Trust Proliferation: an Empirical Analysis

This Article presents and analyzes the findings of the first global survey of service providers to donative trusts. Survey responses by 409 service providers from 82 jurisdictions, the largest, most diverse respondent group ever obtained in survey research targeting trust service providers, along with a series of interviews with trust service providers in the U.S. and U.K., enabled me to provide answers to empirical questions that have long vexed research on donative trusts.

I found that trusts likely, according to the trust instrument, to subsist for more than a century are fairly common, especially offshore; however, the more prevalent a practitioner estimates such trusts to be, the more he or she believes them not to be in practice likely to outlast a century. To alleviate the fear that value settled into extreme long term trusts will be irrevocably dedicated to inefficient uses, I suggest that legislatures make the validity of such trusts conditional on the availability of mechanisms for early modification and termination.

Trustee exculpatory terms are now standard in donative trusts serviced by professionals, with most settlors neither demanding nor receiving any quid-pro-quo for their inclusion. Statutorily-mandated disclosure of such terms to service providers' clients appears unlikely to ensure that those clients understand the terms' consequences. If jurisdictions wish to recalibrate their trust services markets based on a threshold of trustee liability higher than bad faith, they should enact legislation setting a mandatory minimal liability standard for trustees and stating that drafted attempts to provide liability thresholds lower than that standard shall be void. Alternatively, courts should use their equitable powers to protect beneficiaries by disregarding exculpatory terms or construing them so as to protect beneficiaries' interests.

Anti-creditor techniques protecting beneficiaries' entitlements are even more ubiquitous than trustee exculpatory terms, particularly so in trusts serviced by U.S.-resident providers. Because many protected beneficiaries are not in fact any less able than the average person to take care of their financial affairs, the extent of protection available under the law of many U.S. jurisdictions is excessive. I conclude that the law should cease recognizing and enforcing these techniques. Alternatively, courts should use their equitable powers to deny such protection where unmerited.

Finally, my results show the express reservation of powers to trust settlors to be a majority phenomenon in the U.S., but a minority one elsewhere. The actual control of trusts by their settlors, whether in the exercise of settlor-reserved powers or otherwise, is likewise far more common in the U.S. than elsewhere. I suggest that the preferential treatment of settlor-controlled trusts under federal income tax law is unmerited, and that in order to encourage trust settlors to reserve fewer powers, the income tax bracket schedule applicable to complex trusts should be decompressed. The protection of lenders to settlors should be strengthened by making trust property subject to settlor-reserved powers, above a low threshold of powers reserved, available to settlors' creditors.

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INTRODUCTION

Recent decades have witnessed a global expansion and transformation of both trust law and trust practice. The trust, a legal institution once unique to England and its erstwhile colonies, has spread to dozens of additional jurisdictions, from the Far East[1] to Russia and Eastern Europe[2] to nearly every Latin American jurisdiction.[3] Many U.S. States, English Crown Dependencies and United Kingdom Overseas Territories developed innovative trust models directed primarily, and sometimes exclusively, at a non-resident clientele.[4] New trust regimes from Virginia to Dubai chuck away Centuries-old rules of trust law so as to provide alternative rules offering maximum appeal to trust service providers' potential clients.[5] This vigorous development of new trust regimes has been met with a similar expansion in global trust practice. Jurisdictions such as Italy, Brazil, Israel, the United Arab Emirates and

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[1] *See, e.g.,* LUSINA HO & REBECCA LEE, TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS (2013).

[2] *See, e.g.,* Tomáš Richter, *National Report for the Czech Republic*, *in* TOWARDS AN EU DIRECTIVE ON PROTECTED FUNDS 59 (Sebastian Kortmann et al. eds., 2009); Bernard Dutoit, *Russian Civil Law between Remnants of the Past and Flavor of the Present*, *in* PRIVATE AND CIVIL LAW IN THE RUSSIAN FEDERATION 181 (William Simons ed., 2009).

[3] *See, e.g.,* NICOLAS MALUMIAN, TRUSTS IN LATIN AMERICA (2009).

[4] *See, e.g.,* ANTHONY DUCKWORTH, STAR TRUSTS: THE SPECIAL TRUSTS (ALTERNATIVE REGIME) LAW 1997: CAYMAN ISLANDS – 2ND GENERATION OF PURPOSE TRUSTS AND MORE (1998) (laying out the merits of the Cayman Islands' innovative STAR trusts regime); Douglas J. Blattmachr & Jonathan G. Blattmachr, *A New Direction in Estate Planning: North to Alaska*, TR. & EST., Sept. 1997, at 48 (laying out the 1997 reforms in Alaska trust law, enacted in order to draw non-resident clients to the state's legal and financial service providers); *Jersey Leads Trust World With Innovative Amendment*, OFFSHORE TRUSTS GUIDE, http://www.offshoretrustsguide.com/features/Jersey_Leads_Trust_World_With_Innovative_Amendment__571301.html (describing an amendment to the Trusts (Jersey) Law, 1984, incorporating a version of the so-called "Rule in *Re Hastings-Bass*", as well as a version of the doctrine of mistake, as applied to trustees, into the legislative text).

[5] *See, e.g.,* VA. CODE ANN. § 64.2-745.1–745.2 (2016) (the Virginia self-settled spendthrift trust regime, enacted in 2012); Trust Law 2005, § 28 (D.I.F.C.) (providing that a trust may continue indefinitely under the law of the Dubai International Financial Center).

dozens more are now home to a large and growing number of professionals providing services to trusts.[6]

While the existence of innovative trust regimes and of new populations of trust practitioners is advertised, respectively, by the jurisdictions offering those regimes and the practitioners concerned, very little data has to date been available on the extent to which innovative types of donative trusts, governed by the laws of different jurisdictions, are actually used by clients around the world. The great majority of the global growth and transformation of trust practice has remained empirically uncharted. U.S. scholars provided empirical treatments of two questions: (i) what impact did U.S. states' abolition of the rule against perpetuities have on the quantity of trust assets administered in each state and the average size of trust accounts administered there,[7] and (ii) what impact did the 1990s reform of U.S. trust investment law have on trustees' investment practices and the volatility of trust corpus.[8] One other issue, that of settlors' attitudes towards trustee exculpatory terms, received empirical study in England. [9] But that is essentially all: we do not know to what extent each of the many other innovations dozens of jurisdictions have recently inserted in their trust laws has been utilized, who has been utilizing them, for what purposes, and under which circumstances.

This dearth of empirical data renders much of the normative debate concerning trust law and practice conjectural. The normative debate has been lively: several scholars argue that much of the recent rapid proliferation and evolution of the law and practice of donative trusts constitutes a harmful race to the bottom,[10] facilitating the erosion of tax bases as well as of traditional protections accorded to trust users' creditors, spouses, children, and other claimants. They further argue that a significant fraction of those donative trusts settled, subject to the laws of jurisdictions

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[6] STEP, DIRECTORY AND YEARBOOK 2014 (2014) (listing the membership of the Society of Trusts and Estates Practitioners, with branches and chapters in 104 countries).

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

[8] *See* Martin D. Begleiter, *Does the Prudent Investor Need the Prudent Investor Act-An Empirical Study of Trust Investment Practices*, 51 MAINE L. REV. 28 (1999); Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Change Trust Portfolio Allocation?*, 50 J.L. & ECON. 681 (2007); Robert H. Sitkoff & Max M Schanzenbach, *The Prudent Investor Rule and Trust Asset Allocation: An Empirical Analysis*, 35 ACTEC J. 314 (2010); Robert H. Sitkoff & Max M Schanzenbach, The Prudent Investor Rule and Market Risk: an Empirical Analysis (November 2015) (unpublished manuscript) http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2583775.

[9] *See* LAW COMMISSION, CONSULTATION PAPER NO. 171: TRUSTEE EXEMPTION CLAUSES 30-46 (2002) (England & Wales).

[10] *Compare* the notorious absence of such a race from U.S. corporate law: Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679 (2002).

such as the Cayman Islands, Jersey, Guernsey, Mauritius, Singapore or Nevis by settlors not resident there, serve such unsalutary goals as tax minimization and defeating creditors' claims, and that the recent emulation of trust innovations pioneered by such jurisdictions in trust regimes enacted by many U.S. states has similarly undesirable consequences.[11] Evidence brought for these arguments has been anecdotal, manifesting the need for a broad empirical inquiry into modern trust practice, extending beyond the U.S. and U.K. to the myriad jurisdictions that now serve as busy hotbeds of that practice.

The present Article plugs this substantial gap in the literature by reporting and analyzing the findings of the first global survey of professional service providers to donative trusts. I garnered data from 409 service providers in 82 jurisdictions, the largest, most diverse respondent group ever obtained in survey research targeting trust service providers.[12] Trust service providers are a diverse group, including lawyers, accountants, bankers, tax advisors and others who provide services to trust users. The groundbreaking nature of my survey is largely a result of the special difficulty of eliciting information on donative trust practice, which is often highly confidential. Even where donative trusts or their trustees are subject to regulatory disclosure requirements, the information reported does not extend to the administrative and dispositive particulars of trusts, on which answers to the questions addressed in this Article depend. There is no existing cache of donative trust instruments, analogous to the corporate contracts disclosed to the SEC and utilized by Eisenberg & Miller,[13] Coates,[14] Cain & Davidoff[15] and Sanga.[16] The missing data

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[11] For such arguments, *see, e.g.*, Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?*, 85 CORNELL L. REV. 1035 (2000); Lionel Smith, *Mistaking the Trust*, 40 H. K. L.J. 787 (2010); M. W. LAU, THE ECONOMIC STRUCTURE OF TRUSTS 165–79 (2011).

[12] Exactly four such research projects have reached publication: BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (1986) (surveyed the 50 largest of each of U.S. bank trust departments, corporate pension funds, foundations and private universities, 200 respondents in all, about their investment practices); Francis J. Collin et al., *A Report on the Results of a Survey about Everyday Ethical Concerns in the Trust and Estate Practice*, 20 ACTEC NOTES 201 (1995) (surveyed 262 members of the American College of Trusts and Estates Counsel (ACTEC) regarding their techniques for coping with the everyday ethical concerns raised by trust and estate practice); Begleiter, *supra* note 8 (surveyed 239 corporate trustees in Iowa about their investment practices, to examine the impact on those practices of Iowa legislation of 1991 reforming the traditional prudent man rule); LAW COMMISSION, *supra* note 9, at 30-46 (surveyed 345 U.K. trustees and U.K. legal advisors to trustees and settlors about the prevalence of trustee exemption/exculpation terms, settlor attitudes towards such terms, and potential techniques for their regulation).

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

[14] *See* John Coates, *Managing Disputes through Contract: Evidence from M&A*, 2 HARV. BUS. L. REV. 295 (2012).

can only be obtained by approaching practitioners directly. The data I obtained by doing so provides a richer picture of global donative trust practice, addressing an unprecedentedly broad range of issues, than has ever been obtained.

Based on the survey results, on analysis thereof and on a series of interviews with U.S. and U.K. trust service providers, I offer answers to longstanding questions concerning four foci of trust law reform that have attracted considerable debate: perpetual trusts, trust terms relieving trustees from liability for the consequences of duty infringement, techniques protecting beneficiaries' entitlements under trust from their creditors, and settlors' control over trusts they have settled. Here follows a brief exposition of the stakes involved in each of the four.

Perpetual trusts, made possible by many jurisdictions' recent abolition of the rule against perpetuities, are claimed to benefit their settlors and beneficiaries, as well as the trust service providers serving them, at the expense of the rest of society: not only may a settlor's plan for allocating his or her property several centuries into the future eventually allocate that property in a sub-optimal manner,[17] but perpetual trusts enable the prolongation of spendthrift trust arrangements into the indefinite future, making possible the perpetual peppering of society with uncompensated harm.[18] Further, the tax savings perpetual trusts make possible for their settlors and beneficiaries, as by permitting a multi-generational exemption from federal transfer taxation,[19] may lead to revenue shortages, the consequences of which will be largely borne by persons who do not use perpetual trusts. Some have argued, however, that fears raised by the popularity of perpetual trusts are misplaced, as it is not unusual for trusts that are, on their face, expected to exist in perpetuity, or at least for a few centuries, to give each of their beneficiaries a power to appoint a share of corpus, free of trust, among his or her descendants, thus creating potential for the trust to be emptied long before the end of the traditional perpetuity period.[20] Others suggest that the tax savings from perpetual trusts are modest, and that U.S. states' abolition of the

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[15] *See* Matthew D. Cain and Steven M. Davidoff, *Delaware's Competitive Reach*, 9 J. OF EMPIRICAL LEG. STUD. 92 (2012).

[16] *See* Sarath Sanga, *Choice of Law: an Empirical Analysis*, 11 J. OF EMPIRICAL LEG. STUD. 894 (2014).

[17] *See* LAU, *supra* note 11, at 171-72.

[18] For the consequences of spendthrift trusts, *see, e.g.*, JOHN CHIPMAN GRAY, RESTRAINTS ON THE ALIENATION OF PROPERTY 174 (2nd ed. 1895); Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic And Cognitive Perspectives*, 73 WASH. U. L. Q. 1(1995); Kent D. Schenkel, *Exposing the Hocus-Pocus of Trusts*, 45 AKRON L. REV. 63 (2012).

[19] *See* Sitkoff & Schanzenbach, *Jurisdictional*, *supra* note 7, at 370-73.

[20] *Id.* at 413 ("We are told that such [special powers] are boilerplate in transfer-tax-exempt perpetual trust forms") and sources cited there, at n.147; Bridget J. Crawford, *Who Is Afraid of Perpetual Trusts?*, 111 MICH. L. REV. FIRST IMPRESSIONS 86-87 (2012); Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* 9-10 (University of Michigan Law School Public Law and Legal Theory Working Paper No. 259, 2014).

rule against perpetuities has not in fact led to the formation of many perpetual trusts administered in the abolishing states.[21] I found that trusts likely, according to the trust instrument, to subsist for more than a century are fairly common, especially offshore; however, the more prevalent a practitioner estimates such trusts to be, the more he or she believes them not to be in practice likely to outlast a century.

The recent eclipse of trustees' traditional duty of care and liability for loss consequent on its infringement – with dozens of jurisdictions amending their law to clarify that they will respect trust terms relieving trustees from duty, liability, or both – is claimed to have transferred the risk of loss through trustee negligence from trustees to trust funds and the beneficiaries entitled to them.[22] Some claim, however, that this decline is, in fact, unlikely to transfer value from beneficiaries to trustees, since settlors are sure to extract some quid-pro-quo from trustees in return for settlors' consent to the presence of trustee exculpatory terms in the trust instrument.[23] I found that trustee exculpatory terms are now standard in donative trusts serviced by professionals, with most settlors neither demanding nor receiving any quid-pro-quo for their inclusion.

One reason for the original acceptance of spendthrift trusts in U.S. law was an assumption that many such trusts were created for "improviden[t]" beneficiaries who were "incapa[ble … of] self-protection".[24] Along with trust settlors' power to mold their gifts at their pleasure, it was the situation of such beneficiaries that was seen to justify the law respecting spendthrift clauses. Many suspect, however, that spendthrift protections are often enjoyed by persons perfectly able to fend for themselves economically, at the expense of other participants in the credit markets.[25] I found that techniques protecting beneficiaries' entitlements under trust from their creditors are present in an overwhelming majority of donative trusts serviced by U.S.-resident providers and fairly common in those serviced by others, with no sign of protected beneficiaries being less able than other persons to conduct themselves vis-à-vis their creditors absent such protection

While many of the legal consequences of the creation of a trust flow from an assumption that the settlor has lost all control over both the trustee and trust property, skeptics suspect many trusts to be sham arrangements, meant to keep the settlor's creditors and the tax authorities at bay while disguising his or her ongoing control

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[21] *See* Hines, *supra* note 7.

[22] *See, e.g.*, Adam Hofri-Winogradow, *The Stripping of the Trust: from Evolutionary Scripts to Distributive Results*, 75 OHIO STATE L. J. 529, 560 (2014).

[23] *Id.* at 561.

[24] Nichols v. Eaton, 91 U.S. 716, 727 (1875). *See* discussion in ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS 25-31 (2d ed. 1947); GRAY, *supra* note 18, at 251-55; Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES IN L. 355, 375–78 (2009).

