and beneficiaries to the trust service providers serving them. Most of the reforms discussed also create potential for infringements of corrective justice which either did not exist, or was less significant, pre-reform. I conclude that all but one of the seven reforms I examine should be reversed.

I *Introduction*

Trust law has spent the last quarter-Century changing at an exhilarating speed. Much, though not all, of the change consisted of the casting off of traditional restrictions and requirements, a "stripping of the trust". Legislatures worldwide have been eliminating traditional rules of trust law designed to impose liability on negligent trustees, protect vulnerable beneficiaries and prevent the use of trust law to evade the claims of settlors' and beneficiaries' creditors, including their spouses, children, and governments. In many jurisdictions, traditional rules limiting trustees' investment powers and their delegation power have been liberalized, while

[*] Hebrew University of Jerusalem, Faculty of Law. I thank Greg Alexander, Ilan Benshalom, Julie Cohen, Steve Cohen, Hanoch Dagan, Avihay Dorfman, Howard Erlanger, Joshua Getzler, Yehonatan Givati, Assaf Hamdani, Sharon Hannes, John Langbein, Daphne Lewinsohn-Zamir, Ariel Porat, Anat Rosenberg, Richard Ross, Lionel Smith, Larry Solum, Stewart Sterk, Doron Teichman, Joshua Teitelbaum, Assaf Ya'acov, Eyal Zamir, workshop and colloquium participants at the Hebrew University of Jerusalem, Tel-Aviv University, the Inter-Disciplinary Center, Herzliya, Georgetown Law Center, Cornell Law School, New York Law School, Wisconsin Law School, Oxford University, and participants at the Modern Studies in Property Law conference held in Southampton, U.K., for helpful comments and suggestions; Shai Belz, Sarith Felber, Shannon Kisch and Amos Weizman for superb research assistance; and the Israel Science Foundation (Personal Research Grant 333/10) and Sacher Institute at the Hebrew University for financial support. I further thank David Dyzenhaus and the anonymous reviewers for the UTLJ for their important comments, which contributed significantly to the improvement of this article.

the rule against perpetuities and the ban on self-settled spendthrift trusts were abolished. Some other jurisdictions even abolished the classical requirement that title in the trust assets be transferred to the trustees. Each jurisdiction adopted a different selection of trust reforms.

This article describes seven aspects of the current global revolution in trust law, examining their consequences from a distributive justice perspective, from a corrective justice perspective and against the traditional functionality of donative private trusts. Comparing the consequences of recent reforms with the distributive justice and corrective justice implications of the pre-reform law of donative private trusts shows a marked deterioration from an already-flawed baseline. Two of the seven reforms clearly lead to results which are distributively harmful. Four others have distributive outcomes that while not as clear, are probably also harmful, as their principal effect appears to be the transfer of value to financial service providers. None of the reforms have distributively beneficial consequences. Four of the seven create potential for infringements of the corrective justice ideal which either did not exist, or was less significant, pre-reform. Just one reform has potential for reducing trusts' pre-existing potential for infringing corrective justice. Some of the reforms amplify the vigorously exclusionary effect characteristic of donative private trusts generally into a practice harming everyone except trust users and those legal and financial professionals providing trust services. Other reforms make trust relationships less beneficial for trust beneficiaries themselves, making trust administration more lucrative for the professionals supplying it at their clients' expense. I conclude that all but one of the recent reforms I discuss should be reversed. The fact that five of the seven reforms further a traditional function of donative private trusts – reinforcing property-holders' enjoyment of their property and power to set an agenda for that property,[1] even at the expense of others' rights and powers – reflects the already-flawed distributive character of much pre-reform donative private trust law and practice.

The article unfolds as follows. In Part II, I describe seven aspects of "the stripping of the trust", the current transformation of the law of trusts whereby requirements, forms and restrictions which were features of traditional trust law are gradually eliminated. In Part III, I systematically analyze all seven reforms from both a distributive justice perspective and a corrective justice perspective, pointing out their impact on trust parties (settlors, trustees, beneficiaries, protectors, enforcers and others), trust non-parties (such as the personal creditors of settlors, trustees and beneficiaries, trust creditors, and trustee delegates), and, where relevant, society as a

[1] See Larissa Katz's theory of ownership as "a position of agenda-setting authority" in her 'Exclusion and Exclusivity in Property Law' (2008) 58 UTLJ 275 at 278.

whole. Where available, I use empirical data to bolster my analysis. In Part IV I ask whether the seven reforms, so deeply disruptive of the traditional *forms* of trust law and practice, also transform the traditional *function* of donative private trusts. Part V sums up my argument, concluding that all but one of the recent reforms should be reversed.

II *The stripping process*

Common-law-based legal systems have long employed a fairly consistent understanding of the trust. According to this understanding, a trust is an equitable obligation imposed on the owner of an asset to hold it in a fiduciary capacity, using it for the benefit of another or a permitted purpose, the asset being immune from the owner's personal creditors and the beneficiary enjoying both rights in the asset and personal rights against the trustee.[2] Recent decades, however, have seen the trust concept undergo a rapid process of increasing variation: jurisdiction after jurisdiction has modified aspects of the traditional model or made what were mandatory requirements into default rules. This Part offers descriptions of seven aspects of the stripping process, consisting of the curtailment of requirements, forms, and restrictions which were features of the traditional trust model.[3]

A CURTAILMENT OF TRUSTEES' DUTY OF CARE AND LIABILITY CONSEQUENT ON ITS INFRINGEMENT

Some of trustees' duties under traditional law, which some scholars believe to be indispensable,[4] have, in fact, long been stripped away by trust service providers. Such providers have since, at the latest, the mid-18th century been drafting trust instruments so as to exempt themselves from parts of the

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[2] I rely, principally, on two English treatises, David Hayton, Paul Matthews & Charles Mitchell, *Underhill and Hayton: Law of Trusts and Trustees*, 18th ed (LexisNexis, 2010) 2 [Underhill and Hayton]; Geraint Thomas & Alastair Hudson, *The Law of Trusts*, 2nd ed (Oxford UP, 2010) 11-12 [Thomas and Hudson].

[3] Despite aggregating more aspects of the process than discussions elsewhere in the literature, my description is still, of necessity, selective. To keep the article's proportions reasonable, I focused on reforms *abolishing* traditional trust law rules, while omitting some of the new features *introduced* into trust practice.

[4] See e.g. Edward Rock & Michael Wachter, 'Dangerous Liaisons: Corporate Law, Trust Law, and Inter-doctrinal Legal Transplants' (2002) 96 Nw U L Rev 651 at 661-63 (contrasting trust law, supposedly characterized by a strict application of such duties, with corporate law, which imposes weaker standards and does not seriously enforce them); Luc Thévenoz, 'Trusts: The Rise of a Global Legal Concept', online: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1723236> at 22-23 [Thévenoz, Trusts]; compare his acceptance that "the vesting of legal title with the trustee is inconsequential" at 22.

heavy burden of liability imposed on them by the default law.[5] The last thirty years have seen an erosion in the extent of trustees' mandatory liability, as onshore and offshore jurisdictions have raced to reduce that extent so as to attract trustees to the trust regimes they offer. Many U.S. states have limited trustees' personal contractual liability to trust creditors to cases where trustees' fiduciary capacity was not disclosed, and their personal liability for torts committed in the course of administering a trust and obligations arising from ownership or control of trust property to cases where trustees were personally at fault.[6] In other cases, trust creditors' sole recourse is against the trust fund.[7] Many offshore jurisdictions have similarly restricted trustees' personal liability to trust creditors.[8]

As for "exculpatory terms" or "exemption clauses", exempting trustees from liability to beneficiaries for loss resulting from actions and omissions infringing their duty of care, different jurisdictions allow them to different extents. Most U.S. states, as well as England, the Bahamas, Belize, the Cayman Islands and the Cook Islands, permit 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.[9] California, Scotland, Jersey,

[5] See Chantal Stebbings, *The Private Trustee in Victorian England* (Cambridge UP, 2002) at 123-25 [Stebbings, *Private Trustee*] (noting, at 123, that trustees' use of indemnity clauses "was common from the early years of the nineteenth Century"); Peter Luxton, 'Trustee Exclusion Clauses: Lost in the Heather?' in Elizabeth Cooke, ed, 1 *Modern Studies in Property Law* (2001) 59 at 61 [Luxton, Trustee Exclusion Clauses] (noting even earlier cases of such use).

[6] See *Uniform Trust Code* s 1010(a)-(b) (2005) [UTC], the substance of which has been enacted, as of August 2013, in 26 states and the District of Columbia; see references to each state statute in the *Restatement (Third) of Trusts* s 105 cmt. c (2012) [Restatement].

[7] See UTC s 1010(c); *Uniform Probate Code* s 7-306(c); Restatement ss 105-106.

[8] See Paolo Panico, *International Trust Laws* (Oxford UP, 2010) at 253-61 [Panico]. See e.g. Jersey, where third parties knowing that the trustee is acting as such have recourse against the trust property alone, unless the trustee acted in breach of trust: *Trusts (Jersey) Law 1984*, Art. 32, and the British Virgin Islands, which have since 2003 provided a similar regime as an option: *Trustee Ordinance, 1961*, c 97 (2003).

[9] In the United States, UTC s 1008 provides that exculpatory terms are unenforceable to the extent that they relieve trustees "of liability for breach of trust committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries." It is further provided 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 "invalid as an abuse of a fiduciary or confidential relationship" and is unenforceable. The *Restatement (Second) of Trusts* s 222 (1959) provided similarly. The Restatement s 96(1) (2012) uses similar language, adding that provisions purporting to relieve trustees of accountability for profits derived from a breach of trust are unenforceable. For English law, see *Armitage v Nurse*, [1997] EWCA Civ 1279; see discussion at infra note 17. For the Cayman Islands, see *Lemos v Coutts Ltd*, [2003] CILR 381 (Grand Ct.). For the Bahamas, see Panico, supra note 8 at 298-301. For Belize, see

Guernsey, Malta, Mauritius and the Dubai International Financial Center hold liability for gross negligence, too, to be inexcludable,[10] while Bermuda, the Turks and Caicos Islands, South Africa and New York safeguard even liability for plain negligence from exclusion (the latter, as regards executors and testamentary trustees alone).[11]

The development of English law concerning trustee exemption clauses over the last 25 years makes a good example of the stripping *process*, whereby jurisdictions' positions regarding, in this case, trustee liability for loss caused to beneficiaries have become increasingly permissive. English textbooks published in the 1950s stated that exemption clauses should not be a standard form, or that they should only be used for unpaid trustees.[12] While "the mood of the profession has changed, perhaps due to the rise of the "litigation culture", and many firms routinely insert, *as a matter of practice*, wide trustee exemption clauses for paid trustees",[13] the permissible bounds of trustee exemption clauses under English *law* were until 1998 unclear. Paul Matthews argued that excluding trustees' liability for grossly negligent breaches is probably illegal,[14] and William Goodhart suggested that paid, professional trustees, and possibly unpaid, lay trustees too, should not, as a rule, be allowed to exempt themselves from liability for any negligent breaches.[15] It was, however, the more permissive view of David Hayton, who opined that trustees may exclude their liability for

Trusts Act 2000, s 50(6). For the Cook Islands, see *International Trusts Act 1984*, s 19E (providing that all trustee exemption clauses shall be valid, effective and liberally interpreted).

[10] California: *Cal. Prob. Code* s 16461(b) (West 2012). Scotland: *Wyman v Paterson*, [1900] A.C. 271 (H.L.); *Carruthers v Carruthers*, [1896] A.C. 659 (H.L.); *Rae v Meek*, (1889) 14 A.C. 558 (H.L.); *Knox v Mackinnon*, (1888) 13 A.C. 753 (H.L.). Jersey: *Trusts (Jersey) Law, 1984*, s 30(10); *Midland Bank Trust Company (Jersey) Ltd v Federated Pension Services*, [1995] JLR 352; *West v Lazard Brothers*, [1993] JLR 165. Guernsey: *Trusts (Guernsey) Law, 2007* s 39. Malta: *Malta Trusts and Trustees Act, 1998*, c 331, s 21(7). Mauritius: *Trusts Act, 2001* s 50(6). Dubai International Financial Centre: *Trusts Law, 2005* s 58(10). See discussion in Panico, supra note 8 at 302-9, 315-16.

[11] Bermuda: *Trustee Act, 1975*, s 22(1). Turks and Caicos Islands: *Trusts Ordinance, 1990* s 20(10); South Africa: *Trust Property Control Act, No. 57 of 1988*, s 9; New York: *N.Y. Est. Powers & Trusts Law*, s 11 – 1.7; see discussion in Panico, supra note 8 at 315.

[12] James Kessler & Leon Sartin, *Drafting Trusts and Will Trusts*, 11th ed (Sweet & Maxwell, 2012) at 105-6.

[13] Ibid, my emphasis. Even so, the authors assert that "[e]xperience suggests that there will be no difficulty in finding corporate trustees prepared to act without these clauses": ibid at 123.

[14] Paul Matthews, 'The Efficacy of Trustee Exemption Clauses in English Law' (1989) Conveyancer 42.

[15] William Goodhart, 'Trust Law for the Twenty-First Century' in AJ Oakley, ed, *Trends in Contemporary Trust Law* (Oxford UP, 1996) 257 at 270-71.

grossly negligent breaches, drawing the line at reckless breaches,[16] which was adopted by the English Court of Appeal in *Armitage v. Nurse*, a 1998 landmark.[17] The decision in *Armitage*, largely endorsing professional trustees' practice of excluding their liability for any but fraudulent or dishonest breaches, provoked widespread criticism. Most critics, including the Law Commission, England's statutory law reform body, argued that professional trustees should not be able to exclude liability for negligence.[18] Yet this criticism has yet to produce any change in the law. The Law Commission followed its critical 2002 Consultation Paper on the subject with wide-ranging consultation, an opportunity taken by many trust industry individuals, firms and associations.[19] Having heard them all, the commission concluded in its 2006 Report on the subject that statutory curtailment of trustee exemption clauses would be difficult to achieve, recommending instead that the regulatory bodies to which trustees and trust drafters are subject and the professional bodies of which they are members adopt a rule of practice, according to which "any paid trustee who causes a settlor to include a clause in a trust instrument which has the effect of excluding or limiting liability for negligence must before the creation of the trust take such steps as are reasonable to ensure that the settlor is aware of the meaning and effect of the clause".[20]

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[16] David Hayton, 'The Irreducible Core Content of Trusteeship', in AJ Oakley, ed, *Trends in Contemporary Trust Law*, last note, at 47-62 [Hayton, The Irreducible Core].

[17] *Armitage*, supra note 9, where Millet LJ rejected suggestions that trustee liability for grossly negligent actions cannot be excluded, noted that the common law does not distinguish between ordinary and gross negligence, and chose to draw the line at reckless actions; Millet's approach was followed by the majority of the Privy Council panel which heard *Spread Trustee Co Ltd v Hutcheson*, [2011] UKPC 13 (appeal taken from Gue.) at paras 57 and 108. A similarly permissive approach is evident in the English *Trustee Act 2000*, c 29, which imposes, in s 1, a general duty of care on trustees, only to declare that it "does not apply if … it appears from the trust instrument that the duty is not meant to apply" (sch 1, para 7).

