Give the People What They Want? The Onshoring of the Offshore

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I. INTRODUCTION

My lecture today is about the limits of freedom of choice in trust law. Trusts are magnificently flexible, and this has been one of the strengths of the trust institution since its origin in the middle ages. But trusts are not infinitely flexible. A trust has a certain logic to it, and there are aspects of this logic that are not susceptible to freedom of choice, except perhaps in a particular form which I will illustrate with a story.

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I once found myself travelling on an aircraft at the time when the flight attendants were serving a meal. They start at the front and work their way back. I could hear them, as they approached, asking other passengers, over and over: "Would you like chicken or vegetarian?" But sometimes they run out of one thing or another. When they arrived at my row, the attendant offered a meal to my neighbor, and said, "Sir, the meal is a vegetarian pasta dish." The passenger replied, "Isn't there a choice?" The flight attendant—who, I can only assume, was having a bad day—paused, and said very deliberately: "Yes sir, there is a choice. You can take it, or you can leave it."

No one has to choose a trust. But there are some things that people want to do with trusts that may attract the same answer as that given by the flight attendant. There are some things that you cannot do with a trust, and if you want to do them, you will have to find some other way. Although trusts are flexible, this is only up to a point.[1]

In recent decades, the offshore jurisdictions of the world have made a business of responding to what people want. They have done this through low rates of taxation, but also through the provision of legal institutions that do not exist in other places.[2] And now some of these institutions are appearing onshore, in places like Alaska and Delaware.[3] My lecture sounds a cautionary note in relation to these developments. I believe as much as anyone in freedom of choice. But I also believe that the rules of private law reflect important truths about interpersonal justice. We are responsible for our actions, and the law reflects this. The law *should* reflect this. When the law does not reflect this, we need to ask why. It is the exception, not the norm. Every normative order contains exceptions, but by their nature, exceptions are exceptional. They need to be justified.

II. THE IRREDUCIBLE CORE OF THE TRUST

The trust is so flexible, as a legal institution, that Professor John Langbein, in a 1995 article, famously compared it to a contract.[4] But in later writing, he explored the limits of the trust's flexibility and what might be called the mandatory part of trust law.[5] In the Commonwealth this is often called, after a famous article by David Hayton, "the irreducible core" of the

1. EVELYN WAUGH, SCOOP ch. 3 (1938).

2. Some examples will be given in Section III.

3. Some examples will be given in Section IV.C.

4. *See generally* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995).

5. *See generally* John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U.L. REV. 1105 (2004) [hereinafter Langbein, *Mandatory Rules*]; John H. Langbein, *Burn the Rembrandt? Trust Law's Limits on the Settlor's Power to Direct Investments*, 90 B.U. L. REV. 375 (2010) [hereinafter Langbein, *Rembrandt*].

trust.[6] The idea of the irreducible core is that if you do not have it, you don't have a trust any more. You have chosen not to take it, but to leave it. The late Justice Scalia once said, in a concurring opinion, "A trust without a res can no more be created by legislative decree than can a pink rock-candy mountain."[7] A trust must have trust property; that is part of the irreducible core.

There is a lot of debate about what exactly belongs to the irreducible core. Professor Langbein takes the view that a trust must benefit the beneficiaries, or it is not a trust.[8] That widely held view seems sensible. The core of the common law trust is the obligation owed by the trustees to the beneficiaries concerning the benefit of the trust property. It follows from this that the trust must benefit the beneficiaries. The irreducible core is one example showing that although the trust is flexible, it is not infinitely malleable. Langbein invokes these principles to explain why U.S. courts have frequently modified trust terms that restricted trust investments, often restricting them to holding shares in a corporation that was the settlor's creation.[9] Having all your eggs in one basket is very risky, and that does not benefit the beneficiaries. The same is true when a settlor tries to restrict beneficiaries' rights to information.[10] If the beneficiaries did not have that right, the trustees' obligations to the beneficiaries would be illusory. In these settings at least, benefiting the beneficiaries is more important than respecting the settlor's wishes, and when those things collide, the settlor's wishes have to yield.