[25] *See, e.g.*, Willard M. Bushman, *The (In)validity of Spendthrift Trusts*, 47 OR. L. REV. 304, 312 (1968).

over the trust assets.[26] I found that settlor control of trusts, whether or not resulting from the exercise of expressly reserved powers, is far more common in donative trusts serviced by U.S.-resident providers than in those serviced by others.

I further found the law of Delaware to be the most popular legal system governing trusts, with that of England in second place and the rest of the top ten nearly exclusively populated with trust regimes offered by various offshore jurisdictions.

The rest of this Article is structured as follows. Part I describes my survey. Part II describes the respondent group, based on data regarding respondents' distribution between jurisdictions, the amount of trusts they service per year, the wealth of their typical donative trust clients, and the legal systems they reported as commonly used to govern trusts. Part III presents and analyzes the survey and interview results regarding perpetual trusts, trustee exculpatory terms, techniques protecting beneficiaries from their creditors and settlor control of trusts. Part IV draws some implications for legal policy concerning each of the four phenomena examined. A conclusion and three appendices follow.

I. METHOD: THE TRUST PRACTICE SURVEY

Obtaining detailed, accurate information on specific administrative or dispositive characteristics of those donative trusts currently being administered is challenging. As many donative trusts are not subject to thorough registration or regulatory reporting requirements, the identities of many trust users - settlors and beneficiaries – are unknown. Even should trust users be identified, many are unlikely to divulge information about their trusts to researchers. While some trustees, such as the U.S. institutional trustees Sitkoff and Schanzenbach studied, are subject to registration and/or regulatory reporting requirements, they make an unrepresentative sample of the worldwide, as well as of the U.S. trustee population. Further, even where regulatory reporting requirements exist, data reported can be quite limited. For example, the U.S. institutional trustees Sitkoff and Schanzenbach studied report their "trust holdings, including total assets and number of accounts"[27] as well as income earned on their trust and fiduciary holdings, expenses incurred and any losses suffered, to federal banking regulators,[28] but not the administrative or dispositive

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[26] *See* discussion of the application of the sham doctrine to trusts in Matthew Conaglen, *Sham Trusts*, 67 CAMBRIDGE L.J. 176 (2008); PAOLO PANICO, INTERNATIONAL TRUST LAWS 33-52 (2010); Matthew Conaglen, *Trusts and Intention*, in SHAM TRANSACTIONS 122 (Edwin Simpson & Miranda Stewart eds., 2013); Nicholas Le Poidevin, *Trusts: a Practitioner's Perspective*, in SHAM TRANSACTIONS, *supra* at 141.

[27] *See* Sitkoff & Schanzenbach, *Jurisdictional*, *supra* note 7, at 388.

[28] FEDERAL DEPOSIT INSURANCE CORPORATION, UNIFORM BANK PERFORMANCE REPORT USER'S GUIDE: FIDUCIARY & RELATED SERVICES 22-37 (2015)

characteristics of trusts the assets of which they hold.[29] While many trustees file tax returns for trusts they administer, those returns only include such data as is useful for tax collection. The I.R.S., for example, collects and makes publicly available detailed data on income earned, deductions taken and federal tax paid by trusts subject to U.S. taxation,[30] but not data on the administrative or dispositive characteristics of reporting trusts.[31] Some jurisdictions have established trust registries, independent of their tax regimes and bank regulation. Belize, for example, requires registration of the names of the trust, the trustee, and the trust's local agent, as well as the date of the trust's creation; these requirements do not apply to trusts created by residents of Belize.[32] Regimes governing the exchange of tax-relevant information between jurisdictions also entail the annual reporting of information concerning trusts. Under both the U.S. Foreign Account Tax Compliance Act (FATCA) and the OECD Common Reporting Standard (CRS), reporting financial institutions must provide, for each reportable person (a class including all trust settlors, trustees, beneficiaries, protectors and any other natural person who directly or indirectly controls a trust), his or her name, address, jurisdiction of residence, Taxpayer Identification Number, account number at the reporting institution, either the account value on the last day of the year or the average account value for the year, gross interest, dividends and other income paid into the account, gross proceeds from the sale or redemption of financial assets paid or credited to the account, and the gross amount paid or credited to the account holder with respect to the account.[33] Even the unprecedented extension of

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https://cdr.ffiec.gov/cdr402705/public/download/UserGuide/v47/FFIEC%20UBPR%20User%20Guide%20Fiduciary%20&%20Related%20Services--Page%201 2015-04-01.PDF.

[29] For data institutions must report to federal banking regulators regarding fiduciary services they provide, see FEDERAL DEPOSIT INSURANCE CORPORATION, *supra* note 28.

[30] INTERNAL REVENUE SERVICE, SOI TAX STATS - INCOME FROM ESTATES AND TRUSTS STATISTICS (2015) http://www.irs.gov/uac/SOI-Tax-Stats-Income-from-Estates-and-Trusts-Statistics.

[31] The self-classification of reporting trusts, for income tax purposes, into simple, complex, grantor, split-interest, qualified disability and qualified funeral trusts (for which *see* INTERNAL REVENUE SERVICE, *supra* note 30) does provide some rough data on the distribution of reporting trusts across these trust types, which each have their administrative and/or dispositive characteristics.

[32] Gian C. Gandhi, *Notice: Registration of International Trusts*, INTERNATIONAL FINANCIAL SERVICES COMMISSION BELIZE (Sept. 1, 2008), http://www.ifsc.gov.bz/international-trust-registry/, emphasizing that "[n]o confidential or private information needs to be disclosed to the Registry and it is **not** necessary that a copy of the Trust Deed be filed with the Registry. … The International Trusts Registry is not open to the public. It is a closed Registry. The confidentiality of a trust is fully protected" (emphasis in original).

[33] I.R.C. § 1471(c)(1) (2012), Treas. Reg. §§ 1.1471-4(d)(3)(ii)-(iv), 1.1471-4(d)(4) (as amended in 2014) (information required to be reported under FATCA); I.R.C. § 1473(2)(A)(iii) (2012), Treas. Reg. § 1.1473-1(b) (2013) (definition, in the trusts context, of a "substantial United States owner" of an "account holder which is a United States owned foreign entity"; "substantial United States owners" are reportable persons for FATCA purposes); OECD, STANDARD FOR AUTOMATIC EXCHANGE OF FINANCIAL INFORMATION IN TAX MATTERS, IMPLEMENTATION HANDBOOK 72-75, 77-86 (2015). Reporting requirements under FATCA do not apply to trusts in which no non-U.S. financial institution is involved.

reporting requirements applicable to trusts under FATCA and the CRS, then, does not extend to the reporting of data on the administrative or dispositive characteristics of reporting, or reportable, trusts. Even where a jurisdiction requires a copy of the trust instrument to be deposited with its trusts registry, instruments deposited tend to be unavailable to the public, as in the Cayman Islands.[34]

Given the severely limited nature of publicly available data on donative trust practice, eliciting additional data on that practice should be a high-priority item on any trust research agenda. And given the tendency of trust users to be unknown, or if known – not forthcoming with data about their trust affairs, approaching professional trust service providers appears a more promising approach. Such providers are also likely, due to their professional training and involvement in multiple trusts, to better comprehend the characteristics of trusts with which they have been, and are, involved than trust users. I therefore approached trust service providers using two complimentary research methods: an online survey and face-to-face interviews. Asking trust practitioners questions about trust practice is itself, however, a difficult undertaking. Three difficulties stand out. One is that for most jurisdictions, complete lists of professional trust service providers are neither available nor possible to compile. For complete lists of those providing a given service to be available, the service has to be regulated, tracked by a government agency, or self-organized in a monopolist guild. However, unlike banking, legal practice, accountancy, insurance and many other services, trust practice remains, in many jurisdictions, unregulated and unorganized per se, with some providers subject to regulatory regimes because they are banks, attorneys, accountants, insurers, or suppliers of other regulated services, while other providers remain free of any regulation or organization. Another difficulty is that many trust service providers will not respond to queries regarding their practice. The secretive nature of donative trust practice and its being subject to less thorough regulation than alternative economic arrangements are commonly thought to contribute to the demand for trust services. These drivers of non-response exacerbate the more general non-response problem encountered in conventional surveys of the general population.[35] A final difficulty is that even those trust service providers who choose to respond to a survey or agree to be interviewed may not respond truthfully to direct questions about their own practice, perhaps looking to convey a certain impression regarding their practice, regardless of its accuracy. Absent a complimentary data source such as an accessible registry where

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[34] The Cayman Islands General Registry notes on its website that one of the three types of trusts available under Cayman law, "exempted trusts", "require[s] that a trust deed be delivered to the Registrar of Trusts. The filed trust documents are open to inspection by the trustee and any other person authorized by the trust, but they are not open for public inspection": *Trusts*, CAYMAN ISLANDS GENERAL REGISTRY, http://www.ciregistry.gov.ky/portal/page?_pageid=3521,6697362&_dad=portal&_schema=PORTAL.

[35] *See* Douglas S. Massey & Roger Tourangeau, *New Challenges to Social Measurement*, 645 ANN. OF THE AM. ACAD. OF POL. AND SOC. SCI. 6 (2013).

trust instruments are deposited, inaccurate survey responses and interview data are likely to remain unidentified.

I addressed all three difficulties by attempting to reach the largest possible number of trust service providers, reasoning that the more responses I obtain, the smaller will the distortionary impact of inaccurate responses be. Having formulated a questionnaire (reproduced in Appendix 1) and uploaded it to a dedicated website, I sent, using mass-mailing software, email messages to 26,605 addressees identified as potential trust service providers, inviting them to take the survey. The addressee list was populated with the membership of the three leading organizations of the trust and estate planning profession: the Society of Trusts and Estates Practitioners (STEP), the American College of Trust and Estate Counsel (ACTEC) and the American Bar Association Section of Real Property, Trust and Estate Law (ABA RPTE section). While the membership of STEP is worldwide, with members in 104 jurisdictions both onshore and off, on every continent except Antarctica and in many island jurisdictions,[36] the membership of both ACTEC and the ABA RPTE section is nearly exclusively U.S.-resident. Given that STEP is comparatively unpopular among U.S. trust practitioners, having grown its global ambit from an English and (non-U.S.) offshore core, the memberships of the three organizations create, when put together, as balanced a sampling frame as is currently attainable of the global population of professional trust service providers.[37]

Eventually, 409 of the 24,096 addressees for whom I had correct email addresses provided usable survey responses. This nominal response rate figure is in line with survey experts Tourangeau, Conrad, Couper and Bosnjak's experience of declining response rates to web surveys: response rates to their web studies of US samples declined from 20% in 2002 to 3% in 2006, 1.9% in 2008 and 1% in 2010.[38] Nonresponse to the present survey is likely to have been driven by several factors. These include trust service providers' powerful culture of confidentiality, their interest in keeping information about the service they provide secret, and the over-inclusive character of the addressee population: unlike in conventional household surveys, where each person contacted has the sought-after data, such as their age, weight or educational attainments, in their possession, whether or not they choose to share that data with researchers, many of my addressees had no knowledge of the

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[36] *See* STEP, DIRECTORY AND YEARBOOK 2014 (2014) (listing the membership of the Society of Trusts and Estates Practitioners).

[37] Persons serving in trust-related capacities, such as trustee or trust protector, other than as remunerated professionals are, given the professionalization of trusteeship (for which *see* John H. Langbein, *Rise of the Management Trust*, TR. & EST., Oct. 2004, at 52), probably now a minority of those serving in such capacities. Contacting even a representative sample of such persons appears impossible.

[38] *See* Mick P. Couper & Michael Bosnjak, *Internet Surveys*, *in* HANDBOOK OF SURVEY RESEARCH 527, 537 (Peter V. Marsden & James D. Vright eds., 2nd ed. 2010); ROGER TOURANGEAU, FREDERICK CONRAD & MICK COUPER, THE SCIENCE OF WEB SURVEYS 43 (2013).

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

Despite the difficulties described, *the survey yielded the largest, most diverse respondent group ever obtained in survey research targeting trust service providers*. The likelihood of significant self-selection bias being present in my results appears small: as I show in Part II, the 409 respondents proved a remarkably diverse group, which was not significantly different, regarding each of the characteristics examined (base jurisdiction, proportion based in the U.S., and gender), from the sampling frame of addressees invited to take the survey. The addressee group was itself representative of professional trust service providers worldwide. Further, to the extent that respondents provided misleading answers to my questions or were unrepresentative of the population of service providers to donative trusts, these problems are likely to have resulted in an underestimate of the frequency of such controversial phenomena as perpetual trusts, spendthrift trusts and terms exculpating trustees, rather than the reverse. That my estimates of the frequency of those phenomena are nevertheless quite high is thus a significant finding, showing that they must be employed often.

To further bolster the reliability of my findings, I followed up the survey with eleven qualitative interviews with trust service providers resident in the U.S. and U.K. Interviewees were selected so as to create maximum variability as to their professional expertise (lawyers, accountants, bankers and other trust service providers) and client population. The interviews, an hour long on average, were semi-structured, starting from a developed version of the survey questionnaire but departing therefrom as necessary to provide a degree of detail unobtainable through survey research. They are listed in Appendix 2.

II. THE RESPONDENT GROUP

My survey data derives from responses by 409 trust service providers. In order not to deter potential respondents, I avoided asking addressees to provide personal descriptors such as their gender, income or age; I later obtained information about addressees' and most respondents' gender indirectly. I did, however, ask addressees to provide a limited extent of descriptive information more closely connected with their professional activities. One descriptor I asked addressees to provide was the jurisdiction in which each is based. I asked addressees to both name that jurisdiction (Question 36) and classify it as either onshore or offshore (Question 35). In response, 75.6% of respondents reported being based in onshore jurisdictions, which can be defined for present purposes as jurisdictions where (i) a large part of trust services supplied in the jurisdiction are consumed by local residents, and (ii) if the local legal system includes a trust regime, recent trust law reforms abolishing traditional restrictions on the freedom of trust users to design their trusts as they like have been relatively few, restrained and belated. 16.4% of respondents reported being based in offshore jurisdictions, which can be defined for present purposes as jurisdictions where (i) most, and sometimes all, trust services supplied in the jurisdiction are consumed by non-residents, and (ii) if the local legal system includes a trust regime, that regime has been recently reformed so as to create or maintain its attraction for foreign users. Finally, 4.4% of respondents reported being based in one of the two "midshore" jurisdictions, New Hampshire and New Zealand, which maintain both an onshore-type trust practice, serving locally resident trust users, and an offshore-type trust practice, serving foreigners attracted to the jurisdiction's trust regime and/or to its resident trust service providers.[39] Data regarding jurisdictions where each of the addressees invited to take the survey is based were not significantly different: 82.1% were based in onshore jurisdictions while 16.1% were based offshore, $\chi^2 = .53$, $p > .1$.

When asked to name the specific jurisdiction where they are based, eighteen respondents (4.4%) provided no response while four more (1%) reported being based in multiple jurisdictions. The remaining 387 respondents reported being based in 82 different jurisdictions. 229 (55.99%) were based in the U.S., and the remaining 158 (38.6%) in 39 non-U.S. jurisdictions. Once again, equivalent data for the population of addressees invited to take the survey were not significantly different: 63.53% of those addressees were based in the U.S., $\chi^2 = .94$, $p > .1$.

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

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[39] Appendix 3 classifies all the jurisdictions respondents mentioned into onshore, offshore and midshore jurisdictions.

Table 1. **Jurisdictions where Respondents reported being Based**

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

Note. Jurisdictions where respondents reported being based are listed, in descending order according to the amount of respondents who self-identified as being based in each jurisdiction.

Table 2. **Jurisdictions where U.S.-Based Respondents reported being Based**

	N of observations	Percent (of U.S.-based total)		*N* of observations	Percent (of U.S.-based total)
Illinois	15	6.6	Wisconsin	3	1.3
New York	14	6.1	Alaska	2	.9
Texas	11	4.8	Hawaii	2	.9
Ohio	10	4.4	Mississippi	2	.9
Virginia	10	4.4	Utah	2	.9
Pennsylvania	9	3.9	Washington, D.C.	2	.9
Georgia	8	3.5	Alabama	1	.4
Missouri	8	3.5	Arizona	1	.4
New Jersey	8	3.5	Delaware	1	.4
Colorado	7	3.1	Idaho	1	.4
Florida	7	3.1	Indiana	1	.4
Maryland	7	3.1	Iowa	1	.4
California	6	2.6	Kansas	1	.4
Massachusetts	6	2.6	Kentucky	1	.4
Michigan	6	2.6	Nebraska	1	.4

New Hampshire	6	2.6	Nevada	1	.4
Minnesota	6	2.6	New Mexico	1	.4
North Carolina	5	2.2	Oregon	1	.4
Tennessee	5	2.2	Virgin Islands	1	.4
Oklahoma	4	1.7	Washington	1	.4
South Carolina	4	1.7	Multiple States	3	1.3
Louisiana	3	1.3	State Unspecified	31	13.5
South Dakota	3	1.3			

Note. U.S. states where U.S.-based respondents reported being based are listed, in descending order according to the amount of respondents who self-identified as being based in each state.