[18] The critics included, int. al., the Trust Law Committee, a group of practitioners and academics: Trust Law Committee, *Trustee Exemption Clauses, Consultation Paper* (1999); Luxton, supra note 5; the Law Commision, *Trustee Exemption Clauses, Consultation Paper, Law Com no. 171* (2002); and Christopher Groves & Judith Ingham, 'Trustee Exemption Clauses: Who Are We Trying to Protect?' (2003) 6 Private Client Business 404.

[19] See the list of Respondents to Consultation Paper No. 171 in Law Commission, *Trustee Exemption Clauses, Report, Law Com no. 301* (2006), Appendix H.

[20] Law Commission, *Trustee Exemption Clauses, Report*, last note, para 7.2. Remarkably, the British Columbia Law Institute has similarly retreated from a position that trustees should be statutorily prevented from relying on exemption clauses, and required to apply to the court for exoneration (*Exculpation Clauses in Trust Instruments, Consultation Paper No 6* (2000)), to a position that clauses exempting trustees from liability for negligent breaches of trust should remain valid, requiring beneficiaries to apply to the court for a declaration that a specific clause was ineffective in relation to a specific breach, which the court might grant where it appeared that the trustee's conduct had been 'so unreasonable,

Responding to the Commission's recommendation, the Society of Trusts and Estates Practitioners (STEP), the key professional body of the English trust industry, has published a Practice Rule on the subject, providing that a STEP member who drafts a will or trust instrument or is aware of being named as trustee or executor under an instrument where he, or any trustee or executor, is entitled to remuneration, including for preparing the instrument, or has or will have a financial interest in the trusteeship, executorship or the preparation of the instrument,

> "shall use his reasonable endeavours to ensure:
>
> (i) that he or another shall have notified the Settlor of the provisions … relating to the Disclosable Circumstances; and
> (ii) that he has reasonable grounds for believing that the Settlor has given his full and informed acceptance of such provisions prior to his execution or approval of the Instrument".[21]

The double-barreled reasonableness standard in this formulation, and the long list which follows it of situations where, according to STEP, no disclosure is necessary, make clear the Rule's focus on protecting trustees from beneficiaries' lawsuits rather than protecting beneficiaries from trustees' exemption clauses.

B CURTAILMENT OF BENEFICIARIES' RIGHTS

Concurrently with the decline of some trustee duties and liabilities, beneficiaries' rights against their trustees have also been declining in many jurisdictions. While the U.S. Uniform Trust Code (UTC) provided, upon its 2000 promulgation, that trustees must notify at least some beneficiaries of irrevocable trusts who are 25 or older "of the existence of the trust, of the identity of the trustee, and of their right to request trustee's reports",[22] and that they must respond to a request by such beneficiaries "for trustee's reports and other information reasonably related to the administration of a trust",[23] most states to have enacted the Code have enacted those duties, if at

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irresponsible or incompetent that, in fairness to the beneficiary, the trustee ought not to be excused' (*Exculpation Clauses in Trust Instruments, Report No. 17* (2002)).

21 STEP, *Guidance Notes: STEP Practice Rule on Trustee Exemption Clauses* (2009).

22 UTC ss 813(b)(2) and (3), made mandatory in s 105(8). On the necessity of providing beneficiaries with information sufficient for them to enforce trustees' duties see John Langbein, 'Mandatory Rules in the Law of Trusts' (2003-4) 98 Nw U L Rev 1105 at 1126.

23 UTC s 813(a), made mandatory in s 105(9).

all, in weakened form,[24] and they were made optional in a 2004 amendment to the Code.[25] The 2007 installment of the Restatement of Trusts (Third) also permits some curtailment of beneficiaries' rights to information about the trust.[26] In England, the Judicial Committee of the Privy Council held in *Schmidt v Rosewood Trust Ltd*., a 2003 decision, "that a beneficiary's right or claim to disclosure of trust documents or information"[27] is not best approached, as in the earlier case of *O'Rourke v Darbishire*,[28] as a function of his or her proprietary rights in the trust property, but as "one aspect of the court's inherent jurisdiction to supervise, and if necessary to intervene in, the administration of trusts."[29] What was earlier seen as an aspect of beneficiaries' rights in the trust property is now seen as a remedy in the discretion of the court.

While few jurisdictions deny that for an arrangement to qualify as a trust, someone must have the power to control trustees' exercise of their powers, some now decouple that power from beneficiary status. Most radically, Cayman Islands trust law has since 1997 included an elective "Alternative Regime", under which the rights of a beneficiary of an ordinary trust – to bring actions (including, in case of breach of trust by the trustee, against trustees and third parties, for personal and proprietary remedies), to make applications to the court concerning the trust, to receive information concerning the trust and its administration from the trustee, and to inspect and take copies of trust documents – are allocated to an "enforcer", who may or may not be a beneficiary. Unless appointed enforcers, beneficiaries have no standing to enforce the trust, "an enforceable right against a trustee or an enforcer, or an enforceable right to the trust property."[30] Non-

[24] Information on the amendments enacting states have made to the UTC is provided on the Uniform Law Commission website: *Trust Code*, online: <http://www.uniformlaws.org/Act.aspx?title=Trust%20Code>. Of the 26 states to have enacted the Code as of August 2013, 16 have made trustees' duties to give beneficiaries information default law, contrary to the original UTC recommendation that they be made mandatory.

[25] UTC s 105 cmt. entitled "2004 Amendment"; see discussion in Thomas Gallanis, 'The Trustee's Duty to Inform' (2007) 85 NC L Rev 1595.

[26] Restatement, ss 82, 83.

[27] [2003] UKPC 26, [2003] 2 AC 709, [50], [66].

[28] [1920] AC 581 (H.L.).

[29] *Schmidt v Rosewood Trust*, supra note 27 at [51], [66]. See discussion in, e.g., Gavin Lightman, 'The Trustees' Duty to Provide Information to Beneficiaries' (2004(1)) Private Client Business 23 [The Trustees' Duty]; Lionel Smith, 'Access to Trust Information: Schmidt v. Rosewood Trust Ltd.' (2003) 23 Estates & Trusts J 1.

[30] *Cayman Islands Special Trusts (Alternative Regime) Law*, *1997*, now incorporated, as Part VIII (ss 95-109), into the *Trusts Law (2009 Revision)*; the gist is in ss 100-102. The quote is from s 100(1). The rights of enforcers are laid out in s 102. Perhaps importantly. s 106, entitled "theft", provides that "for the purpose of the Penal Code . . . property held upon a special trust shall be regarded [as against its trustees and enforcers] as belonging to others . . . [and a trustee or enforcer's intention] to defeat the trust shall be regarded . . . as

beneficiary enforcers having first appeared in legislation permitting non-charitable purpose trusts,[31] where absent an enforcer, no-one could control the trustees, the Cayman Islands innovated by inserting them in "people trusts", decoupling trust enforcement from beneficiary status. The U.S. UTC, contrastingly, accorded non-beneficiary enforcers a far cooler welcome, only permitting them in non-charitable purpose trusts (for up to 21 years) and in trusts for animal beneficiaries,[32] while the Restatement (Third) permits non-beneficiary enforcers as an addition to, but not a replacement for, beneficiaries' enforcement powers.[33]

The decline of beneficiaries' rights and powers and the rise of the non-beneficiary trust enforcer have their origin in settlors' distrust of beneficiaries. Settlors are often uneasy with giving away their property to trustees; in the frequent cases where beneficiaries are minors, unborn, incompetent, or otherwise seen, rightly or not, as unreliable, settlors find little solace in that according to the traditional trust model, the key persons able to control trustees' execution of their office are beneficiaries. Settlor apprehension of trustees being monitored and controlled by such beneficiaries also gave birth to the trust protector, an additional trust officer, empowered to monitor and control trustees. Settlors often appoint themselves, or a confidante, as either protectors or enforcers of their trusts.[34]

Curtailing the rights accorded beneficiaries under the traditional trust model has proven controversial among trust scholars. Honoré believed that beneficiaries' rights vis-à-vis trustees and third parties are inexcludable "essentials" of the trust.[35] Most commentators agree that under "onshore"

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an intention to deprive others of their property." The Cayman Special Trusts model has been followed in other offshore jurisdictions, notably Guernsey (*Trusts (Guernsey) Law 2007*, s 12) and the Bahamas (*Purpose Trusts Act 2004*).

[31] As in Jersey*: Trusts (Amendment No. 3) (Jersey) Law*, *1996*; Guernsey: *Trusts (Guernsey) Law*, *2007*, ss 12-13; the Isle of Man: *Purpose Trusts Act*, *1996*; and Bermuda: *Trusts (Special Provisions) Act*, *1989*, s 12A.

[32] The UTC permits non-beneficiary enforcers where beneficiaries are animals alive during the settlor's lifetime (s 408), and otherwise for up to 21 years (s 409). The UTC's drafters rejected the freer use of non-beneficiary enforcers common in some offshore jurisdictions: David English, 'The American Uniform Trust Code' in David Hayton, ed, *Extending the Boundaries of Trusts and Similar Ring-Fenced Funds* (Kluwer, 2002) 313 at 322.

[33] Restatement s 94 cmt. d(1).

[34] On protectors see, e.g., Restatement ss 64(2) cmt. d and reporter's notes to cmts. b-d, 75, and 94 cmt. d(1) and reporter's notes; Mark Ascher and Austin Wakeman Scott, *Scott and Ascher on Trusts*, 5th ed (Aspen Publishers: 2010) § 16.7; Andrew Holden, *Trust Protectors* (Jordans, 2011); Panico, supra note 8 at 405-445.

[35] Tony Honoré, 'Trusts: the Inessentials' in Joshua Getzler, ed, *Rationalizing Property, Equity and Trusts* (LexisNexis, 2003) 7 at 15-20 [Honoré, Inessentials]; Tony Honoré, 'On fitting Trusts into Civil Law Jurisdictions', online: <http://users.ox.ac.uk/~alls0079/chinatrusts2.PDF> at 14-15 [Honoré, Fitting].

law, a trust for beneficiaries cannot exclude those rights.[36] A notable trend in recent scholarship has been the recognition of non-charitable purpose trusts, enforceable by a non-beneficiary enforcer, as a desirable feature of even the longest-established systems of trust law.[37] Since 2001, some commentators, notably David Hayton, have argued for the recognition, under those systems, of the non-beneficiary enforcer as a possible element of trusts for beneficiaries, while retaining beneficiaries' own enforcement rights.[38] But while accepting that a reformist trust jurisdiction such as the Cayman Islands can permit beneficiary trusts where beneficiaries' usual rights have been transferred to a non-beneficiary enforcer, few suggest that such trusts should be recognized as a feature of "onshore" law.[39]

C ELIMINATION OF REQUIREMENT THAT TRUSTEES OWN THE TRUST PROPERTY

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[36] E.g. Donovan Waters, 'Reaching for the Sky: Taking Trust Laws to the Limit' in David Hayton, ed, *Extending the Boundaries*, supra note 32, 243 at 283-90, arguing that beneficiaries' enforcement rights are a key tenet of mainline trust law, and decoupling beneficial enjoyment from enforcement is transforming the trust into an institution or device which should not necessarily be called a trust; Hayton, The Irreducible Core, supra note 16 at 54, arguing that rights such as bringing trustees to account and access to information cannot be diverted from beneficiaries to a protector so as to deprive the former of effective power to bring trustees to account. If so diverted, the protector holds those rights as a fiduciary for the beneficiaries, and the beneficiaries retain a right to obtain information from the trustees, joining the protector as co-defendant if need be.

[37] David Hayton, 'Principles of European Trust Law' in David Hayton, ed, *Extending The Boundaries*, supra note 32, 19 at 32 [Hayton, Principles]; David Hayton, 'Developing the Obligation Characteristic of the Trust' (2001) 117 LQR 97; cf. Paul Matthews, 'From Obligation to Property, and Back Again? The Future of the Non-Charitable Purpose Trust' in *Extending The Boundaries*, 203, who argued at 227-31, *contra* Hayton, that while a trust-like contractual arrangement featuring an "enforcer" is possible as a matter of English contract law, especially after the *Contracts (Rights of Third Parties) Act 1999* [Eng], English trust law does not recognize the non-beneficiary enforcer. Matthews argued that enforcer trusts render the trust property ownerless, and that the "right-holder" needs to have a personal interest in the property for there to be a trust; for him to be able to complain about trustee misdeeds absent such an interest would turn the trust into a contract (ibid, 241). For a similar view, James Penner, *The Law of Trusts*, 6th ed (Oxford UP 2008) at 239-41.

[38] Hayton, Developing the Obligation, last note; David Hayton, 'Overview' in Peter Birks & Arianna Pretto, eds, *Breach of Trust* (Oxford: Hart Publishing, 2002) 379 at 383; Lightman offered a similar view in The Trustees' Duty, supra note 29.

[39] Hayton argued that "where a [Cayman Islands Alternative Regime] trust is intended to be a trust exclusively for persons … it will be a sensible precaution to appoint one or two beneficiaries as enforcers so as to oust a possible public policy response of a traditional trust *lex fori* where trust assets are situated and where the "merits" of the particular circumstances incline the court to attempt to find a resulting trust for the settlor" (David Hayton, 'Anglo-Trusts, Euro-Trusts and Caribbo-Trusts: Whither Trusts?' in *Modern International Developments in Trust Law* (Kluwer, 1999) 1 at 11).

(Even) more radically, six trust jurisdictions do not now require that the trustee own the trust property. The jurisdictions concerned fall into two groups. The first consists of "shapeless trust"[40] jurisdictions, which leave those settling trusts free to allocate title in the trust assets to whichever point of the "trust triangle" they choose: settlor, trustee or beneficiary. There are currently two such jurisdictions: China and Israel. The Chinese Trust Act of 2001 defines a trust as a situation where "the settlor, based on his faith in trustee [sic], *entrusts* his property rights to the trustee and allows the trustee to, according to the will of the settlor and in the name of the trustee, administer or dispose of such property in the interest of a beneficiary or for any intended purposes."[41] Both the Chinese courts and commentators have interpreted this definition, in light of the other provisions of the Act, not to mandate the transfer of title in the trust assets from settlor to trustee.[42] One reason the Chinese chose a "shapeless" model was apparently a belief that the Chinese population shall make more use of trusts should trust creation be possible absent a transfer of title away from the settlor, "tak[ing] into account the psychological impediment in Chinese culture against relinquishing ownership over one's property to another person".[43] The fear that the new regime will be left unused may have also been a result of the 1990s crisis of China's state-owned investment trusts, many of which became heavily indebted.[44] It was hoped that by permitting what many

[40] The "shapeless trust" moniker was coined by Maurizio Lupoi for the definition of the trust in the Hague Convention on the Law Applicable to Trusts and on their Recognition: Maurizio Lupoi, 'The Shapeless Trust' (1995) 1.3 Trusts & Trustees 15; and full discussion in Maurizio Lupoi, *Trusts: A Comparative Study*, (Simon Dix trans., Cambridge UP, 2000) at 327-67 [Lupoi, *Trusts*].

[41] *Xintuo Fa (信托法)* [Trust Law] 2001 Standing Comm. Nat'l People's Gaz. 311.