This is a very important feature of the trust and helps us to think about the traditional rule that there is no such thing as a non-charitable purpose trust.[11] A trust for purposes has no beneficiaries in the normal trust law sense. People may benefit of course; this can be illustrated by thinking about charitable trusts, which are purpose trusts. Consider a charitable trust for the promotion of education. People may get benefits and be thought of as beneficiaries in a loose sense. But they do not have the trust law rights of beneficiaries: to be informed, to demand an accounting of what has been

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6. David Hayton, *The Irreducible Core Content of Trusteeship*, *in* TRENDS IN CONTEMPORARY TRUST LAW 47, 47–49 (A.J. Oakley ed., 1996).

7. Begier v. I.R.S., 496 U.S. 53, 70 (1990) (Scalia, J., concurring).

8. *See* Langbein, *Mandatory Rules*, *supra* note 5, at 1120–23.

9. *See id.* at 1111–17; Langbein, *Rembrandt*, *supra* note 5, at 385–95.

10. Langbein, *Mandatory Rules*, *supra* note 5, at 1125–26. A decision of the Court of Appeal of Bermuda confirms that in the absence of legislative authority, the common law does not accept a trust in which only a protector, and not the beneficiaries, have the right to information about the trust: *In re* Application for Information about a Trust, [2013] CA (BDA) 8 Civ (Berm.), *available at* https://www.gov.bm/sites/default/files/CA1402_in_the_matter_of_a_trust__evans_.pdf. I thank Adam Hofri-Winogradow for this reference.

11. The principle is discussed in all texts on trust law. For U.S. law, see 2 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 12.10 (5th ed. 2006); RESTATEMENT (THIRD) OF TRUSTS §§ 44, 47 (AM. LAW INST. 2003). The traditional rule has now been changed in some states of the United States; we will return to this in Section IV.C.

done with the trust property and how it is held, to enforce the trust, to sue the trustees for breach of trust. Those rights belong to beneficiaries in the strict sense, and a pure purpose trust has none. So, if it is part of the mandatory core of trust law that a private, non-charitable trust must benefit the beneficiaries, it is not surprising that, traditionally, it is not possible to create a non-charitable purpose trust, that is, a private trust without beneficiaries. We will come back to this.

III. THE OFFSHORE STORY

The rise of the offshore is a relatively recent phenomenon, dating from the 1960's or perhaps the 1970's, depending on the commentator.[12] The part of it with which I am concerned is not offshore finance, nor the low or non-existent tax rates that have led to the term "tax havens." As a trust lawyer, my focus is on the practice of legislative reform that offshore financial centers have engaged in as part of a drive to attract wealth, usually in the interests of creating local jobs or, more generally, improving the local economy.[13] The law of trusts is found all over the world—at least, all over the common law world, and increasingly in other legal systems as well. If you are trying to give people a reason to send their money away, far away from where they live, you have to do better than provide the same law of trusts that is on offer where they live.

For this reason, the law of trusts in offshore jurisdictions may look very different from the trust law that I learned in law school. Moreover, it is in an almost constant state of evolution.

Compared to the trust law I learned in the 1980's, some of this offshore trust law seems pretty esoteric. And much of it, of course, came about to provide comfort to people who might be nervous about sending large amounts of money to a distant land. Examples includes trust protectors, and the legislative enshrinement of settlor reserved powers, a step designed to preclude any argument that the reservation of such powers invalidates the trust. Other innovations were created to provide structures that settlors might find less restrictive than traditional trust law. It was a matter of giving the customer what he or she wanted. Examples include the abolition of the rule against perpetuities, and the legalization of non-charitable purpose trusts.[14] In 1997, the Cayman Islands created the STAR trust, an acronym from the

12. For an example, see section II.C of the IMF Background Paper on Offshore Financial Centers. IMF, *Offshore Financial Centers* (June 23, 2000), https://www.imf.org/external/np/mae/oshore/2000/eng/back.htm.

13. Paul Matthews, *The New Trust: Obligations Without Rights?*, *in* TRENDS IN CONTEMPORARY TRUST LAW, *supra* note 6, at 1, 30–31; Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom*, 85 CORNELL L. REV. 1035, 1037–39 (2000).