To further examine whether the respondent group was significantly different from the population of addressees invited to take the survey, I identified the gender of each addressee, as well as that of the majority of respondents who chose to identify themselves.[40] The gender ratios of the two populations were strikingly similar: among addressees, there was one woman for every 2.009 men, while among respondents who chose to identify themselves and whose gender I was able to ascertain, there was one woman for every 1.97 men, $\chi^2 = .026$, $p > .1$.

The extent of respondents' experience and acquaintance with trusts can be approximated by the amount of trusts they and their firm service in a typical year (Questions 29 and 30 respectively). As Table 3 demonstrates, most survey participants service between 10 and 100 trusts annually. Those respondents based in offshore jurisdictions appear to service significantly fewer trusts per year than other respondents, $\chi^2(4) = 12.6$, $p = .013$. U.S.-based respondents appear to service significantly more trusts per year than other respondents: $\chi^2(4) = 15.28$, $p = .004$.

Table 3. **Amount of Trusts Serviced Per Year**

	N of observations	Percent
Amount of trusts serviced by respondent in a typical year		
1-10	133	32.5
10-100	213	52.1
100-200	40	9.8
200-500	12	2.9
>500	4	1.0
No response	7	1.7
Amount of trusts serviced by firms respondents work at in a typical year		
1-10	77	18.8
10-100	137	33.5

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

100-200	57	13.9
200-500	54	13.2
500-1000	23	5.6
1000-2000	13	3.2
2000-5000	8	2.0
>5000	6	1.5
No response	34	8.3

Note. Respondents are classified according to the amount of trusts they self-reported servicing per year. The firms respondents work at are classified according to the amount of trusts respondents reported those firms to service per year.

To provide a rudimentary characterization of the population making use of donative trusts, I asked respondents to estimate the overall wealth, in and out of any trusts, of their typical donative trust client, so far as known (Question 31). However, given the property sharing arrangements common to many families, not to mention their use of trusts, clients could enjoy, and even control, property owned by other family members. I thus asked respondents to also estimate the overall wealth, in and out of any trusts, of the entire family of their typical donative trust client, so far as known (Question 33). Responses received, detailed in Table 4, reveal that most respondents do much of their trust-related work for clients worth between one and ten million dollars. For U.S.-based respondents, the amount of trusts the firm they work at services in a typical year is correlated with both the wealth of their typical donative trust client, $r_s = .28$, $p < .001$, and that of their typical donative trust client's family, $r_s = .24$, $p < .001$. Such correlations were not found for respondents based outside the U.S. At the same time, respondents based in offshore jurisdictions attract wealthier clients than other respondents; this result holds both as regards each client's own wealth, $\chi^2(10) = 23.7$, $p = .008$, and that of his or her family, $\chi^2(10) = 23.9$, $p = .013$.

Table 4. **A Typical Client's and a Typical Client's Entire Family's Wealth**

US Dollars	A typical client's wealth		A typical client's entire family's wealth	
	N of observations	Percent	*N* of observations	Percent
500,000-1M	49	12	30	7.3
1M-2M	60	14.7	33	8.1
2M-5M	88	21.5	78	19.1
5M-10M	73	17.8	81	19.8
10M-20M	47	11.5	41	10
20M-50M	38	9.3	52	12.7
50M-100M	14	3.4	24	5.9
100M-200M	13	3.2	19	4.6
200M-500M	6	1.5	11	2.7
500M-1BN	7	1.7	8	2
1BN-2BN	0	0	4	1.0
2BN-5BN	1	.2	1	.2

No response	13	3.2	27	6.6

Note. Respondents are listed according to the overall wealth of their typical donative trust client, and to the overall wealth of their typical donative trust client's entire family, in both cases including property held in and out of any trusts.

Finally, I asked respondents to name the five legal systems most commonly used to govern trusts (Question 7). 118 respondents (28.9%) left this question unanswered. Of the remainder, 58.8% said practitioners use the trust regime of their jurisdiction of residence. 16.8% said practitioners use the trust regime of their clients' – settlors' or beneficiaries' – jurisdiction of residence. The wealthier a respondent's clients, the higher his or her estimate of the proportion of settlors who create trusts subject to governing laws other than those of their or their beneficiaries' jurisdictions of residence (Question 6), $r_s = .415$, $p < .001$ (wealth of typical donative trust client); $r_s = .46$, $p < .001$ (wealth of typical donative trust client's family). Practitioners I interviewed confirmed that the use of governing laws other than those of clients' jurisdictions of residence increases with clients' wealth: Nick Gray, a Boston attorney, noted that "the type of clients where you would use a foreign system would be the wealthier clients normally". Suzanne Walsh, an attorney in Hartford, CT, said much the same. Reinforcing the same conclusion, Ian Bond, an attorney in the English West Midlands serving mostly "mass affluent" English professionals worth ~2 Million British Pounds rather than higher net worth clients, noted that "almost all of our… [trusts] are English law trusts".

Those among survey respondents based in onshore jurisdictions who only mentioned the legal systems of onshore jurisdictions as commonly used to govern trusts serve clients who are significantly less wealthy than those served by onshore-based respondents who mentioned both onshore and offshore legal systems as commonly used: $KS\ Z = 2.43$, $p < .001$ (wealth of typical donative trust client), $KS\ Z = 2.27$, $p < .001$ (wealth of typical donative trust client's family). This finding is demonstrated in Figures 1 and 2.

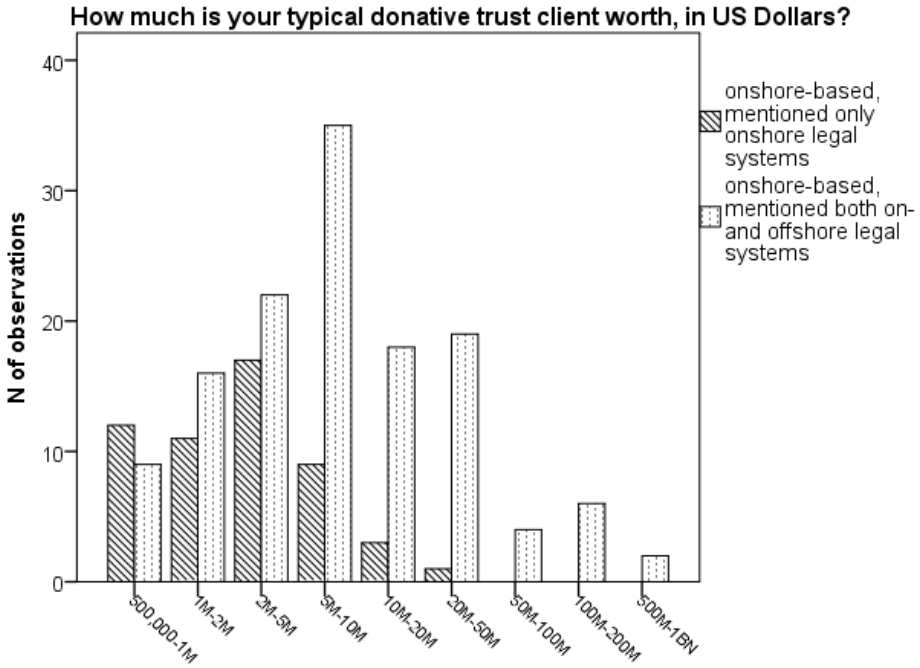

Figure 1. Responses to question 31 by onshore-based respondents

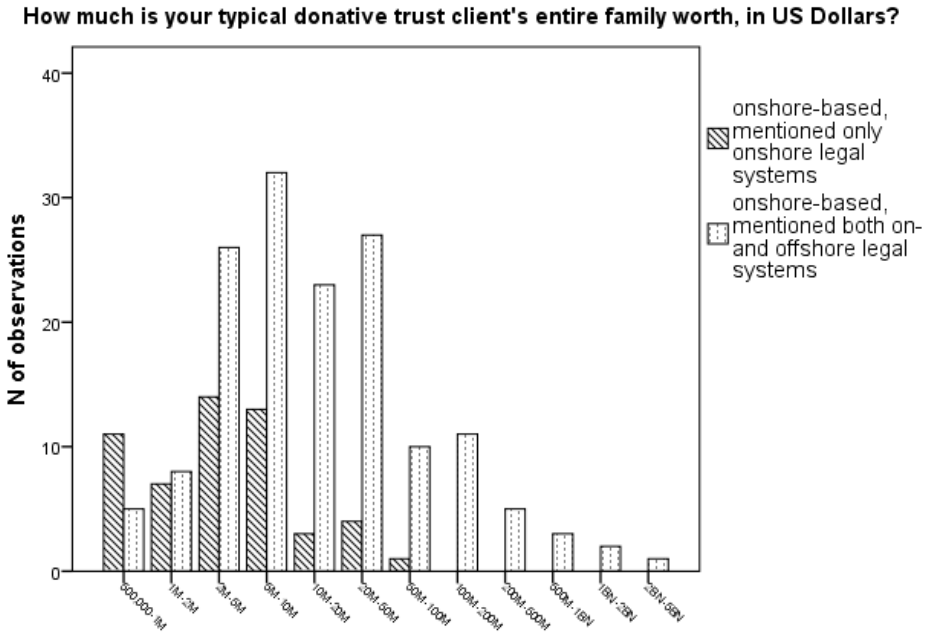

Figure 2. Responses to question 33 by onshore-based respondents

Settlors who settle trusts subject to the law of a jurisdiction other than their or their beneficiaries' jurisdictions of residence allow the jurisdiction where their trusts are to be administered to be changed more easily than other settlors: respondents' estimates of the proportion of settlors who choose a governing law unconnected to their or their beneficiaries' jurisdictions of residence were correlated with their estimates of the prevalence of "flee clauses", which provide for the trusteeship to be transferred, on the occurrence of a specified event, to new trustees in a different jurisdiction, r_s = .432, $p < .001$.

Table 5 presents the legal systems respondents mentioned as most commonly used to govern trusts, in descending order, starting with the system reported to be the most popular, the law of Delaware. For each system, I give the amount of respondents who mentioned it as commonly used to govern trusts, both absolutely and in percentage terms. As many respondents mentioned multiple legal systems, the sum of percentages exceeds 100%.

Table 5. Legal Systems Commonly Used to Govern Trusts

	N of observations	Percent		*N* of observations	Percent
Delaware	89	21.76	Virginia	4	0.98
England	75	18.34	Barbados	3	0.73
Jersey	73	17.84	Colorado	3	0.73
Cayman Islands	49	11.98	Israel	3	0.73
Nevada	49	11.98	Luxembourg	3	0.73
Guernsey	46	11.25	"Offshore" (jurisdiction unspecified)	3	0.73
Florida	44	10.76	Panama	3	0.73
British Virgin Islands	42	10.27	Seychelles	3	0.73
South Dakota	41	10.02	District of Columbia	2	0.49
Alaska	39	9.53	Michigan	2	0.49
New Zealand	37	9.05	Mississippi	2	0.49
"USA" (state unspecified)	33	8.07	North Dakota	2	0.49
Isle of Man	25	6.11	Northern Ireland	2	0.49
Bahamas	24	5.87	South Africa	2	0.49
New York	24	5.87	South Carolina	2	0.49
Australia	19	4.64	Spain	2	0.49
Bermuda	17	4.15	Alabama	1	0.24
Singapore	16	3.91	Alberta	1	0.24
Canada	12	2.93	"British Channel Islands" (island unspecified)	1	0.24
New Hampshire	11	2.69	Brunei	1	0.24
California	9	2.2	"Caribbean" (jurisdiction unspecified)	1	0.24
Liechtenstein	9	2.2	"Dakotas" (jurisdiction unspecified)	1	0.24
Malta	9	2.2	United Arab Emirates	1	0.24
Switzerland	9	2.2	"Europe" (jurisdiction unspecified)	1	0.24
Wyoming	9	2.2	"Foreign" (jurisdiction unspecified)	1	0.24
New Jersey	8	1.95	France	1	0.24
Cook Islands	7	1.71	Georgia	1	0.24
Illinois	7	1.71	Hawaii	1	0.24
Mauritius	7	1.71	India	1	0.24
North Carolina	7	1.71	Kansas	1	0.24

Cyprus	6	1.47	Kentucky	1	0.24
Gibraltar	6	1.47	Labuan	1	0.24
Hong Kong	6	1.47	Louisiana	1	0.24
Maryland	6	1.47	Maine	1	0.24
Pennsylvania	6	1.47	Manitoba	1	0.24
Scotland	6	1.47	Mexico	1	0.24
Tennessee	6	1.47	Netherlands	1	0.24
Texas	6	1.47	New Mexico	1	0.24
"Channel Islands" (island unspecified)	5	1.22	Oklahoma	1	0.24
Massachusetts	5	1.22	Puerto Rico	1	0.24
Missouri	5	1.22	"Rest of the world" (jurisdiction unspecified)	1	0.24
Nevis	5	1.22	"South Pacific" (jurisdiction unspecified)	1	0.24
Ohio	5	1.22	Turks and Caicos Islands	1	0.24
San Marino	5	1.22	"Virgin Islands" (jurisdiction unspecified)	1	0.24
Arizona	4	0.98	Washington	1	0.24
Belize	4	0.98	Wisconsin	1	0.24
Ireland	4	0.98			

Note. Legal systems respondents mentioned as commonly used to govern trusts are listed, in descending order according to popularity. Since respondents were invited to mention several systems, aggregate percentages exceed 100%

Sanga's[41] recent data on choice of law in commercial contracts disclosed to the SEC between 1996–2012 is not strictly comparable, because limited to a choice between U.S. legal systems. Notably, however, while New York leads Sanga's list with 27.3% of contracts examined governed by its law, New York law is merely the sixth most popular U.S. legal system to govern donative trusts. Among U.S. legal systems governing donative trusts, New York is preceded by Delaware, a distant second place in Sanga's list with 12.4% of contracts examined, as well as by Florida, Nevada, South Dakota and Alaska.

Taking a page from Sanga,[42] I calculated the relative use for each legal system respondents mentioned. The relative use is obtained by taking the natural logarithm of the quotient of the likelihood that a respondent mentioned the legal system of a certain jurisdiction as commonly used to govern trusts, divided by the likelihood of that respondent being based in that jurisdiction. As Sanga explains,

[41] *See* Sanga, *supra* note 16, at 906.
[42] *See id.* at 899.

"[p]ositive values … indicate that a state's laws are disproportionally overused, while negative values indicate that they are underused". Table 6 presents the legal systems respondents mentioned as commonly used to govern trusts, in descending order of their relative use. I mention only those systems reported by at least one respondent as his or her jurisdiction of residence, as well as by at least one respondent, not necessarily the same one, as commonly used to govern trusts.

Table 6. **Legal Systems Commonly Used to Govern Trusts, by Relative Use**

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

Note. Legal systems respondents mentioned as commonly used to govern trusts are listed according to their relative use, a measure obtained by taking the natural logarithm of the quotient of the likelihood that a respondent mentioned the legal system of a certain jurisdiction as commonly used to govern trusts, divided by the likelihood of that respondent being based in that jurisdiction.

Unsurprisingly, given the nature of Sanga's relative use measure, offshore jurisdictions, the laws of which commonly serve to govern trusts despite their small resident populations, lead Table 6. U.S. states which qualify as offshore jurisdictions under my definition, such as Delaware and Nevada, share the honors with Caribbean islands, the islands of the British Channel and one south Asian island, Singapore. The leading onshore jurisdiction is Florida, in 12th place.