[42] Chinese case law: *Yanxin Co Ltd v Huabao Trust and Investment Co Ltd*, (Shanghai High People's Ct. Mar. 16, 2005); *Beijing Haidian Science & Technology Development Co Ltd v Shenzhen Xinhua Jinyuan Touzi Fazhan Youxian Gongsi and others*, (Chongqing High People's Ct. 19 Mar. 2007). Comments: e.g., Frances Foster, 'American Trust Law in a Chinese Mirror' (2010) 95 Minn L Rev 602; Lusina Ho, *Trust Law in China* (Sweet & Maxwell Asia, 2003) at 65-66 [Ho, *Trust Law in China*]; Lusina Ho, 'Trust Laws in China: History, Ambiguity and Beneficiary's Rights' in Lionel Smith, ed, *Re-Imagining the Trust: Trusts in the Civil Law* (Cambridge UP, 2012) at 183 [Ho, Trust Laws in China]; Rebecca Lee, 'Conceptualizing the Chinese Trust' (2009) 58 Int'l & Comp L Q 655; Donovan Waters, 'The Future of the Trust – Part I' (2006) 13 J. of Int'l Trust & Corp. Planning 179 at 219-22.

[43] Ho, *Trust Law in China*, last note, at 67, quoting Professor Jiang Ping, Chairperson of the Drafting Committee; Ho, Trust Laws in China, last note, at 201, sources cited in n 49 and text to that note.

[44] For "[t]he shaky finances of Chinese trusts" during the late 1990s, Nicholas Kristof, 'China Ready to Shut 5 Investment Trusts', *New York Times* (3 Feb. 1999) online: The New York Times <http://www.nytimes.com/1999/02/03/business/china-ready-to-shut-5-investment-trusts.html>. According to Ho, *Trust Law in China*, supra note 42 at 3-4, nn 10-12 and text, such investment trust companies were being created from 1979.

settlors were likely to see as a lower-risk method of trust creation, the Trust Act may restore public confidence in those trusts.[45] Another reason for the Chinese choice not to require the transfer of trust assets to trustees was a fear that given China's civilian-style, indivisible ownership model, beneficiaries' rights may not be appropriately protected where title to the assets was transferred to trustees.[46] The Israeli Trust Act of 1979 defines the trust as "a relationship to property by which a trustee is bound to hold the same or act in respect thereof, in the interest of a beneficiary or for some other purpose."[47] Ending thirty years of uncertainty, the Israeli courts have recently ruled that the 1979 Act does not in fact require that title in the trust property vests in the trustee.[48] Israel chose a "shapeless" trust model so that its trust regime fit its trust practice, which having predated the formal introduction of a trust regime, grew a broad, vague view of the trust, understanding the term to encompass any fiduciary situation involving property.[49] Another jurisdiction the trust regime of which is flexible regarding the allocation of title to the trust assets between the parties to a trust is South Africa, which permits the lodging of title either in trustees or in the beneficiaries.[50]

The second group of trust jurisdictions which do not require that title in the trust assets vest in the trustee is led by Québec, which provided in its civil code that "[t]he trust patrimony … constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right."[51] The Québecois

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[45] Ho, Trust Laws in China, supra note 42 at 187-91, 202.
[46] Ibid at 201.
[47] *Trust Law*, 5739-1979, 33 LSI 154 § 1 (1978-79) (Isr.).
[48] CA 5955/09 *Ya'acov Amster, Receiver, v Marsha Tauber Tov* (July 19, 2011), Nevo Legal Database [Nevo]; CA 6406/03 *Endowment Trustees of the Sephardi Community in the Holy City of Sephad and Meiron v Kamus* (June 16, 2005), Nevo. See discussion in Shlomo Kerem, *Trusts*, 4th ed (Perlstein-Ginossar, 2004) 37-39; Lupoi, *Trusts*, supra note 40 at 279, 305 n 228, 334; Donovan Waters, 'The Institution of the Trust in Civil and Common Law' (1995) 252 Recueil Des Cours 113 at 376-78 [Waters, Civil]; Avraham Alter, *Taxation of Ordinary Trusts in Israel* 22-62 (Ph.D. dissertation, Tel-Aviv University, 1985) [unpublished] (on file with author). A notable early article argued, contra, that the Act should be read to require that title in the trust assets be transferred to the trustee, as in the orthodox common law model: Joshua Weisman, 'Shortcomings in the Trust Law, 1979' (1980) 15 Israel L Rev 372 at 372-73.
[49] For the genesis of the Israeli trust regime, Adam Hofri-Winogradow, 'Shapeless Trusts and Settlor Title Retention: an Asian Morality Play' (2012) 58 Loy L Rev 135 at 149-59 [Hofri-Winogradow, Shapeless].
[50] *Trust Property Control Act*, *No. 57 of 1988*, s 1, s v "trust".
[51] *Civil Code of Québec*, S.Q. 1991, c 64, art 1261. Discussion: John Claxton, *Studies on the Quebec Law of Trust* (Thomson Carswell, 2005); Donovan Waters et al, *Waters' Law of Trusts in Canada*, 4th ed (Carswell, 2012) at 1409-44 [Waters, *Trusts*]; Madeleine Cantin-Cumyn, 'La fiducie, un nouveau sujet de droit?' in J. Beaulne, ed, *Mélanges Ernest*

model, providing that the trust assets are owned by no-one, but rather form an autonomous "patrimony by appropriation", has in recent years been adopted in Uruguay, as well as in the new Czech civil code.[52]

Scholars have been divided on whether trusts can exist without title to the trust assets being in the trustee. Even while welcoming what he called "trusts without equity", trusts absent the law/equity duality and beneficiaries' consequent rights in the trust assets, under which beneficiaries merely have rights against their trustees, George Gretton adhered to the idea that for a legal institution to qualify as a trust, title must be in the trustee.[53] Honoré, on the other hand, believed that "it does not matter where the title to the trust property is located. To locate it in the trustee, as in Anglo-American trust law, is convenient but not essential".[54] He added that

> [E]ven if the assets are vested in the trustee, they must, if the beneficiaries or trust objects are to be protected, be separate in law from the trustee's private assets. They must form a separate trust estate….. The estate can, it is true, be treated as nominally owned by the trustee, but it can also be treated as owned by the beneficiary or beneficiaries. It can even be treated as a separate legal entity…[55]

D REFORM OF TRUST INVESTMENT LAW: FROM PRUDENT MAN TO PRUDENT INVESTOR

Another element of traditional trust law which has recently been stripped from leading onshore trust regimes are the constraints put on trustees'

Caparros (Librairie Wilson, 2002) at 129-143; Waters, Civil, supra note 48 at 396-407, 429-32.

[52] Uruguay: *Ley de Fideicomiso*, N° 17.703 (Uru.). Czech Republic: *Act No. 89/2012 Coll., the Civil Code*, ss 1448-74; discussion in Tomáŝ Richter, 'National Report for the Czech Republic' in SCJJ Kortmann et al, eds, *Towards an EU Directive on Protected Funds* (Kluwer, 2009) 59 at 65-70.

[53] George Gretton, 'Trusts without Equity' (2000) 49 Int'l & Comp L Q 599 at 603: "though it functions as a trust, the *bewind* is not trust, for a simple reason: the location of legal title is the reverse of the trust". For a similar position, Waters, Civil, supra note 48 at 449; Hayton, Principles, supra note 37 at 22. Gregory Alexander, 'The Dilution of the Trust' in Lionel Smith, ed, *The Worlds of the Trust* (Cambridge UP, 2013) at 305-312, first expresses a similar position, but later concedes, at 312, that "[i]t might be useful … to explore relaxing the common law requirement that the trustee hold legal title to the trust *res*".

[54] Honoré, Fitting, supra note 35 at 7. Thévenoz, Trusts, supra note 4, expressed, at 22-23, a similar position. Less enthusiastically, Kenneth Reid, too, admitted that trustees' ownership of the trust assets cannot be described as "an essential feature of a trust": id., 'Conceptualising the Chinese Trust: Some Thoughts from Europe' in Remco van Rhee & Lei Chen, eds, *Towards a Chinese Civil Code: Historical and Comparative Perspectives* (Martinus Nijhoff, 2012) 209 at 217 [Reid, Conceptualising].

[55] Honoré, Inessentials, supra note 35 at 9.

powers of investment. Until the 1990s, the law governing trustees' investment of trust property was centered, in the United States, on the Prudent Man Rule, under which trustees were required to “observe how men of prudence, discretion and intelligence manage their own affairs, not in regard to speculation, but in regard to the permanent disposition of their funds, considering the probable income, as well as the probable safety of the capital to be invested,”[56] and invest funds under their administration similarly. The prudent man rule was adopted by most U.S. states in enacting the Model Prudent Man Investment Act, a 1940 model statute sponsored by the American Bankers Association. While the Prudent Man Rule and its statutory guises permitted trustee investment in equities generally, it barred "speculative" investment by trustees, including investment in "speculative" equities, defined to include stock in any company other than one “with regular earnings and paying regular dividends which may reasonably be expected to continue.”[57] The Rule encouraged trustees to invest in both government and corporate bonds, seen as prima facie proper trust investments.[58]

The Prudent Man Rule's pro-bond bias produced suboptimal results during the post-World War II decades, which were characterized by stock rallies and rising inflation. Once it was clear that conservative investment could lose money, many felt a need for reform of trust investment law.[59] As John Langbein put it in 1996, "[w]e now know that, in inflation-adjusted terms, the long-term real rate of return on equities has greatly exceeded bonds."[60] Concurrently, Modern Portfolio Theory, which has steadily gained in popularity through the second half of the 20th Century, taught that industry-specific risk and firm-specific risk could be greatly reduced through diversification, and that "the risk intrinsic to any marketable security is presumptively already discounted into the current price of the security."[61]

These lessons of 1970s inflation and Modern Portfolio Theory, first applied in the U.S. in a regulation interpreting the prudence standard in the

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[56] *Harvard College v Amory*, 26 Mass. 446 at 469 (1830).
[57] *Restatement (Second) of Trusts* s 227 cmt. f (1959); John Langbein & Richard Posner, 'Market Funds and Trust-Investment Law' (1976) 1 Am B Found Res J 1 at 5; Robert H. Sitkoff & Max Schanzenbach, 'Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?' (2007) 50 J L & Econ 681 [Sitkoff & Schanzenbach, Reform].
[58] *Restatement (Second) of Trusts* s 227 cmt. m.
[59] Stewart Sterk, 'Rethinking Trust Law Reform: How Prudent is Modern Prudent Investor Doctrine?' (2010) 95 Cornell L Rev 851 at 867-79, 881 [Sterk, Rethinking].
[60] John Langbein, 'The Uniform Prudent Investor Act and the Future of Trust Investing' (1995-1996) 81 Iowa L Rev 641 at 645 [Langbein, Uniform]. But see long-term data to the contrary at text to infra note 167.
[61] Langbein, Uniform, last note at 647-49.

Employee Retirement Income Security Act of 1974,[62] were applied to U.S. trust investment law generally in the Restatement (Third) of Trusts: Prudent Investor Rule (1992), the first installment of the Restatement (Third) of Trusts, completed in 2012, and the Uniform Prudent Investor Act (1994) [UPIA]. While the prudence of diversification has long been a part of trustees' duty of prudence, "the 1992 revision of the Restatement of Trusts integrated the duty to diversify into the very definition of prudent investing."[63] The UPIA demands that the "trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying."[64] Further, no longer were any investments prima facie "proper" or "speculative." Any investment could now be either proper or improper, depending on the characteristics of the trust in which it was held, such as the trust's liquidity requirements, often dictated by the needs of its beneficiaries. The Restatement (Third) "states that the prudent investor rule is "to be applied to investments not in isolation but in the context of the trust portfolio and as a part of an overall investment strategy . . . .""[65] The UPIA provides that the "trustee's investment and management decisions" are required to "hav[e] risk and return objectives reasonably suited to the trust."[66] "Nearly all [U.S.] states" have adopted the reformed Prudent Investor Rule by legislation.[67]

The recent development of trustee investment law in England has followed a similar trajectory, eliminating constraints English law has previously put on trustees in choosing investments. Until recently, English trustees were subject to the Trustee Investments Act of 1961,[68] which required them "to separate the trust fund into "wider-range" and "narrower-range" investments, with the intention that no more than half of the trust fund should be invested in any investment carrying even that risk associated with publicly quoted companies on the London Stock Exchange".[69] To have their stock and debentures qualify as even "wider-range" investments, companies had to have their securities quoted on a stock exchange, fully paid up (or to be fully paid up within nine months of issue), have paid up share capital of one million Pounds or more, and pay a dividend in each of

[62] *29 C.F.R*. s 2550.404a-1(b)(1)(i), interpreting *Employee Retirement Income Security Act of 1974* s 404(a)(1)(B), 29 U.S.C. s 1104(a)(1)(B).
[63] Langbein, Uniform, supra note 60 at 646.
[64] UPIA s 3 (1994).
[65] *Restatement (Third) of Trusts: Prudent Investor Rule* s 227(a) (1992), now Restatement s 90(a) (2007).
[66] UPIA s 2(b) (1994).
[67] Restatement s 90, gen. note, 340 (2007).
[68] 9 & 10 Eliz. 2, c 62.
[69] Ibid, ss 1-2 and sch 1; quote from Thomas and Hudson, supra note 2 at s 10.76.

the five years preceding investment.[70] While this 1961 structure was default law, always liable to be defeated by alternative provisions drafted for specific trusts,[71] it prevented those trustees to whom it applied from generating a return on investment equivalent to that easily obtainable on the stock markets.[72] Expressive of an older view of appropriate trustee investment which emphasized a duty to invest in assets producing a predictable yield, the Act's provisions were often excluded in trust instruments. As many trustees' investment practice became freer, by the late 1980s a prominent English judge held that the extent of risk trustees may take should be judged, in light of Modern Portfolio Theory, in view of the riskiness of the entire portfolio rather than of each investment choice.[73] Parliament caught up with this freer approach in the Trustee Act 2000, which gave trustees a so-called "general power of investment", permitting them to invest the trust property as though they were its absolute owners.[74] With that general power came a general duty of care, which is, like the U.S. Prudent Investor Rule, context-sensitive, subjecting trustees to a duty to exercise "such skill and care as is reasonable in the circumstances", such as a trustee's holding himself out as having "special knowledge or experience" or performing his duties "in the course of a business or profession".[75] However the provisions of the 2000 Act, like those of its predecessor, are default law, liable to be excluded in trust instruments.[76]

Finally, the law of the Canadian provinces has undergone a similar reform, progressively lifting the constraints put on trustees' investment powers. While provincial legislation has until the 1950s provided, in the style of pre-1961 English statutes, lists of permitted investments, all the provinces have recently liberalized their law of trustee investment. The reform process was aided by the Trustee Investment Act the Uniform Law Conference of Canada drafted in the 1950s, amended in 1970 and revised in 1997. The Uniform Act's three versions themselves exemplify the "stripping process": that of 1957 featured a more restrictive variant of the regime subsequently enacted in England as the 1961 Trustee Investments Act, that of 1970 adopted a version of the Prudent Man Rule, and that of 1997

[70] *Trustee Investments Act*, 1961, sch 1, Part IV, para 2-3.

[71] Panico notes that "[i]t was not uncommon for trust instruments of the Victorian age to give trustees unrestricted discretion over the investment of the trust fund, including the power to extend unsecured loans": supra note 8 at § 2.24.

[72] Thomas and Hudson, supra note 2 at § 10.76.

[73] *Nestle v National Westminster Bank plc*, (1988) 10 TLI 112 (Hoffmann J).

[74] c 29, s 3(1)-(2).

[75] Ibid, at s 1.