14. Matthews, *supra* note 13, at 22–25.

Special Trusts (Alternative Regime) Law.[15] A STAR trust is a trust whose beneficiaries have no rights: "Only the enforcer can enforce the trust and beneficiaries, as such, have no standing to enforce the trust or obtain information in relation to the trust . . . ."[16] Settlors may like these trusts, if they want their beneficiaries to get just exactly what they get, but not to have any ability to cause difficulties by actually being able to enforce the trust. This led to a lively debate in England about what was, and what was not, a trust, a debate to which we will return.[17] Not to be outdone, the British Virgin Islands later created the VISTA trust.[18] Asset protection trusts started appearing in offshore jurisdictions in 1989.[19] Later I will come to even more recent developments.

There is obviously a sense in which these places are in competition with one another. When one of them takes a step which may attract business, the others feel compelled to follow suit. It is law reform by market demand, with the local bar usually treated as knowing best what the market wants.

IV. THE ONSHORING OF THE OFFSHORE

It is impossible to keep a hermetic seal between the offshore and the onshore. Nor would anyone want to. For one thing, the value held in trusts has to be able to move. But the legal systems cannot be kept entirely separate either. There are several ways in which they interact. I will aim to discuss three ways: the decisions of onshore judges; the rules of private international law, or the conflict of laws; and, what is my primary concern, onshore legislation.

A. DECISIONS OF ONSHORE JUDGES

I begin then with the decisions of onshore judges. I mentioned earlier that some settlors might be concerned about sending money to a far-off place, and for this reason, it is important for offshore jurisdictions to show that they have a sound court system with a well-functioning law of trusts.

I would like to give two examples of this. One comes from the Cook Islands, which was a trailblazer in the development of the so-called "asset protection trust." This is a kind of trust in which, contrary to the general law and expectations, settlements of property into trust are not subject to the

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15. Special Trusts (Alternative Regime) Law of 1997, *now incorporated in* Trusts Law (2017 Revision), Part VIII. *See* Trusts Law (2017 Revision) (Cayman Is.), *available at* http://www.gov.ky/portal/pls/portal/docs/1/12420394.PDF.

16. Grant J.R. Stein, *Cayman STAR Trusts: Three Years On*, 7 TR. & TRUSTEES 28, 28 (2000).

17. *See generally* Paul Matthews, *Shooting STAR: The New Special Trusts Regime from the Cayman Islands*, 11 TR. L. INT'L 67 (1997); Anthony Duckworth, *STAR Wars: The Colony Strikes Back*, 12 TR. L. INT'L 16 (1998); Paul Matthews, *STAR: Big Bang or Red Dwarf?*, 12 TR. L. INT'L 98 (1998); Anthony Duckworth, *STAR Wars: Smiting the Bull*, 13 TR. L. INT'L 158 (1999).

18. Virgin Islands Special Trusts Act (2003) (Virgin Is.).

19. In the form of the Cook Islands International Trusts Amendment Act 1989, amending the International Trusts Act 1984, *available at* http://www.cookislandsfinance.com/legislation.php.

normal law of fraudulent conveyances, and moreover the beneficiaries' interests are not available to the beneficiaries' creditors, even if the beneficiary is also the settlor.[20] The Cook Islands are a long way from the United States, but the trust has been very popular with Americans, drawing the attention of the *New York Times* in a 2013 report.[21] The Cook Islands have a historical and continuing connection with New Zealand, and the Cook Islands Court of Appeal is staffed by New Zealand judges.[22]

In 1995, that Court gave judgment in *515 South Orange Grove Owners' Association v. Orange Grove Partners.*[23] The plaintiffs, who had purchased condominiums in California in the late 1980's, obtained in 1994 a judgment in California for almost $6 million against the defendants, who were the developers of the units.[24] The individual defendants moved to Mexico and transferred some of their assets to a Cook Islands asset protection trust.[25] The plaintiffs now sought a Mareva injunction in the Islands.[26] The legislation provided that they would be unable to touch the assets in the trust if it was settled two years or more after the plaintiffs' cause of action accrued.[27] The defendants argued that the cause of action accrued when the plaintiffs bought their apartments, so the two-year period was long over.[28] The Court held that the plaintiffs were judgment creditors; the judgment of the California court turned them from claimants into creditors with a fixed claim, and they were now seeking to enforce the judgment.[29] On this basis, it was held, on a generous interpretation of the legislation, that the fact that gave rise to the plaintiffs' cause of action was the verdict of the jury.[30] In supporting its interpretation, the Court said: "It should not be lightly assumed that Parliament intended to defeat the claims of creditors by allowing international trusts to be used to perpetrate a fraud against a creditor."[31]

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20. *See supra* note 19.