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

III. RESULTS

In this Part, I describe and analyze the data my survey respondents and interviewees provided concerning four trust features which have attracted great interest among scholars, practitioners and policymakers. The *first* is the frequency with which perpetual and other extreme-long-term trusts are used, and the proportion, out of trusts supposed, according to the trust instrument, to last beyond a century, of trusts which are in practice likely to last that long. The *second* is the frequency with which terms exculpating trustees from liability to beneficiaries for loss caused to the latter as a result of trustees' negligent conduct are used, and whether settlors of trusts which include such terms demand and receive some quid-pro-quo for their inclusion. The *third* is the frequency with which trusts include features protecting beneficiaries' entitlements from their creditors, such as spendthrift clauses, self-settled or not, and protective (forfeiture) clauses, and whether where such clauses are present the beneficiaries protected are in fact less able than the average person to take care of their financial affairs. The *fourth* and last issue is the

frequency with which trusts are managed, directly or indirectly, by their settlors, with the trust serving as a screen to disguise this reality.

A. *Perpetual and Extreme-Long-Term Trusts*

Many scholars decry the grave consequences of perpetual and extreme-long-term trusts, which have recently been made possible by many jurisdictions' abolition of the rule against perpetuities. Others claim that few trusts that are, on their face, expected to exist in perpetuity, or at least for a few centuries, are in fact likely to last that long. Anecdotal evidence has it that many trusts which contain language indicating an expected duration of several centuries or more grant their beneficiaries powers to appoint shares of the trust corpus, free of trust. Settlors of such trusts, it is said, fully expect those powers to be used, and thus do not truly intend or expect their trusts to last in perpetuity, or even particularly long.[43] Hines argued that the tax savings consequent on settling perpetual trusts are modest. Using U.S. federal tax return data for 2010, he suggested that not many such trusts have in fact been created by that time.[44]

I wanted to obtain better evidence than has hitherto been available regarding perpetual and extreme-long-term trusts (defined as trusts supposed, according to the trust instrument, to last more than 100 years): how common are they, and whether they are in fact likely to last particularly long. The survey results show that trusts likely, according to the trust instrument, to last more than a century are, while a minority of all donative trusts, fairly common. Respondents' mean estimate, in answer to Question 8, of the proportion of trusts which are supposed, according to the trust instrument, to last more than 100 years was 35.9%, though 38.7% of respondents believed that only 10% or fewer of trusts are supposed to last that long. Respondents' mean estimate, in answer to Question 9, of the proportion of trusts which are supposed, according to the trust instrument, to last in perpetuity was 25.7%, though 52.3% of respondents said that only 10% or fewer of trusts are supposed to last forever, with 33.7% saying that no trusts are supposed to last that long. As expected, responses to Questions 8 and 9 were highly correlated, $r_s = .516$, $p < .001$, and were thus averaged into a measure of the proportion of trusts that are supposed, according to the trust instrument, to last in the extreme long term.

With a majority of respondents (75.6%, n=309) being based onshore, these overall data largely reflect onshore practice; responses by onshore-based respondents, having been isolated, reinforce the resulting impression that a substantial minority of trusts are supposed, on paper, to last in the extreme long

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[43] *See*, e.g., Crawford, *supra* note 20, at 86-87; Waggoner, *supra* note 20, at 9-10.
[44] *See* Hines, *supra* note 7.

term.[45] Interviews I held with onshore practitioners further reinforce that impression: three of the eleven practitioners I interviewed – Gideon Rothschild of Moses & Singer, Catherine Grum of KPMG and Simon Rylatt of Boodle Hatfield - confirmed that they see frequent use of perpetual trusts, while the other eight said that client interest in perpetual trusts is infrequent. Offshore trust practitioners appear considerably more familiar than other practitioners with trusts supposed, according to their terms, to last in the extreme long term: their mean estimate of the proportion of trusts supposed to last for more than a century was 53.1%, and that of the proportion of trusts supposed to last forever, 40.1%. Using the averaged measure of responses to Questions 8 and 9, half of offshore-based respondents estimated that 50% or more of trusts are supposed, according to the trust instrument, to last in the extreme long term, while only 24.6% of onshore-based respondents similarly believed that 50% or more of trusts are supposed to last more than a century. I found correlations between respondents' estimate of the proportion of trusts which, according to the trust instrument, are supposed to last more than a century and the wealth of their typical donative trust client, $r_s = .284$, $p < .001$, as well as between that same estimate and the amount of trusts they service in a typical year, $r_s = .183$, $p < .001$. If responses to Questions 8 and 9 are taken to reflect respondents' own experience with servicing trusts, the latter correlation implies that service provision concerning extreme long term trusts is more concentrated than service provision concerning all trusts, while the former offers some support for the commonsensical hypothesis that the client base for so-called "dynastic", extreme long term trusts is wealthier, on average, than the client base for all trusts.

Onshore and offshore respondents also differ in their responses to my Question 10, where I asked how many of those trusts which, according to their terms, are perpetual or extreme-long-term, are in fact unlikely to last longer than 100 years, because, for example, beneficiaries have powers of appointment over the trust corpus and are likely to use them and empty the trust before it turns 100. Looking at the entire response pool, responses to this question ran the gamut from all trusts which are perpetual or extreme-long-term on paper also being in fact likely to last for more than 100 years (17.3% of respondents) to 80% or more of those trusts being unlikely to last for more than a century (36.8% of respondents). 11.8% of respondents chose the 50-50% option.

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[45] One U.S. practitioner told me of a practice where a client created one dynasty (perpetual or extreme-long-term) trust along with a large number of shorter-term trusts directed at using the annual exclusion under I.R.C. § 2503(b) (2012), currently $14,000 annually per donee (*see* Rev. Proc. 2015-53 § 3.35(1), 2015-44 I.R.B. 615, 623), so that while dynasty trusts made a small proportion of all trusts the client created, they were much higher in value than all others. I hope to investigate the relative value of perpetual and other trusts in future work.

Offshore-based respondents, who believe, more than onshore-based respondents, extreme-long-term trusts to be a common phenomenon, also seem more familiar than their onshore brethren with trusts which are extreme-long-term on their face but not in fact likely to last more than a century. Offshore-based respondents' mean response to Question 10 was 56.6%, while for onshore-based respondents the mean estimate was 50.6%.[46] It may not be the beneficiaries of perpetual-on-paper trusts who bring them to a premature end: respondents' estimates of the prevalence of perpetual and extreme-long-term trusts were correlated with their estimate of the prevalence of decanting powers, which enable trustees to decant the trust property into another trust with shorter duration: $r_s = .194$, $p < .001$ (trusts supposed to last more than a century), $r_s = .202$, $p < .001$ (perpetual trusts). Some of these results are summarized in Table 7.

Table 7. **The Prevalence of Extreme Long Term Trusts**

	Mean	*SD*	*Mode*
What share of trusts are supposed, according to the trust instrument, to last more than 100 years? (Question 8)			
Sample overall	35.9	32.9	0
Onshore-based respondents	32.2	31.1	0
Offshore-based respondents	53.1	34.1	100
What share of trusts are supposed, according to the trust instrument, to last in perpetuity? (Question 9)			
Sample overall	25.7	29.9	0
Onshore-based respondents	22.2	27.4	0
Offshore-based respondents	40.1	34	0
Average of Responses to Questions 8 and 9			
Sample overall	30.7	27.2	0
Onshore-based respondents	27.1	25.2	0
Offshore-based respondents	46.6	28.8	50
Of those trusts which, according to the trust instrument, are perpetual or very long-term, how many are in practice unlikely to last longer than 100 years?			
Sample overall	51.1	36.1	0
Onshore-based respondents	50.6	36	0
Offshore-based respondents	56.6	35.2	90

Note. Respondents' estimates of the proportion of trusts which are supposed, according to the trust instrument, to last more than 100 years (Question 8); of the proportion of trusts which are supposed, according to the trust instrument, to last in perpetuity (Question 9); and of the proportion of trusts which despite being supposed, according to the trust instrument, to last more than 100 years, are in

[46] This difference failed to reach statistical significance.

practice unlikely to last longer than 100 years (Question 10). For each question, means, standard deviations and modes are reported separately for the entire sample, for the subsample of respondents who reported being based in an onshore jurisdiction and for the subsample of respondents who reported being based in an offshore jurisdiction. All data are percentages.

I found a correlation between responses to Question 10 and the averaged measure of respondents' estimates of the frequency of trusts that are supposed, according to the trust instrument, to last in the extreme long term, $r_s = .221$, $p < .001$.[47] Thus the higher a respondent's estimate of the proportion of trusts supposed, according to the trust instrument, to last in the extreme long term, the higher his or her estimate of the proportion, out of trusts supposed, on paper, to last that long, of trusts which are not in fact likely to do so. This conclusion is reinforced by Catherine Grum and Simon Rylatt, two of the three practitioners I interviewed who reported perpetual trusts to be frequently used, commenting that there is always a way to terminate a perpetual trust, whether by exercising an expressly reserved power of termination or, in the absence of such a power, by an application to the court, asking it to terminate the trust. Grum and Rylatt noted that a key advantage clients see in "perpetual" trusts is that their actual duration is completely flexible, given the ever-present option of terminating them, while the maximum possible duration of trusts subject to a perpetuity period is fixed.

Table 8 presents the results of regression analysis, confirming that the positive correlation between respondents' estimates of the proportion of trusts which are extreme-long-term on paper and their estimates of the proportion of trusts which despite being extreme-long-term on paper are unlikely to last longer than a century remains reliable even once confounds found to affect either (or both) of these estimates are incorporated. I regress (i) a log-transformed version of my averaged measure of respondents' estimates of the proportion of trusts that are supposed, according to the trust instrument, to last in the extreme long term, (ii) the amount of trusts a respondent and (iii) his or her firm service in a typical year, (iv) the wealth of each respondent's typical donative trust client, and (v) a dummy indicating whether each respondent is or is not based offshore (the default being onshore practice), on a log-transformed version of responses to Question 10.

[47] Responses to Question 10 were also correlated with responses to Question 8 and Question 9 separately.

Table 8. **Regression Results: Proportion of Extreme Long Term Trusts Unlikely to Last beyond a Century**

	(1)	(2)	(3)
Proportion of trusts supposed to last in the extreme long term	.334** (.051)	.311** (.053)	.317** (.055)
Amount of trusts serviced by respondent annually		.015 (.067)	.011 (.067)
Amount of trusts serviced by respondents' firm annually		.027 (.067)	.027 (.067)
Wealth of respondent's typical client		.058 (.053)	.060 (.054)
Respondent offshore- or onshore-based			-.023 (.053)
Obs.	349	349	349

Note. The dependent variable is the log of respondents' estimates of the proportion, out of trusts supposed, according to the trust instrument, to last more than 100 years, of trusts which are in practice unlikely to last more than 100 years. Independent variables include the log of an averaged measure of respondents' estimates of the proportion of trusts which are supposed, according to the trust instrument, to last more than 100 years and their estimates of the proportion of trusts which are supposed, according to the trust instrument, to last in perpetuity; respondents' estimates of the amount of trusts serviced annually by each respondent and by the firm each respondent works at; respondents' estimates of the wealth of each respondent's typical donative trust client; and a dummy variable standing for whether each respondent reported being based in an offshore jurisdiction (the default being onshore practice). All coefficients are standardized, with standard errors in parentheses.

* Significant at the 5 percent level.

** Significant at the 1 percent level.

It thus appears that the use of donative trusts supposed to exist for more than a century is, while a minority practice, fairly common. The use of such "dynasty" trusts is concentrated in the hands of relatively experienced service providers with relatively wealthy clients. The data I collected brings some evidence for the view that many trusts which are extreme-long-term on paper are in practice unlikely to outlast a century. Greater use is made of extreme-long-term trusts in the offshore than onshore, but the more prevalent a practitioner estimates such trusts to be, the more he or she estimates them not to be in practice likely to outlast a century.

B. *Trustee Exculpatory Terms*

While the practice of inserting exculpatory terms in trust instruments, removing much of trustees' liability for loss beneficiaries suffer as a result of trustees' negligence, is now in at least its third century, it appears to have become more common, indeed routine, during the last few decades. Even more recently, many legal systems have come to expressly affirm that trustee liability may indeed be so

circumscribed, with key onshore systems such as those of most U.S. states and England allowing even liability for grossly negligent behavior to be excluded.[48] The routinization of exculpatory terms' inclusion in trust instruments seems an instance of service-provider-penned boilerplate serving its authors' interests, with legislatively-mandated disclosure[49] failing to lead to the boilerplate's removal or modification.[50]

But does the decline of trustee liability transfer value from trust users to trust service providers? Ben-Shahar points out that boilerplate terms which eliminate some rights consumers enjoy vis-à-vis vendors are often matched with a relatively affordable price, and that the resulting package - price plus terms - is often superior, for many consumers, to a more costly alternative more respectful of consumers' rights under default law.[51] In applying this argument to donative trusts, one should appreciate that the typical donative trust is likely to be worth far more, both absolutely and as a fraction of the typical settlor or beneficiary's overall wealth, than the typical consumer product, raising the likely cost of trustee negligence to the client. A possible result of this distinction is that even should one grant that Ben-Shahar's argument may justify the routine use of exculpatory terms in contracts governing sales of relatively low-value consumer products such as microwave ovens and mobile phones, despite purchasers' failure to adequately process the terms' consequences into their purchase decision, the use of such terms in donative trust instruments may require more caution. Leslie believed that courts should uphold "broad exculpatory clauses … only if the professional trustee formally offers the settlor two prices for two different services: one commission for full-service trusteeship, and a lower commission for an agreement that includes an exculpatory clause".[52]

Is trust practitioners' preference for exculpatory terms twinned with some quid-pro-quo for trust users, such as a fee reduction? Alison Dunn's 2002 survey of 345 U.K. trustees and legal advisors showed that most settlors served by her respondents did not ask their service providers to remove the exculpatory terms, nor

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[48] *See, e.g.*, UNIF. TRUST CODE § 1008 (2010) (enacted in 31 states; *see* references to different states' enacted versions of the U.T.C., as of 2012, in the recent RESTATEMENT (THIRD) OF TRUSTS § 105 reporter's notes to cmt. c (2012); for discussion, *see, e.g.,* Louise Lark Hill, *Fiduciary Duties and Exculpatory Clauses: Clash of the Titans or Cozy Bedfellows?*, 45 U. MICH. J.L. REFORM 829 (2012). For English law on point, *see* Armitage v. Nurse, [1998] Ch. 241 at 251–56 (Eng.), followed by the majority of the Privy Council panel to hear Spread Tr. Co. Ltd. v. Hutcheson, [2011] UKPC 13, [2012] 2 A.C. 194, [57], [108] (appeal taken from Gue.).

[49] Such as that provided for in UNIF. TRUST CODE § 1008(b) (2010).

[50] For the failure of mandated disclosure in other contexts, *see* OMRI BEN-SHAHAR & CARL E. SCHNEIDER, MORE THAN YOU WANTED TO KNOW: THE FAILURE OF MANDATED DISCLOSURE (2014).

[51] *See* Omri Ben-Shahar, *Regulation through Boilerplate: an Apologia*, 112 MICH. L. REV. 883, 895-899 (2014).

[52] Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L. J. 67, 102 (2005).

did they ask for any quid-pro-quo.[53] Whether service providers outside England met with a similarly accommodating approach on the part of their clients in respect of trustee exculpatory terms has heretofore remained unknown. Hence my Survey Questions 27, asking respondents what proportion of trusts include a trustee exculpatory term of any kind, and 28, asking them what proportion of settlors of trusts which include trustee exculpatory terms demand and receive some quid-pro-quo for the inclusion of such clauses, such as a fee reduction.[54]

The results are straightforward. As regards Question 27, respondents believe, on average, that 71.1% of trusts include an exculpatory term of some kind. Half the respondents estimated the proportion of trusts that include such a term to be 90% or more. 33% of respondents believe all trusts include trustee exculpatory terms. My interview results confirm the popularity of such terms. Nine of the eleven practitioners I interviewed provided useful information on the subject. Of these nine, five said that exculpatory terms are always present in trusts on which they serve, on which they advise or which they see in their practice. Three said such terms are sometimes used. Only one practitioner I interviewed, veteran trust professional Eric Hayes, who has spent decades working for Boston banks and trust companies, reported that Massachusetts institutional trustees do not ask for the inclusion of exculpatory terms in trusts, unless the trust involves a higher-than-average risk of liability. It may be that Hayes' view reflects the practices of some years ago; it does not reflect a reality unique to the Boston market, as other Boston trustees said that exculpatory terms are always used (Nick Gray) or sometimes used (Tom Monroe).