[76] Ibid, at s 6(1)(b) (the general power of investment may be restricted or excluded); sch 1, para 7 (the duty of care may be excluded). See discussion of the current English law in Underhill and Hayton, supra note 2 at §§ 49.1-49.73; Thomas and Hudson, same note, at §§ 10.71-10.96, 32.48-32.59, 54.

adopted the Prudent Investor Rule, clearly influenced by U.S. developments. The Prudent Investor standard has by now been adopted by most of the more populous Canadian provinces,[77] as well as by the Australian States and New Zealand.[78]

E LIBERALIZATION OF TRUSTEE DELEGATION

Like the classical constraints on trustees' investment powers, the classical constraints on their power of delegation have recently been eliminated by many jurisdictions. Under traditional trust law, trustees were "under a duty to the beneficiary not to delegate to others the doing of acts which the trustee can reasonably be required personally to perform."[79] The courts distinguished between ministerial functions, which could be delegated, and discretionary functions, which could not.[80] As some discretionary functions, notably the investment of trust funds, have during the 20th Century become increasingly complex, opt-outs from the non-delegation rule became common in trust instruments. Trustees of trusts not including an opt-out developed a practice of de-facto delegation, with investment advisors recommending courses of action and trustees independently, yet consistently, deciding to adopt them.[81] The new reality of frequent delegation of discretionary functions raised additional legal issues: trustees feared that even purchasing mutual funds for the trust might be construed as (forbidden) "double dipping", as both trustees and fund managers were being paid for investment services.[82] The increasing inconvenience of the

[77] The Prudent Man Standard is currently the law in Manitoba, New Brunswick, Newfoundland and Labrador, the North-Western Territories and the Yukon Territory. The Prudent Investor standard is currently the law in British Columbia, Alberta, Saskatchewan, Ontario, Nova Scotia and Prince Edward Island (Waters, *Trusts*, supra note 51 at 1487). The 1991 Civil Code of Québec preserves a softened version of the old "legal list" approach, providing a list of trustee investments which are presumed to be sound and a list of forbidden investments (ss 1339 and 1340-41 respectively; discussion in Waters, ibid, at 1005). See generally ibid at 1003-1023.

[78] Though the Australian and New Zealand legislation speaks of a "prudent person" rather than a "prudent investor", its substance reflects the insights of Modern Portfolio Theory. The New Zealand Trustee Amendment Act 1988 "was perhaps the first example of the introduction of modern portfolio theory into trust legislation": Panico, supra note 8 at § 2.44; § 2.47 for Australia.

[79] *Restatement (First) of Trusts* s 171 (1935); *Restatement (Second) of Trusts* s 171 (1959).

[80] Langbein, Uniform, supra note 60 at 650-51.

[81] Ibid at 651.

[82] Sterk, Rethinking, supra note 59 at 898. In 1990s Ontario, investment in mutual funds was in fact held to be an unlawful delegation of the core discretionary function of choosing investments: *Haslam v Haslam* (1994), 114 D.L.R. (4th) 562 Ct.J. Further decisions to the same effect are cited in Waters, *Trusts,* supra note 51 at 1008. This holding has now been reversed by Canadian provinces' Trustee Acts, modeled on the U.S. Uniform Prudent

non-delegation rule led U.S. states to enact legislation reversing it, culminating in the Restatement (Third) of Trusts: Prudent Investor Rule, which provided that "[a] trustee has a duty personally to perform the responsibilities of the trusteeship except as a prudent person might delegate those responsibilities to others. In deciding whether, to whom, and in what manner to delegate fiduciary authority in the administration of a trust, and thereafter in supervising agents, the trustee is under a duty to the beneficiaries to exercise fiduciary discretion and to act as a prudent person would act in similar circumstances."[83] The UPIA provides similarly, and "imposes duties of care, skill, and caution on trustees in selecting agents, in formulating the terms of the delegation, and in reviewing "the agent's performance and compliance with the terms of the delegation.'"[84] Where the UPIA applied this provision to delegation of trustees' "investment and management functions", the UTC extends it to delegation of any of trustees' "duties and powers".[85] A Restatement (Third) comment provides that trustees may even sometimes have a duty to delegate their investment functions.[86] Under the Restatement (Third), the UPIA and the UTC, trustees who comply with these duties are thereby rendered not liable where despite their compliance, the delegate's actions or omissions cause loss to the trust fund. Aggrieved beneficiaries "must look exclusively to the agent."[87] Trustee delegation reform has thus reached a reversal of the traditional common law position, according to which third parties with whom trustees contract are potentially liable to the trustees rather than to the beneficiaries.[88]

The English default law of trustee delegation has remained more restrictive. While any extent of delegation could always be expressly allowed in a trust instrument, and clear provisions authorizing trustees to delegate both their dispositive and administrative powers are in fact common in modern English settlements and wills,[89] a comparison of the law applicable absent such provisions during the late 19th Century to that applicable today shows that liberalization has, in England, proceeded slowly

Investor Act: e.g., *Ontario's Trustee Act*, R.S.O. 1990, s. 27(3) (as amended); Waters, ibid at 928, n 80 and text.

[83] *Restatement (Third) of Trusts: Prudent Investor Rule* s 171 (1992).

[84] Langbein, Uniform, supra note 60 at 652-53, quoting UPIA s 9(a)(3) (1994).

[85] UTC s 807; according to the Comment to this section, it "permits trustees to delegate various aspects of trust administration". *Quaere* whether "administration" includes trustees' dispositive functions.

[86] Restatement s 90 cmt. j (2007).

[87] Ibid, s 80 cmt. g (2007); UPIA, s 9(b)-(c) (1994); UTC s 807(c). The quote is from Langbein, Uniform, supra note 60 at 653.

[88] I thank Lionel Smith for his advice on the common law position.

[89] Underhill and Hayton, supra note 2 at § 51.2; Thomas and Hudson, supra note 2 at § 15.48.

and remained partial. According to the English law of the late 19th Century, trustees could not delegate their powers, except where "such employment was expressly authorized by the settlement, or where out of necessity in the particular transaction it was impossible for the trustee satisfactorily to do the act himself, or where the act was merely ministerial and employment of an agent was not the delegation of a function but the performance of a function through an agent, normally necessary or in the ordinary course of affairs from the point of view of a prudent man of business".[90] The Trustee Act 1925 granted a trustee intending to leave and remain out of the United Kingdom for more than a month a power to delegate, by power of attorney, any and all of his functions, the delegating trustee remaining liable for the acts and omissions of the delegate.[91] The same Act granted the trustees of a trust, acting collectively, a power to delegate their administrative tasks, the trustees not being "responsible for the default of any such agent if employed in good faith".[92] Another provision of the 1925 Act declared that a trustee shall not be liable for any loss caused to the beneficiaries by the "acts, receipts, neglects or defaults" of a delegate "unless the same happens through [the trustee's] own willful default".[93] More recent legislation has somewhat extended the ambit of permissible delegation by trustees. The Powers of Attorney Act 1971 provided that a trustee may by power of attorney delegate any and all of its functions for a period of one year or less, the delegating trustee remaining liable for the acts and omissions of the delegate.[94] The same provision is now part of the Trustee Delegation Act 1999.[95] The Trustee Act 2000 again allowed trustees, as a body, to delegate

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[90] Underhill and Hayton, supra note 2 at § 51.2; Thomas and Hudson, supra note 2 at § 15.04. The leading case is *Speight v Gaunt* (1883) (U.K) 22 Ch D 727; 9 App Cas 1 [*Speight*]. And see historical analysis of the 19th Century law in Stebbings, *Private Trustee*, supra note 5 at 98-127.

[91] *Trustee Act, 1925* (UK) 15 Geo 5, c 19, s 25. Similar provisions remain in force in the Canadian provinces of British Columbia, Manitoba and New Brunswick (Waters, *Trusts*, supra note 51 at 919), as well as in several offshore jurisdictions (Panico, supra note 8 at §3.24).

[92] *Trustee Act*, *1925* (UK), 15 Geo 5, c 19, s 23; Stebbings, *Private Trustee*, supra note 5, emphasizes at 127, n 134, that this provision "significantly widened [trustees'] power of delegation." An early decision parsing this section construed it to mean that trustees may delegate any of their tasks: *Re Vickery* (1931), 1 Ch 572. For the usual understanding of the section, expressed in my text, see the Law Commission, *Trustees' Duties and Powers*, *Report no*. *160* (1999) at 45; Panico, supra note 8 at § 3.20. The section is still in force in some jurisdictions, including, e.g. *Trustee Act 1956* (NZ) and the British Virgin Islands (*Trustee Ordinance*, *1961* at s 24(1)).

[93] *Trustee Act, 1925* (UK), 15 Geo 5, c 19, s 30(1).

[94] Ibid, c 27, s 9.

[95] Ibid, c 15, s 5. Panico believes that the time limit on this statutory power can be effectively ignored by giving an agent successive powers of attorney, each for a period of one year or less: supra note 8 at §3.21.

all of their administrative functions,[96] excepting "any power to decide whether any fees or other payment due to be made out of the trust funds should be made out of income or capital"[97], powers to appoint trustees[98] and powers to delegate any function, appoint nominees or custodians, except those powers in the 2000 Act itself.[99] The Act provides that trustees must monitor the agent, custodian or nominee appointed, and give him directions, or revoke the appointment where circumstances so require; trustees' general duty of care applies to these duties.[100] Delegating trustees are only liable for their agents', nominees' or custodians' acts and defaults where they failed to comply with their duty of care in appointing an agent, setting the terms of the agency, monitoring the agent or revoking the agency.[101] However the delegation powers in the 2000 Act may be either enlarged or restricted by trust instrument.[102]

While common law Canadian provinces' law of trustee delegation has long developed in step with English developments, they have recently abandoned the English example as regards the delegation of trustees' investment-related powers and duties, choosing to follow the U.S. UPIA instead. The law of most Canadian provinces still largely preserves the traditional Canadian common law position that trustees cannot delegate policy decisions, whether dispositive or administrative.[103] Where permissible, trustee delegation was (and is) subject to the Prudent Man Rule. The result is that trustees are permitted to hire an agent to perform work which does not involve policy decisions, so long as a prudent man of business would similarly delegate that work when tending to his own affairs. Trustees are similarly subject to the Prudent Man Rule in choosing and supervising their agents. Where trustees abide by these standards, they are not responsible for the agent's intelligence or honesty.[104] All the common law provinces of Canada adopted, following the English Trustee Act of 1925, statutory language providing that a trustee shall not be liable for any loss caused to the beneficiaries by the "acts, receipts, neglects or

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[96] Ibid, c 29, s 11(1); trustees' dispositive functions are declared not delegable in s 11(2)(a).
[97] Ibid, s 11(2)(b).
[98] Ibid, s 11(2)(c).
[99] Ibid, s 11(2)(d).
[100] Ibid, ss 22-23; sch 1.
[101] *Trustee Act*, *1925* (UK), 15 Geo 5, c 29, s 23.
[102] Ibid, s 26; analyzed in Joshua Getzler, 'Legislative Incursions into Modern Trusts Doctrine in England: the Trustee Act 2000 and the Contracts (Rights of Third Parties) Act 1999' (2002) 2(1) Global Jurist Topics 7, n 35 and text; Underhill and Hayton, supra note 2 at ch 51; Thomas and Hudson, supra note 2 at chapter 15. The delegation provisions of the Trustee Act 2000 were replicated by several offshore jurisdictions, including the Isle of Man and Singapore: Panico, supra note 8 at § 3.53.
[103] Waters, *Trusts,* supra note 51 at 915-18.
[104] Ibid, 920-921.

defaults" of a delegate "unless the same happens through [the trustee's] own willful default".[105] While unlike in the U.S., the Canadian prohibition on the delegation of policy decisions is thus still largely in place, several of the common law provinces have recently reversed it in the limited context of investment. These provinces have enacted statutes modeled on the U.S. UPIA by way of the 1997 version of the Uniform Law Conference of Canada's Trustee Investment Act, providing that a "trustee may delegate to an agent the degree of authority with respect to the investment of trust property that a prudent investor might delegate in accordance with ordinary business practice". The statutes further provide that where a trustee exercises prudence in selecting an agent, setting the terms and limits of the authority delegated, acquainting the agent with the investment objectives and monitoring the agent's performance, the trustee shall not be liable to the beneficiaries for the agent's decisions or actions.[106]

Finally, the permissive frontier of trustee delegation law is currently occupied by Jersey. Until its amendment in 2006, the Trusts (Jersey) Law provided that while, as a rule, "a trustee shall not delegate the trustee's powers unless permitted to do so by this Law or by the terms of the trust",[107] he or she "may delegate management of trust property to and employ investment managers whom the trustee reasonably considers competent and qualified to manage the investment of trust property".[108] The 2006 amendment reversed the general presumption in favor of delegation, declared that trustees' dispositive trusts and powers, too, may be delegated, and provided that delegates may themselves delegate any of their trusts or powers.[109]

F FALL OF THE RULE AGAINST PERPETUITIES

The widespread decline of the rule against perpetuities fits into the general decline of restrictions on settlors' power of disposition, itself a key aspect of the stripping process. Under the traditional common law rule against perpetuities,[110] "a contingent future interest must vest, if at all, within twenty-one years after the expiration of some life in being when the interest

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[105] Ibid, 925, n 61. Ontario repealed its provision in 1998.
[106] Waters, *Trusts*, supra note 51 at 928-30 and the Table on page 1488; the quote in my text is from the British Columbia Statute, *Revised Statutes of British Columbia, 1996*, c 464, as amended by *Statutes of British Columbia*, 2002, c 33, s 15.5(2) (BC).
[107] *Trusts (Jersey) Law, 1984*, L.11/1984, s 25(1) (version in force until October 27, 2006).
[108] Ibid, s 25(2)(a).
[109] *Trusts (Jersey) Law 1984,* as amended by the *Trusts (Amendment No. 4) (Jersey) Law, 2006*, L.21/2006, s 25(1).
[110] The rule was settled gradually, in a long series of English cases. The most frequently cited are *The Duke of Norfolk's Case* (1682), 3 Chan Cas 1, 22 ER 931 (Ch); *Cadell v Palmer* (1833), 1 Cl & Fin 372, 6 ER 936 (HL).

was created."[111] The rule, however, is increasingly being either abolished or weakened by both onshore and offshore[112] jurisdictions. By 2013, twenty-nine U.S. states and the District of Columbia have either abolished the Rule or extended their perpetuity periods to several hundred years.[113] Sitkoff and Schanzenbach wrote that "[t]he driving force behind the erosion of the Rule was not a careful reconsideration of the ancient common law policy against perpetuities, but rather a 1986 reform to the federal tax code. Under the 1986 Code [as amended to 2014, a transferor can pass $5.34 million, either during life or at death[114]], free from federal wealth transfer taxes. By passing this [exempted amount] in trust, a transferor can ensure that successive generations benefit from the trust fund [and any appreciation], free from federal wealth transfer taxes, for as long as state perpetuities law will allow the trust to endure."[115] The 1986 tax code thus made the rule against perpetuities into "a highly salient margin of differentiation"[116] between jurisdictions, and soon enough, banking and lawyer associations in the several states of the U.S. were pressuring state legislatures to abolish the rule, so as to sustain each state's attractiveness as a site of trust management.[117] Lawyers' anxiety to have the rule abolished was further founded on the traditional rule's quirky complexity, a potential source of lawyer liability for professional malpractice.[118] Once Delaware abolished its rule in 1995, abolition spread quickly among U.S. states.[119] The choice of state A's trust law as governing law of a trust settled by a resident of state B benefits trust service providers in state A because to make the choice of that state's perpetuity-friendly law stick, the settlor is likely to appoint a resident of state A as trustee and transfer at least some trust funds to a financial