The most common response to Question 28 was 0%; 63.6% of respondents believe no settlors of trusts which include a trustee exculpatory term demand and receive any quid-pro-quo for the inclusion of that term. The mean response was 10.4%. 25.18% of respondents believed both that all trusts include an exculpatory term of some kind *and* that no settlors demand and receive any quid-pro-quo for the inclusion of these terms. Responses to these two questions confirm Dunn's U.K. data of 2002, according to which exculpatory terms are very common in trusts served by professional trustees, without settlors asking for any quid-pro-quo.[55] A minority of practitioners, including Eric Hayes, reported that practitioners demand the incorporation of exculpatory terms in trust deeds as quid-pro-quo for serving as trustees of trusts with a higher than usual perceived risk of loss, as where the trustee holds a family business rather than a diversified portfolio of investments, or where the trustee is to be directed by others, such as a trust protector.

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[53] *See* LAW COMMISSION, *supra* note 9, at 36-37.

[54] More detailed questions on trustee exculpatory terms were planned, but were eventually pulled from the questionnaire due to their expected adverse impact on the response rate.

[55] *See* LAW COMMISSION, *supra* note 9, at 33, 36-37.

I found no relation between estimates by respondents whose answers to Question 28 were larger than 0% of the frequency with which trusts include exculpatory terms of any kind and their estimates of the frequency with which settlors of trusts which include such terms demand and receive any quid-pro-quo for their inclusion, $p > .3$. The data did, however, reveal some interesting correlations between responses to Questions 27 and 28 and some characteristics of the respondent group reported in Part II. I found both the wealth of a respondent's typical donative trust client and that of that client's family to be positively correlated with that respondent's estimate of the proportion of trusts which include exculpatory terms, $r_s = .167$, $p = .001$ and $r_s = .158$, $p = .002$ respectively. It appears that the wealthier a service provider's donative trust clients, the more he or she believes exculpatory terms to be standard features of donative trusts. And what is more, the amount of trusts a respondent and his or her firm service annually appears to be *negatively* correlated with his or her estimate of the proportion of settlors who demand and receive some quid-pro-quo for the inclusion of an exculpatory term, $r_s = -.18$, $p = .001$ in both cases. Thus the more trusts a practitioner services, the lower his or her estimate of the likelihood of settlors demanding and receiving quid-pro-quo for the inclusion of exculpatory terms.[56]

It thus appears that exculpatory terms, without settlors demanding and receiving any quid-pro-quo for their inclusion,[57] are now a conventional standard in donative trusts serviced by professionals. This reality is especially clear regarding practitioners serving wealthy clients and those handling a large number of trusts.

C. *Anti-Creditor Techniques Protecting Beneficiaries' Entitlements*

Debate regarding the justifiability of techniques protecting beneficiaries' entitlements under trusts from beneficiaries' creditors, such as spendthrift clauses and "protective" (forfeiture) clauses, has now raged for at least 140 years. Critics of such techniques, from John Chipman Gray on, have long charged that the existence of a class of property interests in equity which beneficiaries' creditors could not reach so long as income or corpus were not distributed impedes the operation of the credit economy as well as the enforcement of judicial and administrative decisions and

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[56] A respondent's being based onshore or offshore does not appear to make a difference regarding either his or her estimate of the frequency with which exculpatory terms are used or his or her estimate of the frequency with which settlors of trusts which include such a term demand and receive some quid-pro-quo for its inclusion.

[57] It is possible that due to Question 28 being concerned with actively negotiated quid-pro-quo, some instances of quid-pro-quo given absent such negotiation are not reflected in the results. Respondents, however, are hardly likely to have distinguished, in responding to the 28th question on a lengthy online survey, between quid-pro-quo granted following active negotiation and quid-pro-quo granted under other circumstances.

demands by levying against obligors' property.[58] It is argued that by discriminating in favor of precisely those debtors lucky enough to enjoy the benefit of a trust, protective techniques entrench and deepen existing socio-economic inequalities.[59] Proponents of protective techniques argue in response that trust settlors, who are settling their own property, are entitled to mold their gifts as they wish, including by bolstering beneficiaries' entitlements with anti-creditor protection. Proponents add that given the (alleged) pattern of settling donative trusts for beneficiaries less able than the average person to provide for themselves, such as minors and reckless young adults, protecting beneficiaries' entitlements from the predatory spirits of the marketplace is often necessary to make sure a trust actually benefits its beneficiaries.[60] Justificatory arguments of this sort were one key to the Supreme Court's early affirmation of spendthrift clauses' validity.[61] The acceptance of spendthrift trusts in the 19th century U.S. having more recently led to many jurisdictions' legitimization of self-settled spendthrift trusts,[62] the normative debate remains unresolved: are beneficiaries who profit from spendthrift clauses and similar protective techniques hapless incompetents or schemers looking to evade their duties under law and contract?

I designed Survey Questions 11 and 12 to help revive this long-stalled debate. In Question 11, I asked respondents to estimate the proportion of trusts which include anti-creditor techniques protecting the entitlements of one or more beneficiaries. Responses show that anti-creditor protective techniques are even more ubiquitous than trustee exculpatory terms: 39% of respondents thought all (100%) trusts include such techniques. The median response was 90%, and the mean, 73.8%. This striking finding, however, is almost entirely based on responses by U.S.-based respondents, 59.5% of whom believe all trusts provide one or more beneficiaries with anti-creditor protection. U.S.-based respondents' mean estimate of the frequency of such beneficiary protection was 89.7%. Not one U.S.-based respondent said that no trusts include such protection. Responses by non-U.S.-based respondents were spread across the scale, with only 13.6% believing that all trusts provide one or more

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[58] *See* sources cited in *supra* note 18.

[59] *See, e.g.*, discussion in Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV. 179, 193-94 (1993).

[60] *See, e.g.*, Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STANFORD L. REV. 1189, 1233-1250 (1985); Getzler, *supra* note 24, at 375-81.

[61] Nichols v. Eaton, 91 U.S. 716, 727 (1875).

[62] *See, e.g.*, AM. COLL. OF TRUST & ESTATE COUNSEL, ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES (David G. Shaftel ed., 2014), *available at* http://www.actec.org/public/Documents/Studies/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes-Updated-through-April-2014.pdf; CHARLES E. ROUNDS, JR. & CHARLES E. ROUNDS, III, LORING AND ROUNDS: A TRUSTEE'S HANDBOOK § 5.3.3.1(c) (2015) [hereinafter LORING].

beneficiaries with anti-creditor protection. Figure 3 illustrates responses to Question 11 by U.S.-based and other respondents.

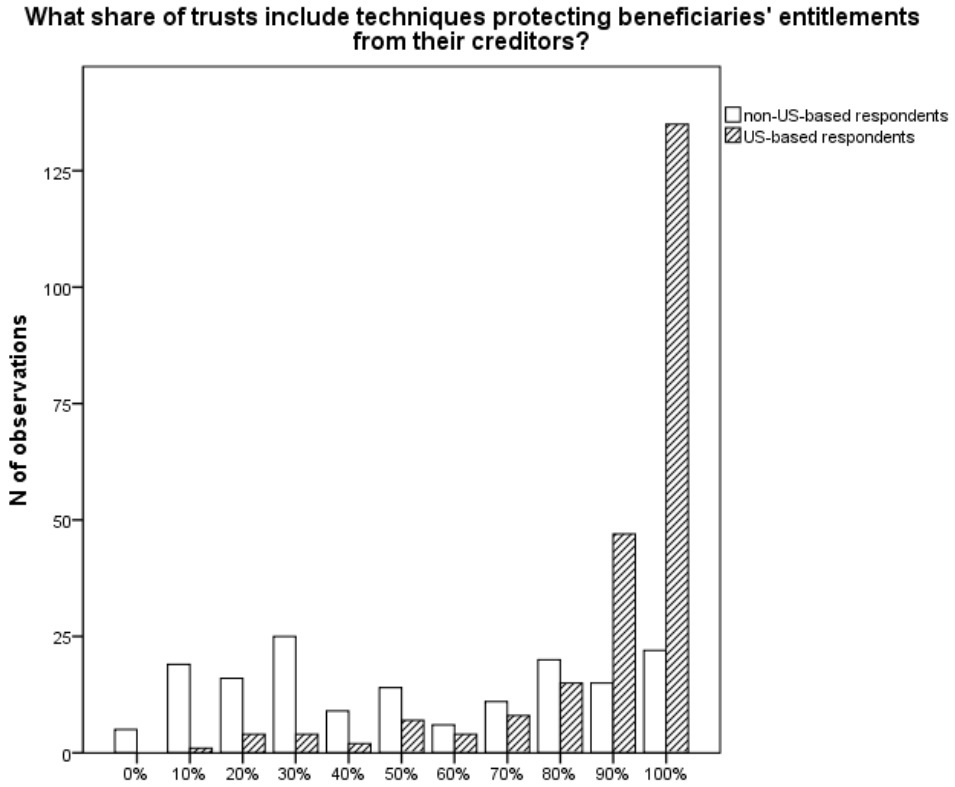

Figure 3. Responses to question 11 by U.S.-based and other respondents

A similar divergence in estimates of the ubiquity of anti-creditor protective techniques between U.S.-based and other trust practitioners was apparent in interviews I conducted. Nick Gray of Boston commented that "every single one" of the trusts in which he is involved contains a spendthrift clause. Tom Monroe, another Bostonian, commented that "almost all of our trusts that are revocable have a spendthrift provision". Gideon Rothschild of New York, who I also interviewed, is a leading expert on self-settled spendthrift trusts.[63] Across the Atlantic, only one of the English trust practitioners I interviewed, a senior bank officer, commented that some testators recognize the need to protect their children's beneficial entitlements under trust from those children's creditors, adding that such protection is normally obtained in England by use of discretionary trusts.

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[63] *See* his publications on the subject, listed on his webpage: GIDEON ROTHSCHILD, http://www.mosessinger.com/attorneys/gideon-rothschild.

In Survey Question 12 I asked respondents to estimate what proportion of beneficiaries whose entitlements under trust are protected are in fact less able than the average person to take care of their financial affairs, because they are minors, young adults, financially imprudent, or for other reasons. The distribution of responses received resembles a normal distribution, with the mean response at 47.4% and both the median and mode at 50%. Respondents shied away from extremes: a mere 10% believed that 10% or fewer of protected beneficiaries are incapable, while 9.3% believed 90% or more of protected beneficiaries to be so. 18.6% of respondents chose the 50/50 option. Onshore-based respondents believed more protected beneficiaries to be incapable (on average, 49.6%) than did respondents based offshore (on average, 38.8%). Two U.S. practitioners I interviewed, Gray and Monroe, said spendthrift protections are used for all beneficiaries, capable or not. Estimates of the prevalence of techniques protecting beneficiaries from their creditors were correlated with estimates of the prevalence of clauses reserving powers to the settlor (of which more in sub-part III.D; $r_s = .379$, $p < .001$). The presence of settlor-reserved powers clauses may reflect settlors' expectations that beneficiaries will not be able to monitor their trustees effectively, possibly due to the same deficiencies which necessitate the use of anti-creditor protections. This correlation could also result, however, from the mere presence of both techniques on templates used by some, but not all, trustees.

D. *Settlor Control of Trusts*

Under traditional trust law, once a settlor created a trust and transferred the property which was to be subjected to that trust to its trustee, the settlor no longer had any rights or powers in the trust property or against the trustee, unless the settlor was himself a trustee or beneficiary of the trust.[64] Many of the advantages of using trusts evolved as expressions of this state of affairs. For example, the creditors of a settlor of an irrevocable trust who is not a beneficiary of the same trust cannot usually recoup his or her debts out of the trust property, subject to the law of fraudulent transfers.[65] As is well-known, however, modern trust practice, in a departure from traditional trust law, has developed a large variety of powers sometimes granted to trust settlors, including powers over the trust property, rights and powers against the trustee and other trust service providers, as well as other powers, such as to change the trust's beneficiaries. Different jurisdictions reacted to the growth of settlor-reserved powers in different ways. Some attempt to deny the characteristic advantages of trusts where powers have been reserved to the settlor, as

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[64] *See* LORING, *supra* note 62, at 246.

[65] *See* 3 MARK L. ASCHER, AUSTIN WAKEMAN SCOTT & WILLIAM FRANKLIN FRATCHER, SCOTT AND ASCHER ON TRUSTS § 15.4, text to n.12 (5th ed. 2010).

by holding settlors to whom powers have been reserved to still own, for tax and/or creditor purposes, the property they transferred to the trustee. For example, under the U.S. federal income tax regime, trust settlors to whom certain powers have been reserved owe tax on income earned on trust assets.[66] Other jurisdictions attempt to ensure that even settlors to whom an extensive array of powers has been reserved enjoy the same advantages as their traditionally powerless brethren. Jersey and Guernsey, for example, both hastened to legislatively confirm that the reservation of a wide array of powers to the settlor is legal where the trust is governed by their laws, and does not render the trust void,[67] permitting empowered settlors, so far as the law of Jersey or Guernsey is concerned, to enjoy the same advantages as their powerless brethren.

The latter sort of legislative amendment refocuses attention on an apprehension which has plagued trusts law and practice for Centuries: to what extent are trusts, whether powers are explicitly reserved to the settlor or not, sham arrangements meant to disguise the settlor's ongoing control over the trust assets? I attempted to obtain data pertinent to this issue by way of a series of related questions. In Survey Question 19 I asked respondents what proportion of trusts include settlor-reserved powers clauses, whether powers of revocation or other powers. With the average response at 55.1%, one-half of respondents believed that 60% or more of trusts include such powers. In Question 20 I asked, more specifically, what proportion of trusts include powers of revocation reserved to the settlor or a nonadverse party; under the U.S. federal income tax, the reservation of such a power to anyone except a so-called adverse party (defined as one having a substantial beneficial interest in the trust, which will be adversely affected by the exercise of the power[68]) will result in the settlor being liable to tax on income earned on the trust property.[69] Here the median response was 50%, with the mean at 45.7%. 35.4% of respondents believed that 70% or more of trusts include such powers. Most respondents clearly believe that a substantial fraction of trusts include such powers of revocation as would, in case the trust was subject to the U.S. federal income tax, render the settlor subject to tax on trust income.

Most of the data pointing to the popularity of settlor-reserved powers generally, and powers of revocation specifically, was contributed by U.S.-based respondents. U.S.-based respondents believe, on average, that 68.7% of trusts include settlor-reserved powers of some kind, while 58.5% include powers of revocation reserved to the settlor or a nonadverse party. Half of U.S.-based respondents believe

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[66] *See* I.R.C., §§ 671-679 (2012).

[67] *See* Trusts (Jersey) Law, 1984, § 9A (Jersey); The Trusts (Guernsey) Law, 2007, § 15 (Guernsey).

[68] *See* I.R.C., § 672(a) (2012).

[69] *See* I.R.C., § 676 (2012).

that at least 70% of trusts include powers of revocation reserved to the settlor or a nonadverse party. Non-U.S. respondents, on the other hand, believe, on average, that 39% of trusts include settlor-reserved powers of some kind, while only 29.7% include powers of revocation reserved to the settlor or a nonadverse party. Half of non-U.S. respondents believe that only 30% or fewer of trusts include settlor-reserved powers clauses, and that at most 20% of trusts include powers of revocation reserved to the settlor or a nonadverse party. These results are illustrated in Figures 4 and 5.