[111] Jesse Dukeminier & James E Krier, 'The Rise of the Perpetual Trust' (2003) 50 UCLA L Rev 1303 at 1304.
[112] See, e.g., Trusts (Jersey) Law, 1984, s 15; Trusts (Guernsey) Law, 2007, s 16; Trust Law 2005, (Act No. 11/2005), s 28 (Dubai International Financial Center).
[113] 'Perpetual and Long-Term Dynasty Trust States', Law Offices of Oshins & Associates, online: < http://www.oshins.com/dynastytruststates.html>.
[114] Internal Revenue Code of 1986, 100 Stat 2085, § 2010(c)(3)(A) (2013, Lexis).
[115] Robert H. Sitkoff & Max Schanzenbach, 'Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes' (2005) 115 Yale L J 356 at 359 [Sitkoff & Schanzenbach, Competition].
[116] Ibid at 374.
[117] Ibid at 374, n 57 and sources cited (noting, e.g., that the New Jersey legislation abolishing the rule against perpetuities was "sponsored by the New Jersey Bankers Association . . . so that New Jersey trust institutions could avoid losing potential dynasty trust business and other types of trust business to Delaware, South Dakota, and Alaska").
[118] Stewart Sterk, 'Jurisdictional Competition to Abolish the Rule Against Perpetuities: R.I.P. for the R.A.P.' (2003) 24 Cardozo L Rev 2097 at 2100-2101.
[119] Sitkoff & Schanzenbach, Competition, supra note 115 at 376.

institution in that state. Appointment as trustee and deposits of trust funds both generate fees for the service providers involved.[120]

As with trustee delegation reform, perpetuity reform in England has been slower and more moderate than in the U.S., while undeniably tending to gradually permit longer perpetuity periods. The Perpetuities and Accumulations Act of 1964,[121] applicable to dispositions made between July 15, 1964[122] and April 6, 2010,[123] may have modestly contributed to the extension of perpetuity periods in practice by permitting disponors to expressly choose a fixed perpetuity period of up to 80 years[124] and adopting the "wait and see" principle, according to which dispositions which *may* be void under the traditional rule are presumed to be valid until proven, at the end of the applicable perpetuity period, to be *definitely* void.[125] The Perpetuities and Accumulations Act 2009, applicable to dispositions made after April 6, 2010, carried the liberalization process further by providing that all such dispositions shall be subject to a perpetuity period of 125 years.[126]

The common law provinces of Canada are moving in the same direction, each at its own pace. New Brunswick and Newfoundland and Labrador have so far retained the traditional rule. Prince Edward Island has extended the perpetuity period to a life in being plus 60 years.[127] Ontario, Alberta, the Yukon Territories, the Northwest Territories (then including what is now Nunavut) and British Columbia have in the 1960s and 1970s adopted the "wait and see" approach of the 1964 English Act, along with some *cy pres* techniques intended to save dispositions from invalidation. British Columbia also introduced the 1964 English Act's alternative perpetuity period of 80 years. Finally, Manitoba[128] and Saskatchewan[129] have now abolished the rule, and both the Yukon[130] and Nova Scotia[131] have enacted similar legislation which is currently awaiting the proclamation necessary to bring it into force.[132] The common law world thus currently falls into two camps regarding perpetuity reform, with most U.S.

[120] Ibid at 374.
[121] C 55 (UK).
[122] Underhill and Hayton, supra note 2 at § 11.5; Thomas and Hudson, supra note 2 at § 8.16.
[123] *Perpetuities and Accumulations Act, 2009 (Commencement) Order 2010*, No 37 (c 6), s 2.
[124] *Perpetuities and Accumulations Act of 1964,* c 55, s 1(1).
[125] Ibid at s 3(1).
[126] *Perpetuities and Accumulations Act 2009* (UK), c 18, s 5.
[127] *Perpetuities Act 1988*, Revised Statutes of Prince Edward Island, c P-3, s 1.
[128] *Continuing Consolidation of the Statutes of Manitoba*, c P33, ss 2-3 (enacted 1983).
[129] *Trustee Act, 2009*, s 58.
[130] *Perpetuities and Accumulations Repeal Act, 2001*, c 12.
[131] *Perpetuities Act, 2011*, c 42, ss 2-3.
[132] Waters, *Trusts,* supra note 51 at 373-80.

jurisdictions, many offshore jurisdictions, some Canadian jurisdictions, Ireland[133] and South Australia[134] having essentially uprooted the rule, while England, the remaining U.S., Canadian and Australian jurisdictions[135] and New Zealand[136] have so far satisfied themselves with relatively modest extensions of the perpetuity period permitted under the traditional rule.

G RISE OF SELF-SETTLED SPENDTHRIFT TRUSTS

Finally, the rise of self-settled spendthrift, or "asset protection" trusts is a further aspect of the stripping process: it has only been made possible by the abolition, in an increasing number of jurisdictions, of the traditional rule prohibiting such trusts. While U.S. trust law has, since the late 19th Century, permitted spendthrift trusts, beneficiaries' entitlements under which cannot be reached by their creditors, it has not, until recently, permitted settlors to shield their assets from their own creditors by placing them in spendthrift trusts for their own benefit.[137] Nor does traditional trust law regard the granting of discretion to trustees as to the amounts to be distributed to a settlor who is also a beneficiary of the same trust as barring that settlor's creditors from access to trust monies: "[e]ven if the trust is discretionary, spendthrift, or both, the settlor's creditors can reach the maximum amount that the trustee can pay the settlor or apply for the settlor's benefit."[138] Looking to draw foreign clients to their local trust service providers, offshore jurisdictions started offering self-settled spendthrift trusts, often called "asset protection trusts", during the 1980s, their legislation providing that funds transferred on trust shall not be accessible by the settlor-beneficiary's creditors.[139] Responding to the competition offshore, U.S.

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[133] *Land and Conveyancing Law Reform Act 2009*, s 16(d).

[134] *Law of Property Act 1936*, s 61 (SA) as amended by the *Law of Property (Perpetuities and Accumulations) Act 1996*, s 4 (SA).

[135] For discussion of the state of Australian perpetuities law see Samantha Hepburn, *Australian Principles of Property Law*, 3rd ed (Routledge, 2013) 166-167, noting that South Australia has abolished the rule against perpetuities, while the Northern Territory applies the traditional rule, New South Wales replaced that rule with a set 80 year period, and Victoria, Western Australia, Tasmania and Queensland allow the use either of the common law period "or a statutory period which cannot exceed 80 years" (ibid, 166).

[136] Under New Zealand law, the perpetuity period can be either that under the traditional rule or a period of up to 80 years specified in a donative instrument: Perpetuities Act 1964, s 6(1). In a recent report, the New Zealand Law Commission has recommended that the perpetuity period under New Zealand law be extended to 150 years: New Zealand Law Commission, *Review of The Law of Trusts: Report: A Trusts Act for New Zealand*, Report No 130 at 218, R49(2) (2013).

[137] The Restatement and the UTC still preserve, in s 58(2) and s 505 respectively, the prohibition on self-settled spendthrift trusts.

[138] Sitkoff & Schanzenbach, Competition, supra note 115 at 380.

[139] E.g., *Belize Trusts Act*, *1992*, ss 7(6) and 12(4); *Cayman Islands*' *Fraudulent Dispositions Law, 1989*; *Bahamas Fraudulent Dispositions Act*, *1991*, No 1 of 1991; *Cook*

states started reversing the rule against self-settled spendthrift trusts in 1997.[140] Alaska and Delaware were the first of (so far) fourteen states to enact Domestic Asset Protection Trust (DAPT) statutes, again targeting mainly out-of-state settlors.[141] Many asset protection trust regimes make some exceptions to the protection offered, the most common such exceptions permitting settlors' ex-spouses and children to satisfy property division, alimony and child support liabilities from the trust fund.[142] Where despite the creation of such a trust, and in contradiction to its terms, the settlor continues to act as if he or she was the absolute owner of the trust assets, the trust is at risk of being set aside as a sham.[143] The political economy mechanism behind these legislative adjustments is similar to that behind abolition of the rule against perpetuities: choice of a state's law to govern a trust generates income to trust service providers resident in that state.[144]

Islands International Trusts Act, 1984, ss 13A-13K; and see Stewart Sterk, 'Asset Protection Trusts: Trust Law's Race to the Bottom?' (2000) 85 Cornell L Rev 1035 at 1047-51 [Sterk, Protection].

[140] John Eason, 'Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations' (2000) 52 Fla L Rev 41; Sitkoff & Schanzenbach, Competition, supra note 115 at 380-82; Sterk, Protection, last note at 1051-55.

[141] David Shaftel, ed, 'ACTEC Comparison of the Domestic Asset Protection Trust Statutes' (30 June 2012), online <http://www.actec.org/public/documents/studies/shaftel_dapt_chart_06_30_2012.pdf>; Kenneth Laino, 'Ohio Enacts Domestic Asset Protection Statute' (3 January 2013), online: Asset Protection Law Journal <http://www.assetprotectionlawjournal.com/2013/01/articles/domestic-asset-protection-trus/ohio-enacts-domestic-asset-protection-trust-statute>. Alaska was the first U.S. state to enact a DAPT statute, to be found in the Alaska Statutes, at s 34.40.110. For a recent example, *Va. Code Ann*., ss 64.2-745.1 to 745.2 (2012).

[142] E.g., *Del. Code Ann*. tit. 12, ss 3570(9), 3573 (alimony and property division exceptions only apply to persons to whom the settlor was married at the time the trust was created); *Hawaii Revised Statutes*, ss 554G-8, 554G-9 (exempting child support, property division and alimony creditors where the transferor is 30 days or more in default in making a payment; the State of Hawaii, to the extent that the creation of the trust results in the transferor being unable to meet his or her state tax liabilities; and secured or collateralized lenders to the transferor based on a representation that the trust property would be available as a security). Not all asset protection trust regimes make such exceptions; see, e.g., *Belize Trusts Act, 1992*, s 7(6) ("Where a trust is created under the law of Belize, the Court shall not vary it or set it aside or recognise the validity of any claim against the trust property pursuant to the law of another jurisdiction or the order of a court of another jurisdiction in respect to – (a) the personal and proprietary consequences of marriage or the termination of marriage"). The Belizean legislation says nothing regarding the rights of the settlor's children.

[143] *Midland Bank plc v Wyatt* [1995] 1 FLR 696; *Minwalla v Minwalla* [2004] EWHC 2823; *A v A* [2007] EWHC 99 (Fam), [2009] WTLR 1.

[144] Sitkoff & Schanzenbach, Competition, supra note 115 at 383.

III *Normative analysis*

Even before the recent reforms, many donative trusts had distributive consequences which appear, from an egalitarian point of view, problematic. The basic function of donative trusts has been, and remains, the direction, expenditure and preservation of value for the benefit of a given person or group. Classically, the group benefitted has been a family: trusts have long been used to prevent family members from ejecting property outside the family, transferring it to non-family recipients such as creditors, lovers and casinos. They have also been used to prevent powerful people and entities outside the family, such as Medieval Lords or the modern fiscal state, from taking property away from the family. All, or substantially all, donative trusts, even the charitable kind, involve a degree of distributive imbalance: the benefited group almost never includes all the members of a society. Donative trusts divide the society within which they exist into an in-group (beneficiaries) and an out-group (everybody else). On strict egalitarian readings of the distributive justice ideal, which require an utterly equal allocation of resources, all trusts fail this ideal, even the trust to build and maintain a hospital in a poverty-stricken town, which is much more easily available to residents of that town than to those of other places, including places equally poor.

Examined against laxer versions of the distributive justice ideal, some donative trusts appear normatively desirable. The case for their being normatively desirable becomes much easier if their distributive effects are measured not against an imaginary, perfectly just society, but against the existing unjust society absent the effects of these trusts. The easiest cases are charitable trusts, family trusts for the benefit of needy, elderly or disabled family members and family trusts intended to incentivize able family members, through conditional gifts, to care for their less able relatives. Family trusts intended to incentivize family members, through conditional gifts, to achieve goals in their own self-interest, such as marriage, a career or an education, can also be seen as distributively beneficial, especially from a desert-based distributive justice perspective and where the resulting marriage, career or education is of value to others besides the beneficiary. Other types of donative private trusts can hardly be described as distributively desirable, however. Dynastic trusts intended to conserve large pots of value in a family for generations, including by preventing family members from spending the money or alienating the property, appear to be distributively harmful. Since the 20th Century, achieving such a dynastic purpose has required working to impede the tax system, society's most important engine of redistribution.

From a corrective justice perspective, on the other hand, most pre-reform donative trusts appear to be just. Since corrective justice permits donations, the fact that donative trust beneficiaries give no consideration for the benefit received does not render the trust unjust from a corrective justice perspective: there is nothing to correct in a donation. Further, some settlors receive consideration for their settlement of property on trust in the form of social capital: the gratefulness of beneficiaries or the social standing resulting from charitable donations. Trustees, too, receive consideration for trust services rendered: some are paid in money, others (lay, unpaid trustees) in social capital. Even spendthrift trusts do not themselves constitute infringements of corrective justice. However, by making beneficiaries' entitlements under trust unavailable to their creditors, including tort creditors, they create a potential for significant infringements of the corrective justice ideal.

In the rest of this Part, I analyze the normative consequences of the seven trust law reforms described in Part II, asking whether, compared with the pre-reform normative baseline just described, they have brought the trusts to which they apply closer to the distributive justice and corrective justice ideals, as applicable, or whether they have made those trusts less just, in either sense. I will proceed by grouping these reforms according to their impact on parties to trust relationships, on non-parties affected by trusts and, where relevant, on society as a whole. Parties to trust relationships include settlors, trustees, beneficiaries, protectors, enforcers and some others. Non-parties affected by trusts include trustee delegates, as well as the trustee's trust creditors and key trust actors' non-trust creditors, including non-kin creditors by contract, tort, unjust enrichment and other law (such as tax and other authorities), and heirs, spouses, cohabitants, former spouses and cohabitants, and children. This varied cast of actors can be fruitfully divided into trust service providers, their clients, whom I call "trust users", and third (or non-) parties, with a further distinction between savvy, sophisticated or well-advised clients (who may be made settlors, trustees, beneficiaries, protectors, enforcers or some combination of these roles) and less sophisticated purchasers of mass-market trust services.

Two of the trust reforms discussed in Part II - abolition of the rule against perpetuities and the rise of asset protection trusts – benefit trust users, both settlors and beneficiaries, as well as trust service providers, by shifting burdens to trust non-parties: beneficiaries' creditors, taxpayers and the general population. In doing so, they impede, rather than promote, distributive justice, concentrating wealth in a select, if heterogeneous, group to the detriment of others.

Some of the empirical consequences of *R.A.P. abolition* were identified by Sitkoff and Schanzenbach, who found that "through 2003, roughly $100 billion in trust funds have poured into the states that have validated perpetual trusts. Assuming the applicability of typical industry commission schedules, these funds are worth perhaps as much as $1 billion in yearly trustees' commissions."[145] The capital flow to perpetuity-friendly states has doubtlessly continued since 2003. Analytically, the rise of perpetual trusts appears to serve all three of the immediate parties to the trust – settlors, trustees and beneficiaries – well. Settlors enjoy the prospect of defining and controlling the allocation of their property between beneficiaries, and perhaps the use those beneficiaries will be able to make of that property, for a much longer time than hitherto. Settlors subject to U.S. taxation further enjoy the exempting of at least some of their property from federal transfer taxes for a much longer time than is possible absent perpetual trusts. Trustees enjoy the prospect of drawing trust management fees for an unlimited period of time and the end of the nontrivial potential for professional malpractice litigation consequent on the traditional rule's complexity. Beneficiaries enjoy the potential for receiving gifts settled on trust by long-deceased settlors, the tax-saving advantages of perpetual trusts, and a great prolongation of their enjoyment of spendthrift trusts settled in their favor. The further removed one is from the trust core of settlor, trustee and beneficiary, the less advantageous perpetual trusts appear. If perpetual trusts stay available for long enough, the number of spendthrift trust beneficiaries is likely to grow, to the detriment of their creditors – a group including their current and former spouses and cohabitees, their children, and anyone to whom they owe a debt, including tort creditors. From the point of view of society at large, perpetual trusts have grave disadvantages. Not only does the prolongation of spendthrift trusts into the indefinite future enable the perpetual peppering of society with uncompensated harm; as Lau observed, a settlor's plan for allocating his or her property several Centuries into the future may eventually allocate that property in a sub-optimal manner.[146] Further, the tax planning advantages of perpetual trusts from the point of view of trust users imply disadvantages for trust non-users, who will have to either bear a greater tax burden, live with a lower standard of government services, or both. Perpetual trusts are also likely to contribute to the preservation of the current distribution of society into classes, increasing the likelihood that the descendants of today's wealthy class will be members of the wealthy class of a hundred or two hundred years hence. In sum, perpetual trusts increase the externalities consequent on trust use. They exacerbate socio-economic inequality. Given these disadvantages, the income that trust service providers earn by providing perpetual trusts is, from the point of view of social welfare, money spent sub-optimally.[147]

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[145] Sitkoff & Schanzenbach, Competition, supra note 115 at 410-11.

[146] Ming-Wai Lau, *The Economic Structure of Trusts: Towards a Property-Based Approach* (Oxford UP, 2011) at 171-72.

[147] For discussion of the advantages and disadvantages of perpetual trusts see, e.g., Bridget Crawford, 'Who Is Afraid of Perpetual Trusts?' (2012) 111 Mich L Rev First Impressions 79; Joshua Tate, 'Perpetual Trusts and the Settlor's Intent' (2005) 53 Kansas L Rev 595;

Much like perpetual trusts, *asset protection trusts* transfer wealth from the settlor-cum-beneficiary's creditors to him or herself and his or her trust service providers. Lenders can respond to the popularization of such trusts in several ways. They can try to multiply judicial decisions disregarding them,[148] so as to signal to actual and potential beneficiaries that asset protection trusts may not be as effective as advertised. Lenders can also insist on good security, to be deposited either with the lender or with a trustee in the lender's jurisdiction of residence. Court decisions disregarding such trusts are more easily enforceable when assets are available in the Court's jurisdiction than where the borrower has earlier removed his or her assets to an uncooperative offshore jurisdiction.[149] Lastly, lenders can respond to the popularization of asset protection trusts by increasing the cost of credit. Should lenders so respond, asset protection trusts will come to harm borrowers as well as lenders, with the harm concentrated on those borrowers not using asset protection trusts. Sophisticated borrowers' asset protection trusts may thus externalize harm onto the less sophisticated part of the credit market, that is, poorer, less sophisticated borrowers. It may be that the slower spreading of asset protection trusts among U.S. states, compared to perpetual trusts, is a consequence of their more obvious nature as an anti-creditor measure, while abolition of the rule against perpetuities helps trust parties avoid both their creditors and the tax authorities. Tax planning enjoys more popular and political legitimacy than evading the claims of non-tax creditors, including spouses, children and tort creditors. Yet analytically, the impact of perpetual trusts and asset protection trusts on trust parties and non-parties is similar: both reforms concentrate wealth and control over assets in the hands of trust parties, and make possible trust parties' infliction of more externalities than before on trust non-parties and the public. Beyond their grave *distributive* implications, asset protection trusts, which make beneficiaries' entitlements under trust unavailable to their creditors, also create potential for significant infringements of the *corrective* justice ideal.

Lawrence Waggoner, "Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised", University of Michigan Public Law Working Paper No 199 (2010).

148 See two U.S. decisions holding asset protection trusts to be ineffective: *Federal Trade Commission v Affordable Media LLC*, 179 F.3d 1228 (9th Cir. 1999) (trust governed by Cook Islands law); *In re Huber*, 2013 WL 2154218 (Bkrtcy. W.D. Wash. 2013) (trust governed by Alaska law).

149 Compare the 9th Circuit decision in the *Affordable Media* case, last note, with the decision of the Cook Islands High Court in *U.S.A. v. Anderson Ltd* (delivered December 4, 2001; available in Maurizio Lupoi's trusts database, http://www.trusts.it/cerca.php?lang=en), striking out the claim by the U.S. to enforce the district court decision upheld in *Affordable Media*. The Cook Islands court accepted the defendants' claim that it had no jurisdiction to enforce the public laws of a foreign country.

The curtailment of beneficiaries' traditional rights to information and to enforce the trust has three different distributive consequences. One is a redistribution of power *between* the immediate parties to a trust: from beneficiaries to settlors. Settlors, traditionally powerless once a trust has been constituted, are given ongoing monitoring and enforcement powers by appointing either themselves or a confidante as protectors or enforcers, or by retaining such powers as settlors. Beneficiaries are greatly weakened by the removal of their traditional monitoring and enforcement powers. As for the quality of trustee monitoring provided, while the financially astute settlor of an inter vivos trust may monitor his or her trustee more effectively than the feckless beneficiary of the same trust, the removal of beneficiaries' monitoring powers may become more problematic once the settlor is dead. With beneficiaries stripped of their enforcement powers, the settlor dead and the protector or non-beneficiary enforcer, if any, less than assiduous in fulfilling the duties he undertook to please the now-deceased settlor, trustees may be able to breach their trusts with little fear of the consequences. A second *distributive* consequence of the decline of beneficiaries' traditional rights is thus a transfer of power, and potentially of value as well, from beneficiaries to their trustees. This transfer creates potential for infringements of the *corrective* justice ideal: trustees may harm beneficiaries with the latter unable to obtain appropriate redress, or even know about the harm done. A third distributive consequence of the same development counteracts the former two to some extent: the decline of beneficiaries' rights paradoxically protects them by depriving them of rights and powers tax authorities and other creditors could seize and exploit. Creditors' best remaining hope is having the transfer with which the trust in question originated declared invalid under fraudulent transfer law.[150] This dimension transfers value from beneficiaries' creditors and society as a whole to beneficiaries, creating potential for further infringements of the corrective justice ideal.

Two other reforms discussed in Part II – the liberalization of trustee delegation and the curtailment of trustees' liability for loss consequent on infringement of their duty of care – transfer wealth from trust users, particularly beneficiaries, to trust service providers, including both trustees and their delegates.

One distributive consequence of *trustee delegation reform* has drawn adverse academic comment. Whereas under traditional law, a trustee who delegated was usually liable to the beneficiaries for loss caused by its agent, the reformed law makes clear that where the trustee delegated properly, chose an appropriate agent and monitored it correctly, the delegate will be

[150] See, e.g., in the U.S., U.S.C., Title 11, ss 547-548; *Uniform Fraudulent Transfer Act*, 1984, ss 4-5. In the U.K., *Bankruptcy Act* 1986, ss 284(1), 339, 340, 423, 357.

solely liable for loss it caused.[151] Should the delegate be insolvent, the reformed rule lays the loss at the beneficiaries' door. Trustee delegation reform thus shifted some risk from trustees to beneficiaries, creating potential for the beneficiaries' loss remaining uncompensated, infringing the corrective justice ideal.[152] Reform also harms beneficiaries, and all other non-service-providers looking to collect from either trust funds or beneficiaries' non-trust assets, by rendering trustees' employment of agents easier and more acceptable, thus multiplying agents, agency costs and agents' fees. The principal effect of trustee delegation reform is thus transferring wealth from trust users to the service providers serving them. While trustees' power to delegate discretionary functions, acquired as a result of that reform, may be thought ex ante to provide trust users with access to a more complete expertise, the availability, before reform, of opt outs from the no delegation rule and of de facto delegation means that improvement is likely to be limited to potential savings of negligible transaction costs incurred earlier. If trust service providers are poorer, on average, than trust users, as may be the case, then transferring wealth from the latter to the former may be distributively desirable.

The eclipse of trustees' duty of care and their liability for loss consequent on its infringement has transferred the risk of loss by trustee negligence from trustees to trust funds and the beneficiaries entitled to them. It thus created potential for infringements of the corrective justice ideal: trustees may negligently harm beneficiaries yet not be under a duty to compensate them or account for loss caused. While, as aforementioned, transferring value from trust users to those supplying trust services may appear distributively desirable prima facie, our distributive estimation of this transfer may change once we recall that it also negatively impacts trust creditors, beneficiaries' creditors, their spouses and their dependents. It benefits trustees, particularly professional trustees such as bank trust departments, which tend, more than lay trustees, to be regular users of

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[151] Restatement s 80 cmt. g (2007); UPIA s 9(b)-(c) (1994); Langbein, Uniform, supra note 60 at 653.

[152] See criticism of this consequence of trustee delegation reform in Melanie Leslie, 'Common Law, Common Sense: Fiduciary Standards and Trustee Identity' (2006) 27 Cardozo L Rev 2713 at 2735-42 (holding that the reformed rule is appropriate for lay trustees, while professional trustees should always be liable for loss caused by agents to whom they delegated); Sterk, Rethinking, supra note 59 at 897-904 (commenting that the reformed rule creates harmful incentives). *Quaere*, however, whether such a shift has occurred, given that trustees, who bore the brunt of liability under the older law, could also become insolvent; and see Hanoch Dagan and Sharon Hannes' suggestion of a "middle-ground default rule" in their "Managing Our Money: the Law of Financial Fiduciaries as a Private Law Institution", forthcoming in Andrew Gold & Paul Miller, eds, *The Philosophical Foundations of Fiduciary Law* (Oxford: Oxford University Press, forthcoming 2014) n 182 [Dagan & Hannes].

exculpatory clauses.[153] Legislation providing that trust creditors shall look to the trust fund, rather than to the trustee's own property, for satisfying trust debts, also transfers wealth from the beneficiaries entitled to that fund to their trustees. It reflects the larger trend towards the "entification" of trusts, treating them as if they were legal persons, which is increasingly apparent in diverse contexts, including tax, bankruptcy, civil procedure, criminal law and trustee delegation.[154]

Economically minded readers may doubt whether the decline of trustee liability transfers value from trust users to trust service providers. Surely, they may suggest, trust users would react to that decline by reducing trustee fees, returning the market for trustee services to equilibrium.[155] It appears doubtful, however, that most settlors possess, on settling their trusts, the level of legal and commercial savvy expected by these readers. In the most important empirical study of settlors' attitudes to trustee exculpatory clauses conducted so far, Alison Dunn found that

> [T]he vast majority of [English] settlors are not particularly interested in the issue of trustee exemption clauses. Settlors are primarily concerned with achieving a specific goal, not the means by which that goal is achieved, and so their concern with trustee exemption clauses is only incidental. … [S]ettlors tend to accept trustee exemption clauses as part of the package of the modern day trust, especially if they have received advice to this effect. Moreover … many settlors regard the choice of trustee as more important than the presence of a trustee exemption clause; about a third of … respondents thought that settlors include a trustee exemption clause in trusts either in order to attract professional trustees or because the clause was requested by the trustee. … [I]n practice the issue of non-inclusion of trustee exemption clauses rarely arises.[156]

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[153] For the different impact of the law governing exculpatory clauses on lay and professional trustees, Leslie, last note.

[154] See further discussion of the "entification" trend at text to infra notes 189-195. For critical exploration of this trend, Lionel Smith, 'Mistaking the Trust' (2010) 40 HKLJ 787 at 793-802.

[155] A remark made by many readers of this article.

[156] The Law Commission (UK), *Trustee Exemption Clauses*, *Consultation Paper* ¶¶ 3.37-3.40 (2002). Commissioned by the Commission "to conduct research into the economic implications of trustee exemption clauses and the potential consequences of regulation of such clauses" (ibid, ¶ 3.4), Dunn mailed questionnaires to sample groups of 2,050 trustees and 400 legal advisers to trustees and settlors. She also conducted 65 interviews with respondents in both groups. Her findings on settlors' attitudes are derived from the responses of trustees and legal advisors.

Unless settlors outside England have vastly different attitudes than the English settlors Dunn studied, it appears that most settlors are unlikely to be sufficiently aware of the implications of exculpatory clauses for the service they are purchasing to demand a fee reduction as quid pro quo. The parties to the trust deal, potential settlors and trustees, enter into negotiations under conditions of asymmetrical information about the consequences of exculpatory clauses. Due to settlor disinterest, non-comprehension, or both, they are likely to conclude their negotiations without that asymmetry having been corrected. It is possible that some unusually sophisticated or well-advised settlors may possess the understanding of exculpatory clauses and their import necessary to drive them to demand a fee reduction as quid pro quo for the insertion of such a clause. However the routinization of trust practice and its spread to the middle class[157] are likely to have made such settlors a minority, as Dunn's study of English settlors demonstrates. Interestingly, trust service providers have so far managed to profit from their exculpatory clauses without the presence or ambit of such clauses becoming a competitive margin between providers. Settlors' ignorance and disinterest have made possible the standardization of such clauses, trust service providers having formed an implicit, but highly effective, cartel on this issue.

As for *the reform of trust investment law*, which emphasized the prudence of diversification and allowed the trustees of some trusts to hold assets seen, under the previous law, as too risky to be held on trust, its distributive consequences appear, from a theoretical perspective, to be unclear, though some claim that it, too, transferred wealth from beneficiaries to trust service providers.[158] The increased emphasis put on diversification per se may, in principle, drive trustees to prevent some losses which would otherwise be likely, by reducing the impact of firm-specific and industry-specific losses on trust value.[159] The same cannot, however, be said for the more innovative holding that no assets are per se too risky to be held on trust. This innovation both imposed additional risk on, and promised potentially enhanced returns to, both trustees and beneficiaries. The beneficiaries of trusts the circumstances of which permit, under the Prudent Investor Rule, higher-risk investments, may now bear the risk, as well as enjoy the potential rewards, of such investments. Increased investment in equities may create a hedge against inflation. The effects of reform on trust and beneficiary creditors reflect its effects on beneficiaries. Trustees have

157 For the spread of trusts to the middle class, Stebbings, *Private Trustee*, supra note 5 at 6, who notes that by the 19th Century, and especially its two later thirds, the use of trusts in England spread to all the sub-strata of the middle class, as well as to some of the skilled working classes.