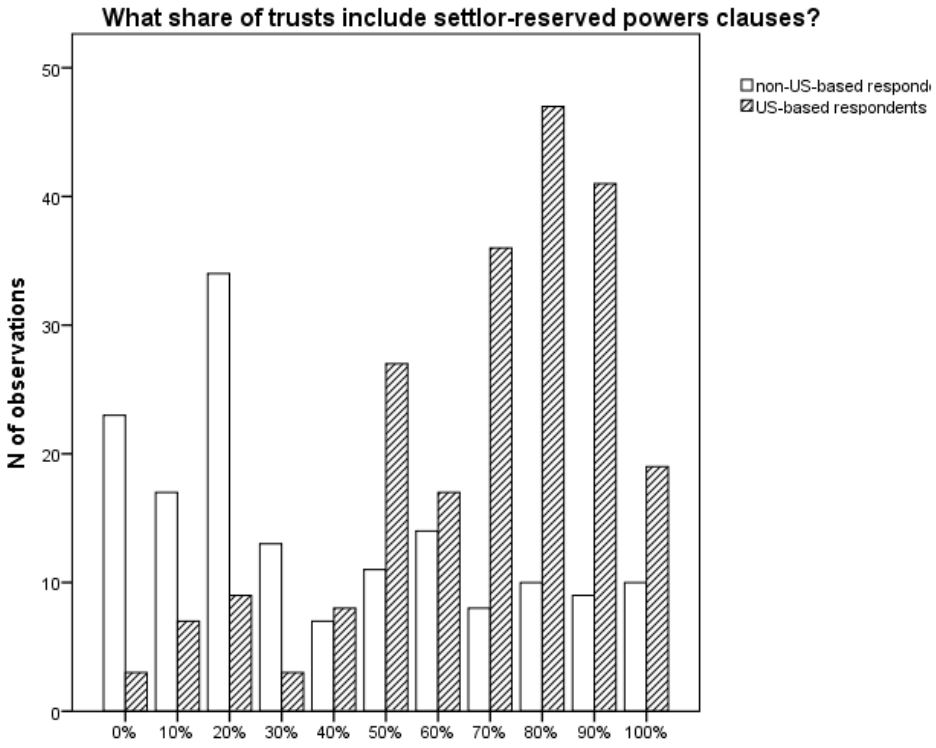

Figure 4. Responses to question 19 by U.S.-based and other respondents

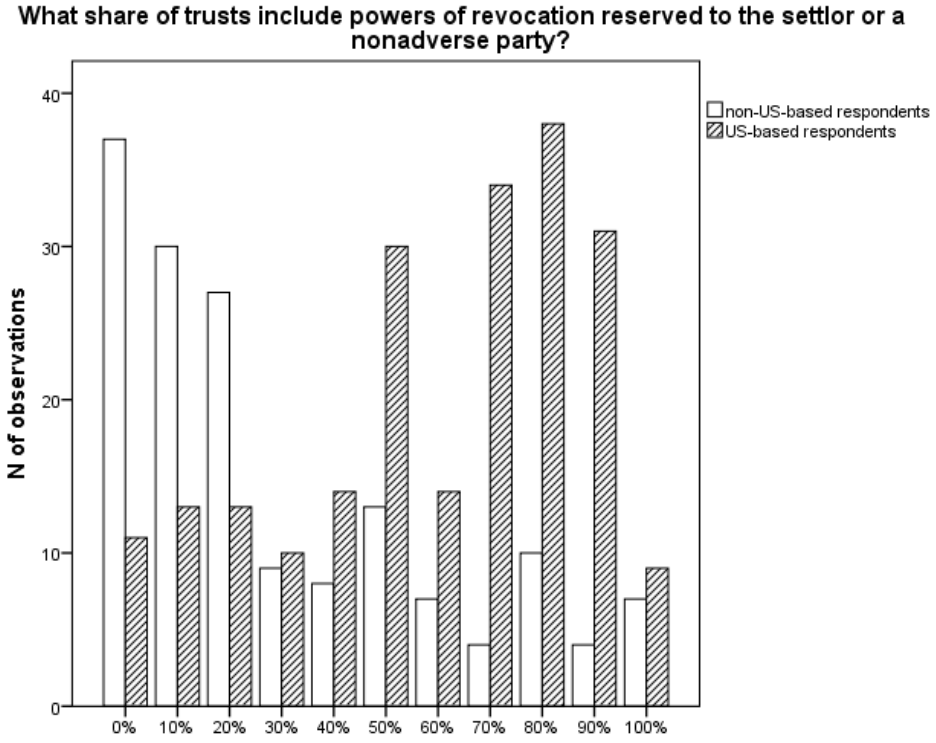

Figure 5. Responses to question 20 by U.S.-based and other respondents

The difference between U.S.-based and other practitioners in their experience of the popularity of settlor-reserved powers was confirmed in interviews I conducted. Four of the six U.S. practitioners I interviewed confirmed that the use of such powers, particularly powers of revocation, is very common. Across the Atlantic, Wilson Cotton, a London-based Attorney, noted that he does not see client enthusiasm for settlor-reserved powers, "largely because most of my clients are domestic U.K. … [that] understand [the traditional trust form, under which settlors do not reserve powers] as a concept". Occupying an intermediate position between the two extremes was Catherine Grum of KPMG, who despite her London location advises an international clientele, much of which is composed of Russian, Middle Eastern and African families. Grum noted that whereas "we used to steer clear of revocable trusts wherever possible … default would be irrevocable", the popularity of revocable trusts had increased: clients tend to prefer them when offered the choice, and banks are happy to oblige since the less independent judgment they are asked, as trustees, to exercise, the less liability will they have for any loss resulting.

The prevalence of settlor-reserved powers in U.S. trust practice is easily explained. Given the uncertainties of the future, powers to revoke a trust, direct a trustee in the exercise of its powers, add or exclude one or more beneficiaries and/or otherwise modify a trust are themselves attractive, whether the settlor is subject to U.S. law or not. For settlors subject to U.S. law, however, reserved powers have several key further advantages. Most reserved powers would result in a trust being classified as a grantor trust for U.S. federal income tax purposes. Income earned on trust assets would then be liable to tax as if it was earned by the settlor directly rather than the trustee, a desirable result given the less compressed tax brackets applied to individual, but not to trustee, income.[70] Settlor-reserved dispositive powers may also defer liability to the federal gift tax, as a gift is only liable to gift tax in the year in which the donor has "so parted with dominion and control as to leave in him no power to change its disposition".[71]

The creditor protection advantages of creating trusts are not, under U.S. law, necessarily removed as a result of the settlor having reserved powers, other than powers of revocation or withdrawal, over the trust. The Uniform Trust Code provides that "[d]uring the lifetime of the settlor, the property of a revocable trust is subject to claims of the settlor's creditors",[72] noting that "the holder of a power of withdrawal is treated in the same manner as the settlor of a revocable trust to the extent of property subject to the power".[73] As for other types of settlor reserved powers, the Uniform Voidable Transactions Act provides that transfers a debtor made are voidable as to a creditor if the debtor made the transfer "with actual intent to hinder, delay or defraud

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[70] *Compare* I.R.C., §§ 1(a) (imposing the top income tax rate of 39.6% on married individuals filing jointly earning more than $466,950 in 2016), 1(b) (imposing the top income tax rate of 39.6% on heads of household earning more than $441,000 in 2016), 1(c) (imposing the top income tax rate of 39.6% on unmarried individuals earning more than $415,050 in 2016), and 1(e) (imposing the top income tax rate of 39.6% on trusts and estates earning more than $12,400 in 2016). Rate tables for 2016 are in Rev. Proc. 2015-53 § 3.01, 2015-44 I.R.B. 617-618. Income earned on assets in settlor-controlled trusts is not subject to the rate schedule in § 1(e): because such trusts are "grantor trusts" for federal income tax purposes, income earned in them is liable to tax as if earned by the settlor directly, and thus subject to the rate schedules in §§ 1(a), 1(b) or 1(c), as applicable. For the grantor trust regime *see* I.R.C. §§ 671-679 (2012). And *see* Mark L. Ascher, *The Grantor Trust Rules Should be Repealed*, 96 IOWA L. REV. 885 (2011).

[71] Treas. Reg. § 25.2511-2(b) (as amended in 1999). To defer liability, settlor-reserved powers have to be substantial: the I.R.S. Office of Chief Counsel has opined that settlor-reserved limited testamentary powers to appoint so much of the trust fund as would still be in the trust at the settlor's death do not prevent the transfers to the trustee from constituting a complete gift of the beneficial term interests, valued at the full value of the transferred property: I.R.S. Chief Counsel Advisory 201208026 (Feb. 24, 2012).

[72] UNIF. TRUST CODE § 505(a)(1) (2010); *see* discussion in Robert T. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 CARDOZO L. REV. 2551, 2566 (2006).

[73] UNIF. TRUST CODE § 505(b)(1) (2010); *see* discussion in Robert T. Danforth, *Article Five of the UTC and the Future of Creditors' Rights in Trusts*, 27 CARDOZO L. REV. 2551, 2566-2568 (2006).

any creditor of the debtor",[74] further providing that "in determining actual intent … consideration may be given, among other factors, to whether … the debtor retained possession or control of the property transferred after the transfer".[75] While a trust settlor's retention of possession or control over the trust property could thus serve to convince a court to hold the transfer of property on trust void, not every power a settlor reserves may amount to control, much less to possession. Should a court decline to hold a transfer on trust voidable, the trust property will be inaccessible to the settlor's creditors despite his or her having reserved powers, other than powers of revocation or withdrawal, over the trust and/or trustee.[76]

Despite the classical default trust paradigm holding settlors to be powerless once their trust has been constituted, the law knows several scenarios where settlor control of trusts and trustees is often seen as legitimate. One such case is where a settlor controls his or her trust by exercising reserved powers he has been granted. Whatever the consequences of such reservation as regards the settlor's liability to tax and other creditors, many legal systems admit that settlor-reserved powers are themselves valid, at least up to a certain quantum of powers reserved. Another permissible scenario is where settlors run their trust by appointing themselves a beneficial interest under it, thus obtaining beneficiaries' powers to control their trustees under general trust law, whether or not augmented in the trust instrument. A third such scenario is where a settlor appoints him or herself trustee of his or her trust. These scenarios contrast with the more problematic situation of a settlor controlling a trust he or she has created, despite his or her lack of formal rights or powers to do so. In order to obtain some sense of the frequency of this latter situation, I asked, in Survey Question 22, what proportion of trusts are in fact run by the settlor or under his or her direction, whether he or she is explicitly given reserved powers or not. On average, respondents believed that 42.2% of trusts are in fact run by their settlors. Half the respondents believed that 35% or fewer of trusts are run by their settlors. I then asked, in Question 23, how many irrevocable trusts, under which the settlor is not a beneficiary, are in fact run by the settlor or under his or her

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[74] UNIF. VOIDABLE TRANSACTIONS ACT, § 4(a)(1) (2014).

[75] UNIF. VOIDABLE TRANSACTIONS ACT, §§ 4(b), 4(b)(2) (2014).

[76]

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

5 MYRON KOVE, GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, BOGERT'S TRUSTS AND TRUSTEES § 233, text to nn.44-48 (rev. 2nd and 3rd ed. 2015).

direction, whether he or she is explicitly given reserved powers or not. Responses to this question were clustered towards the low end of the scale, with a median response of 20%, a mean of 31.1% and a mode of 0%, chosen by 21.6% of respondents.

As with express reserved powers clauses, U.S.-based respondents reported significantly more actual settlor control than other respondents. U.S.-based respondents believe, on average, that 50.3% of trusts are run by their settlor or under his or her direction, whether he or she is explicitly given reserved powers or not, and that 34.1% of irrevocable trusts, under which the settlor is not a beneficiary, are in fact run by the settlor or under his or her direction, whether he or she is explicitly given reserved powers or not. The medians are 50% and 30% respectively. Non-U.S.-based respondents believe that fewer trusts are run by their settlors: they believe, on average, that only 31.4% of all trusts, and only 26.7% of irrevocable trusts under which the settlor is not a beneficiary, are in fact run by the settlor or under his or her direction, whether he or she is explicitly given reserved powers or not. The medians are 20% for both questions. These results are illustrated in Figures 6 and 7.

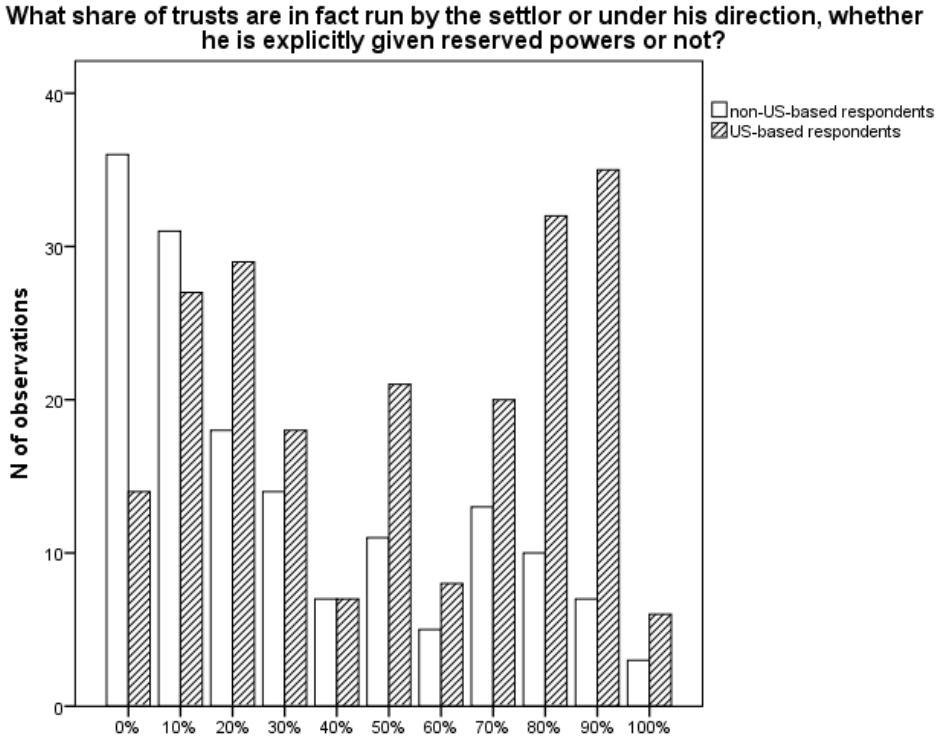

Figure 6. Responses to question 22 by U.S.-based and other respondents

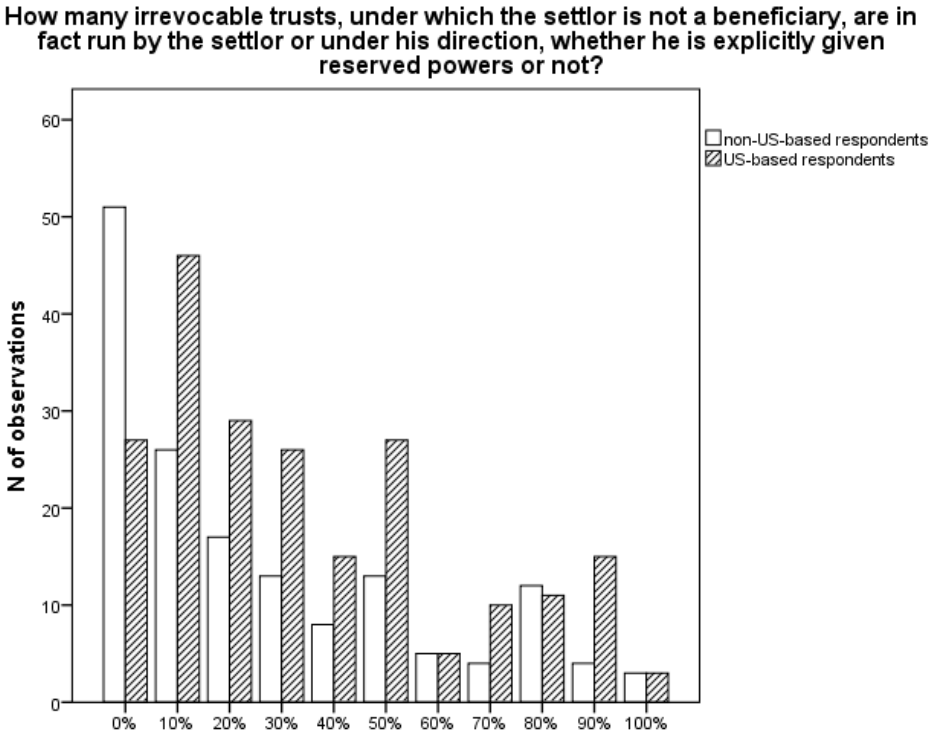

Figure 7. Responses to question 23 by U.S.-based and other respondents

I found that the amount of donative trusts served annually by a respondent's firm is *negatively* correlated with his or her estimate of the proportion of trusts that are in fact run by the settlor or under his or her direction, whether the settlor is explicitly given reserved powers or not, r_s = -.153, p = .004. Service providers working at firms which provide services to larger amounts of donative trusts appear more familiar than other service providers with trusts which are in fact run by the professionals involved. It may be that firms servicing large amounts of donative trusts are the principal repositories of trust management knowhow, with sole practitioners and members of smaller firms deferring to settlors and thus accumulating less experience in the independent management of trusts.