158 See infra note 168 and text.

159 See discussion at supra note 61 and text.

lost the earlier safe haven of conservative investment choices; they may now be sued for having failed to properly invest in riskier assets.[160] Where trustee fees are measured by a given percentage of the trust fund, however, the potentially enhanced appreciation now possible also bears the promise of enhanced fees.[161] The effects of reform on paid non-trustees concerned with trust administration – professionals serving as protectors, enforcers or trustee delegates – reflect its effects on trustees. Trust investment reform may also have a positive influence on overall social welfare, by releasing trust monies for potential investment in asset classes which could not, before reform, obtain the benefit of trust capital. Reform may thus contribute to the allocation of wealth across asset classes and economic activities more closely approximating the optimal such allocation.[162]

Some empirical findings are now available respecting the consequences of trust investment law reform. According to Iris Goodwin, large banks and institutional trustees have, to 2010, baulked at realizing the more radical implications of the prudent investor standard, sticking to relatively conservative strategies.[163] Sitkoff and Schanzenbach report, however, that "trusts in the states that adopted the new prudent-investor rule held more stock (on the order of 1–4 percent depending on the year) at the expense of safe investments … Prior to the reform, [s]tocks composed 41 percent of the average reform state's detrended aggregate portfolio, and safe investments averaged 39 percent. After the reform, … [s]tocks accounted for 47 percent of the average reform state's detrended aggregate portfolio, and safe investments averaged 34 percent."[164]

Trust investment law adjusted to 1970s inflation late – just in time for the crashes of 2000-2002 (dot-com) and 2007- (subprime leading to general crisis).[165] Sterk believes that the "shift to equity investments did not generate tangible benefits for trust beneficiaries. The 2008–9 stock market

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[160] Sterk, Rethinking, supra note 59 at 885-89. In *Meyer v Berkshire Life Insurance Company*, 372 F.3d 261 (4th Cir., 2004), a conservative portfolio of fixed-income annuities "was held to be imprudent due to its lack of diversification, even though no losses had occurred to the fund, because the trustees had failed to adapt its investment strategy to the actual risk tolerance of the beneficiaries": Panico, supra note 8 at § 2.118.

[161] David Super suggested to me that where trustees are allowed to invest in riskier assets, and especially where they have an incentive to exploit this possibility, a more demanding liability standard is necessary, to counter the increased risk of a larger loss. The conjunction of trustee investment reform and the decline of trustee liability in jurisdictions such as England and many U.S. states is thus especially unfortunate.

[162] But see the contrary argument in Joshua Getzler, 'Fiduciary Investment in the Shadow of Financial Crisis: Was Lord Eldon Right?' (2009) 3 J of Equity 219 at 242-43 [Getzler, Crisis].

[163] Iris Goodwin, 'How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune' (2010) 40 Seton Hall L Rev 467 at 504-10.

[164] Sitkoff & Schanzenbach, Reform, supra note 57 at 697.

[165] Sterk, Rethinking, supra note 59 at 867.

decline was dramatic. But even over a longer time horizon of ten years, equity investments have performed poorly: both the Dow Jones Industrial Average and the Standard & Poor's 500 Index … stood at lower levels in June 2009 than they did ten years earlier. In other words, trust law's implementation of modern portfolio theory appears to have left many trust beneficiaries worse off than if trust law had retained traditional principles of trust investing."[166] Were stock market performance between 1999-2009 typical, one would be justified in concluding that the reform of trust investment law was contrary to beneficiaries' interests. While buying stock in the boom times of 1999 only to sell it in the depths of recession in 2009 may have been an exceptionally unfortunate investment scenario, longer-term data showing that bonds have outperformed equities for 129 of the 200 years ending in 2009 does imply that encouraging trustee investment in equities, a policy course redolent of the inflationary 1970s, may not be generally appropriate.[167] The move to portfolio-based trustee investment, which resulted in an increased preference for equities, thus seems to have made beneficiaries lose money, either without a corresponding gain accruing to any party to the trust relationship or with a gain accruing to trust service providers.[168] As with all beneficiary losses, the distributive calculus is complicated by the fact that whereas trust beneficiaries may be a more privileged group than trust service providers, losses suffered by the former also impact trust creditors, beneficiaries' creditors, their spouses and their dependents.

Finally, *the emergence of trust regimes which do not require the transfer of title in the trust assets to the trustee* does not, at present, appear to have well-defined distributive results. Analytically, permitting settlors to retain title in trust property while appointing another as trustee, or grant title in trust property to (non-trustee) beneficiaries, is likely to reduce the potential for trustees' abuse of their fiduciary position, because non-owner trustees are likely to be less powerful than owner trustees: non-owner trustees are likely to need the owner's cooperation in conveying title to trust property. It is concurrently likely, however, to make trustees' management of the trust assets less efficient, because of their need for cooperation, and abuse by settlors or beneficiaries, depending on the locus of title, more likely. The likelihood of creditors mistakenly believing that trust property is the trustee's individually, or that the trustee's individual property is trust property, may be reduced where the trustee no longer has title in the trust

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[166] Ibid at 855; *Cf*. Max Schanzenbach & Robert Sitkoff, *The Prudent Investor Rule: A Theoretical and Empirical Reassessment* (2013) [unpublished]; and see discussion in Dagan & Hannes, supra note 152 at Part III.B.2.

[167] For the long-term data see Getzler, Crisis, supra note 162 at 241.

[168] See an argument tying the reform of trust investment law to the recent rise in the costs of investment intermediation in Getzler, Crisis, supra note 162 at 242.

assets. However, as the trustee will still manage the assets and control them, some potential for such confusion may remain, depending on asset type, registration requirements and the rights, less than title, given the trustee in, or respecting, each asset. Where the settlor or a beneficiary hold title to the trust assets, mistaken beliefs that trust property is the titleholder's individually, and vice versa, may appear or increase. An advantage of settlor or beneficiary ownership of the trust assets is that it would make those assets more easily available for the enforcement of the owner's debts: creditors looking to collect from those assets would face one fewer hurdle, not having to obtain a judicial unwinding of the transfer to trustees. Where the settlor owns the trust assets, his creditors would find clawing property back out of trust easier than where he transferred the property to a trustee, especially a foreign trustee. Beneficiaries' creditors would more easily collect their debts out of beneficiaries' trust entitlements where the beneficiaries own the assets than where trustees own them; anti-creditor tricks involving indeterminate beneficial entitlements are likely to be less effective in the former situation than in the latter. The availability of trust models not involving transfer of title to trustees may thus bring trust practice somewhat closer to the corrective justice ideal, compared to the pre-reform normative baseline described above: once such trust models are actually used, fewer settlor and beneficiary creditors may have to settle for less than the full debt owed them as a result of their debtors' use of trusts. If such trust models come to be increasingly adopted, they may deal a blow to offshore trust practice, because fewer settlors or beneficiaries will be prepared to themselves move offshore than are ready to transfer monies to an offshore trustee.[169]

Empirically, however, the consequences of abolishing the requirement that for a trust to be constituted, settlors must transfer title in the trust assets to their trustees have been various. In China, trust creation in practice almost always involves transfer of title in the trust assets to trustees,[170] while the Chinese People's Courts held, in two much-discussed decisions applying the Trust Act, that where settlors transferred assets to trustees in trust for the settlors themselves, the settlor-beneficiaries remained, despite the transfer, substantial owners of the assets, the trustee being a mere "titular owner".[171] In Israel, the "shapeless" statutory definition of the trust made local practitioners prefer using foreign trust regimes for sophisticated family trusts, while the courts took thirty years to conclude that the Israeli Trust Act permits title in the trust assets to be lodged in any

[169] For further analysis of the pros and cons of not requiring transfer of title to trustees, Ho, Trust Laws in China, supra note 42 at 200-201; Reid, Conceptualising, supra note 54 at 209; Hofri-Winogradow, Shapeless, supra note 49 at 140-43, 172-77.
[170] Ho, Trust Laws in China, supra note 42 at 202.
[171] Ibid at 202-210, describing *Yanxin v Huabao* and *Beijing Haidian*, supra note 42.

one of the settlor, trustee or beneficiary.[172] It thus appears that the availability of trust models not requiring that title in the trust assets be transferred to trustees has yet to give rise to significant use of such models. It may be that trust users choose not to employ these trust models precisely because of their more modest "asset protective" effect. Creditors, on their part, may use the availability of such trust models to protect themselves, as by requiring borrowers to undertake that any trusts they create until their debt is fully repaid do not involve the transfer of title to trustees.

IV *Form and function*

The "stripping process", described in Part II, made great *formal* changes to the trust. The scale of these changes becomes clear once we remind ourselves of the traditional definition of the trust, with which we began that Part. On that definition, a trust is an equitable obligation imposed on the owner of an asset to hold it in a fiduciary capacity, using it for the benefit of another or a permitted purpose, the asset being immune from the owner's personal creditors and the beneficiary enjoying both rights in the asset and personal rights against the trustee.[173] Various elements of the stripping process are taking ownership of the trust assets away from the trustee, excluding much of the liability which expresses trustees' fiduciary status (even to the point of allowing trustees to engage in some conflicted behavior, so that trust property is to some extent used for the benefit of trustees themselves, as such rather than as beneficiaries), and abolishing most of beneficiaries' traditional rights. But do the new trust forms express such a dramatic transformation of the *function* of donative private trusts as of their traditional *form*?

The answer depends on the level of abstraction at which one looks at the functionality of such trusts. At one, relatively concrete, level, recent developments in trust law and practice appear to significantly modify the functionality which characterized donative private trusts during the 19th and 20th Centuries, both as regards trustees' powers and duties and beneficiaries' rights. As is well-known, the 19th and 20th Centuries saw a fundamental shift in the functioning of donative trust trustees, from passive holders of specific assets, usually land, for small numbers of fixed, named beneficiaries, to active, discretionary managers of fluctuating funds of (mostly) securities for large pools of potential appointees.[174] As trustees came to manage their

[172] Hofri-Winogradow, Shapeless, supra note 49 at 162-65 (practitioners), 159-62 (Courts).
[173] Underhill and Hayton, supra note 2 at 2.
[174] Michael Chesterman, 'Family Settlements in Trust: Landowners and the Rising Bourgeoisie' in Gerry Rubin & David Sugarman, eds, *Law, Economy and Society* (Abingdon: Professional Books, 1984) at 124-167; Graham Moffat et al, *Trusts Law*, 5th ed (Cambridge UP, 2009) at 216, 323, 533 [Moffat, *Trusts Law*].

trusts more actively and take on more complex responsibilities and discretions, courts made them subject to increasingly specific, restrictive, and onerous duties.[175] The imposition of such duties expressed an understanding of the trustee role according to which, in the words of one U.S. court, "the primary objective of a trustee should be preservation of the trust rather than enrichment of the beneficiary".[176]

The last twenty years brought a changed understanding of the trustee role and the purpose of donative private trusts. Current law and practice see such trusts as moneymaking vehicles directed towards the enrichment of their beneficiaries, a purpose largely analogous to that of alternative property holding arrangements such as corporations, partnerships and LLCs. Trustees are now seen as money managers who are expected to enrich their beneficiaries, and may legitimately expect to enrich themselves by commission.[177] Such an understanding of the trustee role analogizes it to that of a corporate director or officer. Appropriately enough, trustees have been trying, often successfully, to modify some of the duties and liabilities to which they are subject in directions which make them comparable to those now imposed on corporate directors and officers. Trustees' efforts to reduce their liability to their beneficiaries tend to leave them subject to the same rock-bottom, good faith liability standard to which directors and officers are subject.[178] Replacement of trustees' personal liability to trust creditors with direct creditor access to the trust fund leaves trustees with liability as securely limited as that of corporate directors or officers. Trustee delegation reform allows trustees to delegate core responsibilities, including discretionary powers, to professional delegates, much like a corporation's board of directors, to which management of the corporation is entrusted by its shareholders, delegates much of its responsibilities to executive officers and other responsibilities to committees of the board.[179]

Some contemporary trusts carry trustee delegation further, leaving trustees themselves with little active duties to perform. The trustees of the large donative family trusts in *Garron v the Queen*, a recent Canadian case, were employees of the Barbados branch of a large accounting firm. They

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[175] *Speight*, supra note 90; *Learoyd v Whiteley* (1886) 33 Ch D 347; (1887) 12 AC 727; Stebbings, *Private Trustee*, supra note 5 at 163-98.

[176] *In re Newhoff* (1985), 486 N.Y.S.2d 956, 958, 963 (App Div); accordingly, the court held the trustee liable for making a risky investment.

[177] Melanie Leslie, 'Trusting Trustees, Fiduciary Duties and the Limits of Default Rules' (2005) 94 Geo L J 67 at 95-97.

[178] See discussion of the extent of liability now imposed on directors and officers of U.S. corporations in Michal Barzuza, 'Market Segmentation: the Rise of Nevada as a Liability-Free Jurisdiction' (2012) 98 Va L Rev 935 at 941. I thank Ariel Porat for bringing this article to my attention.

[179] James Cox and Thomas Hazen, *Business Organizations Law*, 3rd ed (West, 2011) § 9.16-18.

had little experience in trust management and did not in fact manage the large and complex trusts in the case. The trusts' real managers were the trustees' investment manager delegates, who were also the Canadian settlors' investment managers, and who, in turn, took instructions from the settlors. The trustees' actual role was limited to signing documents which their delegates put before them.[180] Similarly, under the British Virgin Islands' Special Trust Act (VISTA), where company shares are the only trust asset and no distribution to beneficiaries is planned, the trustees, having been statutorily released from their monitoring duties, have very little to do.[181] These most sophisticated of modern trusts effectively take the trustee role full circle: having in the 19th Century become busy managers, some modern trustees, at least, seem well on their way back to the trust's medieval roots as a form of passive title-holding.

Simultaneously with the metamorphosis of trusteeship, recent changes have transformed the roles of both beneficiaries and settlors. 19th Century English law characterized beneficiaries as owners in equity of their allotted shares of the trust fund and gave them a right to prematurely terminate or modify the trust by consent, emphasizing the alienability of their rights and disregarding the settlor's intentions.[182] This strengthening of beneficiaries' rights again expressed an understanding of the trust as focused on the preservation of property to which beneficiaries were *already entitled*. Most of the recent changes, contrastingly, weaken beneficiaries. As we have seen in Part III, the liberalization of trustee delegation and the decline of trustee liability to beneficiaries for loss consequent on infringements of the duty of care both tend to transfer wealth from beneficiaries to their trustees. Beneficiaries' loss of their rights to obtain information about and enforce the trust, as well as the erosion of their rights in the trust assets consequent on the trend of giving trustees wide discretionary powers of appointment, the abolition of the rule against perpetuities and the acceptance of asset protection trusts, weaken them further. Having few or no rights to trust income or capital, or powers against the trustees, can save tax, however, and protect the persons intended to benefit (even though not made formal "beneficiaries") from their creditors, who might have attached, or applied

[180] *Garron Family Trust v The Queen*, [2009] TCC 450 [*Garron*].
[181] *Virgin Islands Special Trusts Act*, *No 10 of 2003*.
[182] *Saunders v Vautier*, (1841) 4 Beav 115 49 ER 282, affirmed (1841) Cr & Ph 240, 41 E.R. 482; and see Thomas Watkin, 'Changing Concepts of Ownership in English Law during the Nineteenth and Twentieth Centuries: The Changing Idea of Beneficial Ownership under the English Trust' in Martin Dixon & Gerwyn Griffiths, eds, *Contemporary Perspectives on Property, Equity and Trusts Law* (Oxford UP, 2007) at 139-61.

for equitable execution of, any such right or power.[183] The persons intended to benefit profit from the informality of their rights, where any rights or powers formally granted them in the trust instrument or by law could have been exploited by their creditors.[184]

The weakening of beneficiaries is matched by a strengthening of settlors. Both developments started with the rise of spendthrift trusts and the "material purpose" *Claflin* doctrine in late 19th Century U.S. law,[185] and continued with the U.S. popularization of revocable trusts.[186] Current developments such as the rise of enforcers and protectors, who are often either the settlor himself or settlor-controlled, the possibility of the settlor remaining owner of the trust property, as settlor rather than as trustee, and the rise of settlor-retained powers[187] continue the reinforcement of settlors at trustees' and beneficiaries' expense.[188] Overall, the stripping process can be seen to turn the trust from a relationship between trustees and beneficiaries to a shielded semi-entity,[189] protected from claims by settlors', trustees' and beneficiaries' personal creditors, including tax authorities, ex-spouses, and children. Several of the reforms I've discussed can be seen as contributing to the entification of the trust, a reformulation of the principles of trust law in imitation of the law of corporations: the positing of trust assets as the primary fund from which trust creditors' debts are to be satisfied; the restriction of trustee liability to beneficiaries for infringements of the duty of care to a good faith standard; the development of trust models under which the "trust managers", that is, trustees, no longer own the trust assets; the

183 See the equitable execution of a revocation power reserved to the settlor in *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Company (Cayman) Ltd and Others* (2011), UKPC 17.

184 For an earlier instance of beneficiaries' profiting by the informality, and indeed non-recognition, of their rights, Erwin Griswold, 'Spendthrift Trusts' (1948) 48 Colum L Rev 1 at 166-168, who describes how in early Pennsylvania law, the absence of any court recognizing beneficiaries' rights under trusts meant such beneficiaries were fully protected against their creditors. See discussion in Joshua Getzler, 'Transplantation and Mutation in Anglo-American Trust Law' (2009) 10 Theo Inq L 355 at 359 [Getzler, Transplantation].

185 See discussion in Gregory Alexander, 'The Dead Hand and the Law of Trusts in the Nineteenth Century' (1985) 37 Stan L Rev 1189 at 1208, 1242 [Alexander, Dead Hand]; Gregory Alexander, 'The Transformation of Trusts as a Legal Category, 1800-1914' (1987) 5 Law & History Review 303 at 326 [Alexander, Transformation]; Getzler, Transplantation, supra note 184 at 360, 374-81.

186 Restatement s 74 and reporter's notes (2007).

187 Not analyzed in this article, because an instance of the trust being cloaked rather than stripped; supra note 3.

188 Conversely, reforms amplifying the default powers available to trustees absent an express settlor mandate, such as those facilitating trustee delegation, can be said to weaken settlors' control of their trusts, in the limited sense of switching the default position from a less to a more empowered trusteeship.

189 For the concept of "entity shielding", Henry Hansmann et al, 'Law and the Rise of the Firm' (2006) 119 Harv L Rev 1335 (2006).

liberalization of the principles governing the way trust assets are invested; and the newly opened opportunities for trusts to stay in existence forever, joining corporations and LLCs as another form of permitted perpetuity.

The entification of the trust, stripping it from rules which characterized the older trust-as-relationship, reaches its zenith in the commercial, or business, trust. The use of trusts under general trust law as a structure for business organization having declined through the 20th Century,[190] most business trusts are now formed according to bespoke statutory business trust regimes. While the most popular such regime is that contained in the Delaware Statutory Trust Act,[191] the U.S. Uniform Law Commission has recently adopted a Uniform Statutory Trust Entity Act (USTEA).[192] The two regimes replicate all the features of the 'entified' trust discussed above, adding formal entity status.[193] The Delaware Act reverses two further traditional trust law rules: that which rendered transactions between the trustee's own property and trust property voidable at the instance of the beneficiaries, and that providing that persons empowered to direct the trustees in the exercise of their functions owe, as a matter of default law, fiduciary duties to the beneficiaries.[194] USTEA also reverses both of those rules, and goes further by reversing the doctrine holding a trust the sole trustee of which is also its sole beneficiary to terminate by way of merger of the legal and equitable interests.[195]

Contemporary donative private trusts achieve much of their protective effect by using foreign trustees, subjecting the trust to the law of a jurisdiction other than the settlor's or beneficiaries' jurisdictions of

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[190] *Uniform Statutory Trust Entity Act*, 6B U.L.A. 78 (2013 supp.), Prefatory Note, 1. For the Delaware regime's popularity, see ibid., 1-2; cf. Tamar Frankel's finding that, as of 2001, the Delaware regime has not acquired a significant following among business owners: 'The Delaware Business Trust Act Failure as the New Corporate Law' (2001-2) 23 Cardozo L Rev 325 at 337-39. Robert Flannigan wrote that business trusts, having enjoyed popularity only sporadically during the 20th Century, have become very popular with Canadian investors in the early years of the present Century: 'The Political Path to Limited Liability in Business Trusts', (2006) 31 The Advocates' Quarterly 257 at 281.

[191] *Del. Code Ann.*, tit. 12 ss 3801-3824 (1995 & Supp. 2014) [Delaware Act]. See discussion in Flannigan, 'Political', last note, at 271.

[192] *Uniform Statutory Trust Entity Act*, 6B U.L.A. 78 (2013 supp). The USTEA has, to date, been adopted by the State of Kentucky alone: *Kentucky Rev. Stat.*, c 386A (amended 2012).

[193] For entity status see Delaware Act, s 3801(g); USTEA, s 302. For the positing of trust assets as the exclusive fund from which trust creditors' debts are to be satisfied see Delaware Act, ss 3803(a)-(c), 3804(a); USTEA, s 303. For restriction of trustee liability to beneficiaries to a good faith standard see Delaware Act, s 3806(c); USTEA, s 505(a). For perpetual duration see Delaware Act, s 3808(a); USTEA, s 306(a).

[194] For conflicted transactions, see s 3806(h). For trustee 'directors' see s 3806(a).

[195] Conflicted transactions: s 507. Trustee 'directors': s 510. Abolition of merger doctrine: s 306(d). For criticism of USTEA see Smith, 'Mistaking the Trust', supra note 154 at 800-802. I thank one of the anonymous reviewers for the University of Toronto Law Journal for suggesting that I discuss USTEA.

residence, and keeping the substantive settlors' and beneficiaries' rights to the trust property and against the trustees informal by way of using dummy settlors, trustees and beneficiaries and keeping all data regarding the substantive parties to the trust and the contents of the trust fund off the trust documents.[196] The advantages of informality in making creditor and tax authority attacks on trusts more difficult are evidently seen to justify a decline in beneficiary control of trustees, and may explain the decline in trustee liability and accountability. Since, as Larissa Katz observed, "the formalization of private property rights makes owners more vulnerable to the state and enhances the state's governance powers over them",[197] and since the same may be said of owners' vulnerability to their non-state creditors, many trust users choose to keep much of the trust relationship informal, even unwritten.

At a higher level of abstraction, however, most of the seven modifications to the trust form reviewed in Part II cohere with a key traditional function of donative private trusts: avoiding, evading, changing or bypassing many conventional attributes of rights in property, in order to make private property holders' enjoyment of their property and power to set an agenda for that property more complete.[198] Throughout their history, many trusts were both facilitative (of settlors' and beneficiaries' enjoyment of their property) and injurious, making creditors' remedies less effective and harming consumers of those government services paid for with tax receipts. Medieval uses were employed to keep landed property in the

[196] For an example of the use of dummy settlors and trustees, *Garron*, supra note 180; and see discussion of the use of dummy trust parties, with no data on the substantive trust fund, the persons settling it or those likely to enjoy its contents appearing on the face of the trust instrument, in Paul Matthews, 'The Black Hole Trust: Uses, Abuses and Possible Reforms', (2002) Private Client Business 42-54,103-110.

[197] Larissa Katz, 'Governing through Owners: How and Why Formal Private Property Rights Enhance State Power' (2012) 160 U Pa L Rev 2029 at 2030.

[198] The evasion of rules of law was mentioned by antebellum U.S. jurists as a key rationale for the development of property law generally, and equity especially: Alexander, Dead Hand, supra note 185 at 1214-15; Avihay Dorfman, 'On Trust and Transubstantiation: Mitigating the Excesses of Ownership' in Gold & Miller, *The Philosophical Foundations*, supra note 159, at text to nn 58-60. While under traditional trusts law, settlors had little formal control over trust administration, the very constitution of a trust emanated from settlors' power to set an agenda for the property they settled on trust. Trustees exercise the discretions settlors give them so as to fulfil an agenda set by the settlor. As one of the anonymous reviewers noted, even donative private trusts often serve functions other than the evasion of rules of law, such as the maintenance of incapable persons; while commercial trusts serve yet others, such as the structuration and pooling of funds for investment and the operation of unincorporated associations. The 'bankruptcy remoteness' obtained by way of asset securitization, in which trust structures are often involved, serves the avoidance function noted in my text: it protects security holders from the originator's bankruptcy, and the originator from the possibility of default on the obligations underlying the securities.

family, effectively devise it despite fee simple estates then being legally undevisable, avoid the Lord's incidents, then central features of tenancy in land, keep the property away from the market and impose the costs of Lordship on those tenants not using uses.[199] Strict settlements were designed in the 17th Century to keep life tenants in possession from using one of their legal powers, the power to destroy contingent remainders, so that they may be persuaded to resettle the family property.[200] Beneficial entitlements were in the 19th Century distributed between multiple beneficiaries in order to make the collapsing of the trust under the rule in *Saunders v Vautier* impossible, while that very rule served to save fairly perpetuitous trusts from invalidation, because the beneficiaries could, theoretically, get together any minute and terminate the trust.[201] The 20th Century saw a flowering of discretionary trusts intended to make the beneficial owners of trust assets unidentifiable, so that no-one will owe taxes on those assets and no-one's creditors will be able to collect their debts therefrom.[202]

Five of the recent reforms to donative private trust law and practice reviewed in Part II are easily understood as further steps in service of the same function, looking to further private rightholders' enjoyment of the property in which they hold rights, including, where necessary, by frustrating others' rights and powers. The decline of beneficiaries' rights protects them by depriving them of rights and powers tax authorities and other creditors could seize and exploit. Asset protection trusts and perpetual trusts again enable beneficiaries' avoidance of their creditors and the tax authorities. Trustee investment reform was meant to protect beneficiaries by stopping trustees from losing money:[203] equity's earlier restrictions on trustee investment, themselves adopted so as to protect beneficiaries, have in the postwar era become impediments to successful trustee investment. Similarly, the possibility of settlors or beneficiaries holding title to trust property following the creation of a trust provides beneficiaries with a

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[199] For early uses, Joseph Biancalana, 'Medieval Uses' in Richard Helmholz & Reinhard Zimmerman, eds, *Itinera Fiduciae, Trust and Treuhand in Historical Perspective* (Berlin: Duncker & Humblot, 1998) 115-152; and see the listing of 'the chief custodial purposes of [medieval] uses' in Joshua Getzler, 'Duty of Care', in Peter Birks & Arianna Pretto, eds, *Breach of Trust* (Oxford: Hart Publishing, 2002) 41 at 43. Individuals whose property Lords plundered in war may also have borne a share of the costs of Lordship.

[200] Alexander, Transformation, supra note 185 at 319; see further Lloyd Bonfield, *Marriage Settlements, 1601-1740: The Adoption of the Strict Settlement* (Cambridge, UK: Cambridge University Press, 1983); Neil Jones, 'Strict Settlements', in Stanley N. Katz, ed, *Oxford International Encyclopedia of Legal History* 5 (Oxford, UK: Oxford University Press, 2009) 364-368.

[201] Getzler, Transplantation, supra note 184 at 371-72.

[202] Moffat, *Trusts Law*, supra note 174 at 216, 323, 533.

[203] Though, as we have seen, it is doubtful whether the reforms adopted are likely to achieve this goal. A more sinister view of the reforms sees them as enriching trustees and other trust service providers at beneficiaries' expense; see text to supra notes 166-168.

measure of protection from the consequences of trustee disloyalty, by making an injurious breach more difficult to carry out. On the other hand, the decline of trustee liability for breaches of the duty of care and the liberalization of trustee delegation stand out among the recent reforms as not facilitative of beneficiaries' enjoyment of their rights. These two reforms rather enrich trustees and other trust service providers at beneficiaries' expense, deviating from the traditional functions of donative private trusts.

The possibility of title to trust assets staying with settlors or being transferred to beneficiaries stands out as the least harmful of the recent reforms, and, perhaps, as modestly beneficial. While perhaps the most drastic from a doctrinal common law point of view, this reform stands out in furthering beneficiaries' interests (by providing a measure of protection from trustee disloyalty) without subverting any rights of trust non-parties. Settlor or beneficiary ownership of the trust assets could even benefit some non-parties – settlors' and beneficiaries' respective creditors – by making trust assets more easily available for debt collection.

V *Conclusion*

This article presented seven aspects of the current fundamental transformation of the law of trusts, evaluating each of the seven from a distributive justice perspective, from a corrective justice perspective and against the traditional functionality of donative private trusts. The picture resulting from a comparison of the normative implications of recent reforms to the pre-reform normative baseline with which I opened Part III is sobering. While most pre-reform donative private trusts did not offend the corrective justice ideal, many were problematic from a distributive justice point of view, even on relatively undemanding versions of the distributive justice ideal such as desert theory. Compared to this already-flawed baseline, two of the seven reforms (abolition of the rule against perpetuities and the appearance of asset protection trusts) have made possible trusts more distributively harmful than has been possible pre-reform. Another four of the reforms (the curtailment of beneficiaries' rights to monitor and enforce, trustee delegation reform, the decline of trustee liability and trust investment reform) have distributive outcomes that, while not as clear, are still probably harmful, as their principal effect appears to be the transfer of value to financial service providers. The decline of trustee liability for loss consequent on breaches of the duty of care and the liberalization of trustee delegation, and possibly the reform of trustee investment law as well, represent a capture of the trust institution and of legislatures enacting reform legislation by trust service providers. As regards corrective justice, four of the seven reforms (asset protection trusts, the curtailment of beneficiaries' rights to monitor and enforce, trustee delegation reform and the decline of trustee liability) create or aggravate, compared to the pre-reform baseline, potential for infringements of the corrective justice ideal. Just one reform, the emergence of trust models not involving transfer of title in the trust assets to trustees, may, in principle, facilitate the reduction of pre-existing potential for infringements of that ideal. None of the reforms have beneficial distributive effects. Interestingly, the one reform with potentially positive consequences is the most revolutionary from a common law doctrinal perspective. That all of the reforms, except those reflecting a capture of the trust institution and legislatures by trust service providers, further a traditional function of donative private trusts, making private property holders' enjoyment of their property more complete, reflects the distributively flawed character of even the pre-reform law and practice of donative private trusts.

It therefore appears that reversal of all the reforms reviewed in this article, except the emergence of trust models not involving transfer of title in the trust assets to trustees, should be considered. Reversal of the recent reforms to the law of trustee delegation, of trustee liability for loss consequent on infringements of trustees' duty of care, and of trust investment appears to be in the interest of beneficiaries themselves. A reinstatement of the rule against perpetuities, a renewed ban on asset protection trusts and a reinforcement of beneficiaries' traditional rights to monitor and enforce appear to be in the interest, if not of beneficiaries themselves, then of society as a whole. To render such reversals more effective, settlors' freedom to choose the law governing their trust[204] and the practice of empowering trustees or others to change the law governing an existing trust should be restrained. The trust, having been thoroughly stripped, seems to be in need of a new suit of clothes.

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[204] According to The Hague Convention on the Law Applicable to Trusts and on their Recognition, concluded 1 July 1985, entered into force 1 January 1992, Art 6, "[a] trust shall be governed by the law chosen by the settlor". See discussion in Jonathan Harris, *The Hague Trusts Convention: Scope, Application and Preliminary Issues* (Oxford: Hart Publishing, 2002) at 166ff.