Given the sharp difference between U.S.-based and other respondents which characterizes the results obtained regarding settlor control, I wondered whether the negative correlation between the amount of donative trusts served annually by a respondent's firm and respondents' estimates of the proportion of trusts that are in fact run by the settlor or under his or her direction holds for both respondent groups.

To find out, I conducted regression analysis with respondents' estimate of the proportion of trusts which are in fact run by their settlor or under his or her direction as the dependent variable and the amount of donative trusts served annually by a respondent's firm, a dummy representing respondents' being based in or outside the U.S. and the interaction between these last two variables as independent variables. I found both the amount of donative trusts served annually by a respondent's firm and a respondent's being U.S.-based to have a significant effect on respondents' estimates of the proportion of trusts that are run by their settlors or under their direction, b = -.207, SE = .051, t = 4.03, $p < .001$ and b = .296, SE = .051, t = 5.82, $p < .001$ respectively.[77] The interaction of these two variables did not reach significance, $p > .7$, suggesting that the relation between the amount of donative trusts served annually by a respondent's firm and respondents' estimates of the proportion of trusts that are run by their settlor or under his or her direction is not significantly different among U.S.-based and other respondents.

In sum, responses received show that as regards settlor control of trusts, U.S.-based trust practice is very different from trust practice outside the U.S. Both the express reservation of powers to the settlor and actual settlor control of trusts are much more common in the U.S. than elsewhere. Table 9 reports measures of central tendency for the entire sample, U.S.-based and non-U.S.-based respondents regarding the four questions on settlor control.

Table 9. **Settlor-Reserved Powers and Settlor Control of Trusts**

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

[77] b is the standardized estimate of β. I use Student's t-test to check goodness of fit, i.e. whether my estimate b fits the data better than a simple average.

is not a beneficiary, are in fact run by the settlor or under his or her direction, whether he is explicitly given reserved powers or not?			
Sample overall	31.1	20	28.9
U.S.-Based	34.1	30	28.3
Not U.S.-Based	26.7	20	29.2

Note. Respondents' estimates of the proportion of trusts which include settlor-reserved powers clauses (Question 19); of the proportion of trusts which include powers of revocation reserved to the settlor or a nonadverse party (Question 20); of the proportion of trusts which are in fact run by the settlor or under his or her direction, whether he or she is explicitly given reserved powers or not (Question 22); and of the proportion of irrevocable trusts, under which the settlor is not a beneficiary, which are in fact run by the settlor or under his or her direction, whether he or she is explicitly given reserved powers or not (Question 23). For each question, means, medians and standard deviations are reported separately for the entire sample, for the subsample of respondents who reported being based in the U.S. and for the subsample of respondents who reported being based outside the U.S. All data are percentages.

IV. POLICY IMPLICATIONS

The global proliferation of trust regimes and trust service providers has produced much apprehensive normative commentary, but little concrete data regarding the consequences of the far-reaching reforms dozens of jurisdictions have made to their trust regimes, or of the growth of trust practice in dozens of previously trust-free jurisdictions. This article reported and analyzed the results of the first global survey of professional service providers to donative trusts and of a series of interviews with such providers. I found the law of Delaware to be the most popular legal system governing trusts, with that of England in second place and the rest of the top ten nearly exclusively populated with trust regimes offered by various offshore jurisdictions.

My results show that the increased availability of *Perpetual and Extreme-Long-Term Trusts* consequent on many jurisdictions' full or near-abolition of their rules against perpetuities has made such trusts fairly common, though they remain, in onshore practice, a minority of trusts serviced. Offshore-resident providers operate in an environment where the use of such trusts is more common than onshore. The more familiar is a provider with their use, the higher his or her estimate of the proportion of such trusts which, contrary to their terms, are not in practice likely to last more than a century, because they are likely to be emptied during their first 100 years of existence. Some practitioners commented that it is the flexibility of perpetual trusts regarding duration – perpetual in principle, but capable of being terminated at any time – that accounts for their popularity. These results are reconcilable with Hines' finding that a U.S. state having abolished its rule against

perpetuities by 2010 was not correlated with a larger amount of federal fiduciary income tax returns filed in 2010 by trusts resident in that state, or with a larger aggregate gross income reported by those trusts in that year.[78] Hines used I.R.S. data on the amount of reporting trusts per state and the income they reported. His results are reconcilable with mine since trusts may be governed by the law of one jurisdiction while resident in another, in which case data on the amount of trusts resident in the latter will not convey information regarding the amount of trusts governed by its law. Further, even if the amount of trusts governed by the law of a given jurisdiction has not increased following its repeal of the rule against perpetuities, a proportion of trusts governed by its law may be drafted as perpetual, as my results suggest.

My results bear on the debate concerning the appropriate legal policy to be employed given the burgeoning use of perpetual and extreme-long-term trusts. I provide evidence for a suggestion Sitkoff and Schanzenbach made a decade ago, that many apparently perpetual trusts are not in fact likely to survive in perpetuity.[79] The existence of mechanisms for early termination of trusts drafted as extreme long term, including beneficiaries' powers to appoint the trust property outright or modify the trust duration, removes the key normative objection to such trusts, the fear that value settled into them will be irrevocably dedicated to inefficient uses: even uses which appeared efficient when a trust was created may become far less so a century or more later.[80] Given this normative objection, state legislatures may wish to make the validity of extreme long term trusts conditional on the availability of mechanisms for early termination. As for the tax minimization potential of perpetual and extreme-long-term trusts and their prolonging the duration of any harmful features they contain, these should preferably be tackled by directly reforming the tax planning

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[78] *See* Hines, *supra* note 7.

[79] *See* Sitkoff & Schanzenbach, *Jurisdictional*, *supra* note 7, at 413-414.

[80] Additional such mechanisms are available, such as the courts' powers to modify or terminate trusts, or direct trustees to deviate from provisions in their trust instruments: *see* RESTATEMENT (THIRD) OF TRUSTS § 66 (2007) (the "equitable deviation" doctrine, allowing a court to "modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust") and cmt. b (providing that "[i]f appropriate to the circumstances prompting the court action, and to the purposes and other circumstances of the trust, the court may so modify the terms of the trust as to require prompt termination"); UNIF. TRUST CODE § 412(a) (2010), enacted versions thereof were applied in In Re Moeder, 978 N.E.2d 754 (Ind. App. 2012); In Re Chapman, 953 N.E.2d 573 (Ind. App. 2011); In Re Nobbe, 831 N.E.2d 835 (Ind. App. 2005); In Re Fee Trust, No. 92,928, 2005 Kan. Unpub. LEXIS 72 (Kan. Apr. 22, 2005). Modification mechanisms requiring court involvement are less efficient than mechanisms exercisable by the beneficiaries alone.

opportunities[81] or harmful trust drafting opportunities in question[82] rather than curtailed indirectly by re-imposing a durational ceiling on trusts.[83]

Data obtained show *Trustee Exculpatory Terms*, with settlors neither demanding nor usually receiving any quid-pro-quo for their inclusion, to be a conventional standard in donative trusts serviced by professionals. This state of affairs may be explained by exculpatory trust terms being hidden, in classic boilerplate fashion, deep inside protracted trust deeds, away from trust users' – settlors' and beneficiaries' – view. The ubiquity of such terms may render even users who are aware of a term's existence slow to realize that it is not an inevitable part of every trust. Even those clients who are aware of the existence of the term, understand its consequences and realize that it is at least potentially subject to modification may be prone to accept, rather than challenge, it: trustee exculpatory terms may have become a common baseline from which it is expensive to deviate. Further, cognitive limitations, such as the tendency "to equate "low probability" risks with "zero probability" risks"[84] may prevent even such informed clients from concluding that the term's potential consequences may justify active negotiation over its curtailment, removal or the receipt of some quid-pro-quo.[85] Clients insisting on the removal or modification of trustee exculpatory terms may also find professional trustees reluctant to serve them, arguing, as Ian Bond put it, that "if you want me as a professional to advise you, if you want to attract the high level caliber of professional trustees, you have to give them an element of protection, an element of security".

One conclusion flowing from this result is that legislative reform making the validity of an exculpatory term "drafted or caused to be drafted by the trustee"

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[81] The multi-generational exemption from federal transfer taxation consequent on the creation of an extreme long term trust (for which *see* Sitkoff & Schanzenbach, *Jurisdictional*, *supra* note 7, at 370-73) could be curtailed, for example, by making the exemption from generation skipping transfer tax inapplicable to transfers in trust. The Staff of the Joint Committee on Taxation proposed, as long ago as 2005, "closing the perpetuities loophole in the GST tax by prohibiting the allocation of the transfer-tax exemption to a trust for the benefit of a generation more remote than the transferor's grandchildren": *see* STAFF OF J. COMM. ON TAXATION, 109TH CONG., OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 393 (Comm. Print 2005), *available at* http://www.house.gov/jct/s-2-o5.pdf; and *see* discussion in Sitkoff & Schanzenbach, *Jurisdictional*, *supra* note 7, at 419.

[82] *See* my recommendations for reform of spendthrift trust law, at text to *infra* note 94.

[83] For a proposal that a modernized rule against perpetuities be re-imposed, *see* Lawrence W. Waggoner, *The American Law Institute Proposes a New Approach to Perpetuities: Limiting the Dead Hand to Two Younger Generations* (Univ. Mich. Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 200, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1614936.

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

[85] For these limitations, *see, e.g.*, Russell B. Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203 (2003); OREN BAR-GILL, SEDUCTION BY CONTRACT (2012); BEN-SHAHAR & SCHNEIDER, *supra* note 50, at 59-78.

conditional on the term being disclosed to the settlor[86] has not checked the popularity of such terms. Given recent scholarship on the ineffectiveness of disclosure,[87] both the Uniform Trust Code's disclosure requirement and Leslie's stronger recommendation that for exculpatory terms to be enforced, trustees would have "to prove that [the] settlor expressly agreed to the clause"[88] appear unlikely to ensure that settlors understand the consequences of trustee exculpatory terms. Given human cognitive limitations, many settlors are likely, having heard or read an explanation of the exculpatory term along with a statement that the term was part of the trustee's standard conditions, to expressly agree to the term without having cognitively processed its potential implications. Jurisdictions wishing to recalibrate their trust services markets based on a threshold of trustee liability higher than bad faith can take one of the two following courses of action; both are likely to be more effective than the current reliance on client consent following disclosure. One is legislation setting a mandatory minimal liability standard for trustees and stating that drafted attempts to provide lower liability thresholds shall be void. The other, which may be more practical given the great influence trust practitioners wield over many legislatures,[89] is courts using their equitable powers to protect beneficiaries by disregarding exculpatory terms or construing them so as to protect beneficiaries' interests. Courts often use their equitable powers to protect vulnerable parties to private law relationships by either disregarding those aspects of the relationship which exploit vulnerabilities or permit their exploitation, or interpreting them in a far

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[86] *See* UNIF. TRUST CODE § 1008(b) (2010).
[87] *See* BEN-SHAHAR & SCHNEIDER, *supra* note 50.
[88] *See* Leslie, *supra* note 52, at 109.
[89] For this influence, *see* Sitkoff & Schanzenbach, *Jurisdictional*, *supra* note 7, at 417-18.

from literal manner so as curtail their exploitative potential.[90] It was such action by courts of equity that created the law of trusts.[91]

The results show *Anti-Creditor Techniques Protecting Beneficiaries' Entitlements* to be even more ubiquitous than trustee exculpatory terms, and particularly so in trusts serviced by U.S.-resident providers. When I inquired whether beneficiaries of such techniques are in fact less able than the average person to take care of their financial affairs, responses resembled a normal distribution. Such a distribution is typical of random data. It can be evidence for two states of affairs. One is that the profile of protected beneficiaries varies, with some such beneficiaries truly incapable or imprudent while others are perfectly capable adults making calculated use of available protections under the law of trusts. Alternatively, service providers may not know whether protected beneficiaries are capable of self-protection, their responses expressing guesswork rather than any informed belief. Service providers may well be ignorant of beneficiaries' capacities (or lack thereof), having been in touch with the settlor rather than the beneficiaries. Respondents' possible ignorance concerning beneficiaries' capacities may also derive from beneficiaries having not yet been selected; modern trusts often refrain from naming their beneficiaries, granting some party a power to select them, which may remain unexercised for a long time. The two states of affairs may also co-exist: service providers could be informed about the capacities of some beneficiaries while guessing about those of others. Whichever state of affairs obtains, the data received casts a substantial doubt on a traditional justification for protective techniques, the portrayal of the typical protected beneficiary as incapable of self-protection: given my results, it is hardly likely that all, or a large majority of protected beneficiaries are incapable. Was this

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[90] For a good, recent example in a trusts context, *see* the decision of the Supreme Court of Bermuda in the case published, the parties' names having been redacted, under the title In the Matter of an Application for Information about a Trust, (2013) SC (Bda) 16 Civ, 16 International Trust and Estate Law Reports 85. The trust deed under consideration in that case provided that no "person", including the beneficiaries, shall be provided with either accounts or any information concerning the trust absent the consent of the trust protector. As the trust protector was also the principal beneficiary of the trust, his brother, another beneficiary, whose interest under the trust was directly adverse to that of the protector and with whom the protector/beneficiary was on very bad terms, petitioned the court for an order directing the trustees to disclose financial information about the Trust assets. The court granted the order, reasoning that since the protector had only supplied petitioner with a copy of the trust deed once proceedings have been filed, the information control mechanism in the trust instrument was not being used as a means for supervising trustees' administration of the trust for the benefit of *all* the beneficiaries, and therefore the court's intervention was necessary to guarantee minimum standards of trustee accountability (*id.*, [38], [43]). The judgment was upheld by the Court of Appeal for Bermuda: In the Matter of an Application for Information about a Trust, (2013) CA (Bda) 8 Civ.

[91] For the early history of trust enforcement by courts of equity *see* S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 200-239 (2nd ed. 1981); N.G. Jones, *The Use upon a Use in Equity Revisited*, 33 CAMBRIAN L. REV. 67 (2002).

the case, respondents' estimates of the proportion of protected beneficiaries who are incapable would not have varied so dramatically. It thus appears that the extent of beneficiary protection available under the law of most U.S. states[92] exceeds the extent truly justifiable under the improvident or incapable beneficiary rationale. The other rationale traditionally mentioned as a justification for spendthrift protection, settlors' right to mold their gifts as they wish, cannot justify the redistribution of value effected by the common use of protective strategies, from unprotected to protected debtors.[93] Property rights do not entail the power to inflict harm on others in contexts unrelated to the protection of the rightholder's entitlement.

As a matter of legal policy, given that the protection of vulnerable persons is the only valid basis for the law's recognition and enforcement of strategies protecting beneficial entitlements under trust from beneficiaries' creditors, it appears, considering my findings, that the law should cease recognizing and enforcing these strategies. Their beneficiaries include a large number of non-vulnerable persons, while the basic livelihoods of truly incapable persons can and should be protected by way of such more precisely tailored legal techniques as guardianship, conservatorship and the available exemptions under the law of bankruptcy, which do not provide unlimited protection to perfectly capable people.[94] To the extent that law reform abolishing the techniques protecting beneficiaries' entitlements under trust from their creditors appears unlikely, courts should use their equitable powers to deny such protection where unmerited. While courts have often used their equitable powers to protect beneficiaries, where beneficiaries enjoy unjustified protection courts can and should use the same powers to restrict or deny it. Equity should not be made a tool of debt avoidance.

Finally, U.S. trust practice appears to differ from trust practice everywhere else regarding *Settlor Control of Trusts*. Data collected show the express reservation of powers to trust settlors to be a majority phenomenon in the U.S., but a minority one elsewhere. The actual control of trusts by their settlors, whether in the exercise of settlor-reserved powers or otherwise, is likewise far more common in the U.S. than elsewhere. U.S. trust practice appears to have abandoned the traditional expectation that settlors be powerless once a trust has been constituted, adopting instead an alternative vision of inter vivos trusts under which most settlors hold

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[92] For that extent, *see* RESTATEMENT (THIRD) OF TRUSTS §§ 57-60 reporter's notes (2001); but note that the rule in § 58(2), holding self-settled spendthrift trusts invalid, is no longer the law in 16 states: *see* ACTEC COMPARISON OF THE DOMESTIC ASSET PROTECTION TRUST STATUTES, *supra* note 62.

[93] I assume lenders to protected persons are able to deflect the cost of protection by raising the cost of credit, the raise affecting both protected and unprotected borrowers.

[94] For the protection of protected persons' property, *see* UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT §§ 401-433 (1997); UNIF. PROBATE CODE §§ 5-401–5-433. For exemptions in bankruptcy *see* 11 U.S.C. § 522 (2012).

powers to intervene in, or revoke, trusts they have created, and about half of all settlors in fact control their trusts, directly or indirectly. Even absent the actual exercise of powers settlors reserve, trustees of revocable trusts conduct the trusteeship for the benefit of the settlor exclusively, disregarding the interests of any other beneficiaries. Most professional trust service providers outside the U.S., contrastingly, describe a reality where the traditional trust model, leaving settlors powerless once a trust has been launched, remains a majority phenomenon, notwithstanding the appearance of offshore trust regimes, such as those of Jersey and Guernsey, which explicitly permit the reservation of a wide array of powers to the settlor without the trust being thereby invalidated. A minority of trusts do appear to be run by their settlors even outside the U.S.

Federal tax law responds favorably to settlor control of trusts. In the income tax context, the classification of settlor-controlled trusts as grantor trusts means such trusts are not subject to the compressed tax bracket schedule applicable to income earned on assets in so-called "complex trusts", which are not settlor-controlled.[95] Settlor control of trusts may also result in gift tax deferral.[96] The federal tax advantages of settlor-controlled trusts may be the key reason for their U.S. ascendancy. Federal tax law effectively penalizes trusts run on the traditional model, by their trustees for the benefit of all their beneficiaries, with settlors sidelined once the trust is up and running. Given, however, modern trustees' power to deal with the trust property as if they were its absolute owners, trust creation on the traditional model, involving settlor disengagement, does not lead to the inefficient use of property, and should not, as a matter of policy, be discouraged. The income tax bracket schedule applicable to "complex trusts" should therefore be decompressed.

Much like techniques protecting beneficiaries' entitlements, settlors' ability to simultaneously reserve powers over their trust, other than powers of revocation or withdrawal, and enjoy the inaccessibility of trust property to their creditors, transfers value from less privileged to privileged debtors (here, trust settlors who reserved powers).[97] Because this value transfer is unjustified, the uncertain remedy provided by voidable transaction law, under which a debtor having retained possession or control over property he or she has transferred is inconclusive evidence for the debtor having made the transfer with actual intent to hinder, delay or defraud, a finding which, if made, renders the transfer voidable,[98] provides insufficient protection for creditors' interests. This protection should be strengthened by reforming the law of trusts to include a rule holding the property in trusts subject to settled-reserved

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[95] *See* discussion at text to *supra* note 70.

[96] *See* discussion at text to *supra* note 71.

[97] I again assume lenders to privileged persons to be able to deflect the cost of privilege by raising the cost of credit, affecting both privileged and unprivileged borrowers.

[98] See *supra* notes 74-75 and text thereto.

powers, above a low threshold of powers reserved, to be subject to claims of those settlors' creditors.

CONCLUSION

This Article presented and analyzed the findings of the first global survey of service providers to donative trusts. Survey responses by 409 service providers from 82 jurisdictions, the largest, most diverse respondent group ever obtained in survey research targeting trust service providers, along with a series of interviews with trust service providers in the U.S. and U.K., enabled me to provide answers to empirical questions that have long vexed research on donative trusts.

I found that trusts likely, according to the trust instrument, to subsist for more than a century are fairly common, especially offshore; however, the more prevalent a practitioner estimates such trusts to be, the more he or she believes them not to be in practice likely to outlast a century. To alleviate the fear that value settled into extreme long term trusts will be irrevocably dedicated to inefficient uses, I suggest that legislatures make the validity of extreme long term trusts conditional on the availability of mechanisms for early modification and termination.

Trustee exculpatory terms are now standard in donative trusts serviced by professionals, with most settlors neither demanding nor receiving any quid-pro-quo for their inclusion. Statutorily-mandated disclosure of such terms to service providers' clients appears unlikely to ensure that those clients understand the terms' consequences. If jurisdictions wish to recalibrate their trust services markets based on a threshold of trustee liability higher than bad faith, they should enact legislation setting a mandatory minimal liability standard for trustees and stating that drafted attempts to provide liability thresholds lower than that standard shall be void. Alternatively, courts should use their equitable powers to protect beneficiaries by disregarding exculpatory terms or construing them so as to protect beneficiaries' interests.

Anti-creditor techniques protecting beneficiaries' entitlements are even more ubiquitous than trustee exculpatory terms, particularly so in trusts serviced by U.S.-resident providers. Because many protected beneficiaries are not in fact any less able than the average person to take care of their financial affairs, the extent of protection available under the law of many U.S. jurisdictions is excessive. I conclude that the law should cease recognizing and enforcing these techniques. Alternatively, courts should use their equitable powers to deny such protection where unmerited.

Finally, my results show the express reservation of powers to trust settlors to be a majority phenomenon in the U.S., but a minority one elsewhere. The actual control of trusts by their settlors, whether in the exercise of settlor-reserved powers or otherwise, is likewise far more common in the U.S. than elsewhere. I suggest that

the preferential treatment of settlor-controlled trusts under federal income tax law is unmerited, and that in order to encourage trust settlors to reserve fewer powers, the income tax bracket schedule applicable to complex trusts should be decompressed. The protection of lenders to settlors should be strengthened by making trust property subject to settlor-reserved powers, above a low threshold of powers reserved, available to settlors' creditors.

APPENDIX A – SURVEY QUESTIONNAIRE

Please respond to the following questions, making exclusive reference to donative trusts. All other trusts, such as those used in commercial transactions, debenture/indenture trusts, mutual funds structured as trusts and voting trusts are outside the ambit of this survey unless otherwise indicated regarding a specific question.

1. Of the trusts you service, how many are created in a contract (rather than by an instrument other than a contract, such as a unilateral declaration)? Estimate using percentages.
("Trust services" meaning any of the following: trust drafting; functioning as trustee; functioning as protector; functioning as trust enforcer; functioning as custodian of trust assets; functioning as another type of trust officer; functioning as trustee delegate, such as an investment manager; advising settlors, trustees, protectors, trustee delegates or beneficiaries on trust affairs)

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

2. Of the trusts you service, how many include clauses replacing default features of the trust regime (or law) governing the relationship with alternative arrangements? Estimate using percentages. ("Trust services" meaning as above)

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

3. Of the trusts you service which have been created in a contract, how many include clauses replacing default features of the trust regime (or law) governing the relationship with alternative arrangements? Estimate using percentages. ("Trust services" meaning as above)

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

4. Of the trusts you service which have NOT been created in a contract, how many include clauses replacing default features of the trust regime (or law) governing the relationship with alternative arrangements? Estimate using percentages. ("Trust services" meaning as above)

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

5. What proportion of trust beneficiaries attribute significance to the intent or motivation with which you fulfill your duties as trustee, requiring that you intend to benefit them, and will NOT be satisfied with your fulfilling your duties, distributing income and capital correctly and obtaining satisfactory investment results, so long as you did not do so with an intent or out of a motive of benefitting them? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

6. How often do settlors create trusts subject to a governing law other than that of the settlor's or beneficiaries' jurisdictions of residence? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

7. Name the five legal systems most commonly used to govern trusts. For each of them, give reasons for their popularity.

1.

2.

3.

4.

5.

8. What share of trusts are supposed, according to the trust instrument, to last more than 100 years? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

9. What share of trusts are supposed, according to the trust instrument, to last in perpetuity? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

10. Of those trusts which, according to the trust instrument, are perpetual or very long-term, how many are in practice unlikely to last longer than 100 years, because (for example) the settlor did not in fact intend them to last longer, or beneficiaries have powers of appointment over the trust property and are likely to use them and empty the trust before it turns 100? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

11. What share of trusts include techniques protecting beneficiaries' entitlements from their creditors, such as spendthrift clauses, asset protection clauses or protective (forfeiture) trusts? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

12. What share of beneficiaries whose entitlements under trust are so protected are less able than the average person to take care of their financial affairs, because they are minors, young adults, financially imprudent, or for other reasons? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

13. What share of trusts include clauses negating beneficiaries' traditional rights to receive information about the trust and its administration? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

14. When these rights are negated, why is this done? Check all that apply.

- those beneficiaries whose rights to receive information are negated are not in fact intended to receive any benefit
- the settlor wants beneficiaries to be ignorant of their status as such, fearing that such knowledge could adversely impact their motivation to obtain education, obtain and retain a job and succeed
- the settlor wants beneficiaries not to interfere with trust administration
- the trustee wants beneficiaries not to interfere with trust administration
- the trustee gave the settlor a fee reduction as quid-pro-quo for the removal of beneficiaries' rights to receive information, resulting in less troublesome trust administration
- any such rights given beneficiaries may be used by them, their creditors or others to obtain or fish for information which they will use to attack the trust
- Other:

15. What share of trusts include clauses negating beneficiaries' power to enforce the trust? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

16. When this power is negated, why is this done? Check all that apply.

- those beneficiaries whose rights to enforce the trust are denied are not in fact intended to receive any benefit
- the settlor wants beneficiaries not to interfere with trust administration
- the trustee wants beneficiaries not to interfere with trust administration
- the trustee gave the settlor a fee reduction as quid-pro-quo for the removal of beneficiaries' rights to enforce the trust, resulting in less troublesome trust administration
- any such rights given beneficiaries may be used by them, their creditors or others to attack or disrupt the trust
- Other:

17. What share of trusts include a forum choice clause (a clause expressly subjecting the trust to the jurisdiction of a specific court or court system)? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

18. Why are forum choice clauses included? Check all the reasons for their inclusion that you are aware of.

- preventing disagreement regarding forum
- jurisdiction chosen has trust experts on bench
- other pertinent jurisdiction does not recognize relevant type of trust
- other pertinent jurisdiction lacks trust expertise on bench
- other pertinent jurisdiction unlikely to respect trust due to adverse domestic rules of law
- other pertinent jurisdiction likely to pass sensitive information to adverse authorities and/or parties, locally or in third jurisdiction
- courts of other pertinent jurisdiction likely to be biased against settlor and/or beneficiaries
- jurisdiction chosen has short limitation periods on "trust busting" actions
- jurisdiction chosen otherwise restricts "trust busting" actions
- jurisdiction chosen unlikely to recognize foreign rules of law adverse to trust
- jurisdiction chosen unlikely to recognize foreign court orders adverse to trust
- potential or actual political transformation, adverse tax and/or other regulatory reform, war and/or unrest in other pertinent jurisdiction
- Other:

19. What share of trusts include settlor-reserved powers clauses (whether powers of revocation or other powers)? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

20. What share of trusts include powers of revocation reserved to the settlor or a nonadverse party? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

21. What share of trusts which on their face are intended to benefit others are in fact intended to benefit the (formal or substantial) settlor? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

22. What share of trusts are in fact run by the settlor or under his direction, whether he is explicitly given reserved powers or not? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

23. How many irrevocable trusts, under which the settlor is not a beneficiary, are in fact run by the settlor or under his direction, whether he is explicitly given reserved powers or not? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

24. How many trusts include a "flee clause"? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

25. More generally, how many trusts include an "event of duress" mechanism? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

26. What share of trusts include a decanting power? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

27. What share of trusts include a trustee exemption/exculpation clause of any kind? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

28. What share of settlors of trusts including trustee exemption/exculpation clauses demand and receive some quid-pro-quo for the inclusion of such clauses, such as a fee reduction? Estimate using percentages.

0%	10%	20%	30%	40%	50%	60%	70%	80%	90%	100%

29. How many donative trusts do you, personally, service in a typical year? ("Trust services" meaning as above)

- 1-10
- 10-100
- 100-200
- 200-500
- >500

30. If you work at a firm, how many donative trusts does your firm service in a typical year? ("Trust services" meaning as above)

- 1-10
- 10-100
- 100-200
- 200-500
- 500-1000
- 1000-2000
- 2000-5000
- >5000

31. How much is your typical donative trust client worth, in US Dollars? Refer to the client's overall worth, in and out of trust, so far as known – not to that of any, or each, trust.

- 500,000$-1M$
- 1M$-2M$
- 2M$-5M$
- 5M$-10M$
- 10M$-20M$
- 20M$-50M$
- 50M$-100M$
- 100M$-200M$
- 200M$-500M$
- 500M$-1BN$
- 1BN$-2BN$
- 2BN$-5BN$
- >5BN$

32. If your donative trust clients fall into different groups in terms of overall worth, describe how they are distributed (for example, "50% are worth $1M-2M, 25% are worth $2M-5M, and 25% are worth $5M-10M").

33. How much is your typical donative trust client's entire family worth, in US Dollars? Again, refer to their overall worth, in and out of any trusts.

- 500,000$-1M$
- 1M$-2M$
- 2M$-5M$
- 5M$-10M$
- 10M$-20M$
- 20M$-50M$
- 50M$-100M$
- 100M$-200M$
- 200M$-500M$
- 500M$-1BN$
- 1BN$-2BN$
- 2BN$-5BN$
- >5BN$

34. If your donative trust clients' families fall into different groups in terms of overall worth, describe how they are distributed.

35. Are you based at an "onshore" or "offshore" jurisdiction?

36. What jurisdiction are you based in?

APPENDIX B – LIST OF INTERVIEWS

U.S.

Eric P. Hayes, Counsel, Goodwin Procter, Boston, MA, October 1, 2015
Nicholas S. Gray, Partner, Rubin & Rudman, Boston, MA, October 2, 2015
Gideon Rothschild, Partner & Chair of Trusts & Estates and Asset Protection, Moses & Singer, New York City, NY, October 3, 2015
Steven M. Fast, Partner, Day Pitney, West Hartford, CT, October 5, 2015
Suzanne Walsh, Partner, Murtha Cullina, Hartford, CT, October 7, 2015
Thomas Monroe, Trust Counsel, Loring, Walcott & Coolidge Trust, Boston, MA, October 8, 2015

U.K.

Catherine Grum, Head of Family Office, KPMG, London, January 13, 2016
Ian Bond, Partner, Higgs & Sons, Brierley Hill, West Midlands, January 13, 2016
Senior Bank Officer, London, January 14, 2016 [interviewee asked to remain anonymous]
Simon Rylatt, Partner & Head of Private Client & Tax, Boodle Hatfield, London, January 15, 2016.
Wilson Cotton, Partner, Smith & Williamson, London, January 15, 2016.

APPENDIX C – CLASSIFICATION OF JURISDICTIONS: ONSHORE, OFFSHORE AND MIDSHORE

ONSHORE

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

OFFSHORE

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

MIDSHORE

New Zealand, New Hampshire

Note. I classify jurisdictions as onshore, offshore or midshore for trust law purposes. I define an onshore jurisdiction as one where (i) a large part of trust services supplied in the jurisdiction are consumed by local residents, and (ii) if there is a local trust regime, recent trust law reforms abolishing traditional restrictions on the freedom of trust users to design their trusts as they like have been relatively few, restrained and belated. I define an offshore jurisdiction as one where (i) most, and sometimes all, trust services supplied in the jurisdiction are consumed by non-residents, and (ii) the local trust regime, if there is one, has been recently reformed so as to create or maintain its attraction for foreign users. I define a midshore jurisdiction as one where a significant quantity of trust services is locally supplied for consumption by local residents, simultaneously with the provision of such services to non-residents on the offshore pattern.

Classification raised difficulties requiring the application of context-sensitive judgment. Three examples will illustrate the type of difficulties encountered. While

New York trustees provide services to many trust users resident outside New York, I classified New York as onshore due to the conservative nature of its trust law. While Virginia has recently made considerable reforms to its trust law, including the enactment of a self-settled spendthrift trust regime, I classified it as onshore due to its large resident population of trust users. I classified New Hampshire as both on- and offshore since while local trust service providers provide trust services to a considerable number of resident trust users, the state has in recent years repeatedly reformed its trust law so as to appeal to out-of-state users and service providers.

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