21. Leslie Wayne, *Cook Islands, a Paradise of Untouchable Assets*, N.Y. TIMES (Dec. 14, 2013), http://www.nytimes.com/2013/12/15/business/international/paradise-of-untouchable-assets.html.

22. Constitution of the Cook Islands arts. 49(1), 56(2), *available at* http://www.paclii.org/ck/legis/num_act/cotci327.

23. 515 S. Orange Grove Owners Ass'n v. Orange Grove Partners, [1995] CKHC 1; 208.1994 (Cook Islands), *reported in* Case Report, 15 TR. L. INT'L 41 (2001). *Also available at* http://www.paclii.org/cgi-bin/sinodisp/ck/cases/CKHC/1995/1.html. Page citations are to Trust Law International.

24. *Id.* at 42–43.

25. *Id.* at 43–44.

26. *Id.*

27. *Id.* at 46–48; *see* International Trusts Act 1984 §§ 13B(3), (8) (Cook Islands). Even if the plaintiffs were within that period, they would still be unable to get at the assets if their action to do so was begun more than one year after the settlement in trust. International Trusts Act § 13B(3)(b); *Orange Grove Partners,* at 47.

28. *Orange Grove Partners*, at 52.

29. *Id.* at 53.

30. *Id.*

31. *Id.*

If this interpretation were not generous enough, the Court referred to the Parliamentary debates surrounding the enactment of the new legislation, in which both the government and the opposition referred in laudatory terms to the integrity of the emerging Cook Islands financial services industry.[32] The Court said: "In the light of those words we would be loathe to interpret the International Trusts Act as a statute which was intended to give succour to cheats and fraudsters by totally excluding the legitimate claims of overseas creditors."[33]

Thus, we have a kind of cautionary tale that can tell us something about what can be the consequences of legislative overreach, in the context of an independently minded judiciary. And indeed, there is a sequel.

What happened next was that a couple of months later, the plaintiffs found another Cook Islands international trust—that is, an asset protection trust—and they brought another proceeding to reach the assets in it.[34] That trust, however, was established *before* the judgment was given in California.[35] A different provision of the International Trusts Act said that such a trust could not be attacked if it was settled *before* the cause of action "accrued or had arisen."[36] The first Court of Appeal decision would seem to mean that this new trust was immune from attack, since that decision held that the cause of action on a judgment arose when the jury gave its verdict. Not so, said the New Zealand judges of the Cook Islands Court of Appeal. They held that in the phrase, "accrued or had arisen," "had arisen" must mean something different from "accrued," or the extra words would be surplusage.[37] The cause of action "had arisen" earlier, when the plaintiffs gave notice of their claim to the defendants, and so any settlement made after that time was potentially vulnerable to attack.

The two cases together make a cautionary tale indeed. Onshore judges do not like this kind of legislation. I agree with them, and I suspect that many others do as well.

No reader will be surprised to learn that the Cook Islands International Trusts Act has been amended several times since the second *Orange Grove* decision.[38] As I said earlier, it is a characteristic of the offshore that the law is constantly amended to give the clients what they want.

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32. *Id.* at 53–54.

33. *Id.* at 54.

34. 515 S. Orange Grove Owners Ass'n v. Orange Grove Partners (No. 2), [1996] CKCA 2, 1 OFLR 3 (Cook Islands C.A.), *available at* http://www.paclii.org/cgi-bin/sinodisp/ck/cases/CKCA/1996/2.html. Page citations are to the Offshore and Financial Law Reports.

35. *Id.* at 8–10.

36. International Trusts Act 1984 § 13B(4) (Cook Islands); *Orange Grove Partners (No. 2)*, at 10–13.

37. *Orange Grove Partners (No. 2)*, at 18–19.

38. The International Trusts Act 1984 was amended by the International Trusts Amendment Act 1995-96, International Trusts Amendment Act 1999, International Trusts Amendment Act 2004, International Trusts Amendment Act 2013. *See Cook Islands Legislation*,

Let me come now to my second example of how the offshore may meet the decisions of onshore judges. This is a case decided in 2011 that also involved a judgment creditor, who in this instance had secured a judgment of a Turkish court for some $30 million.[39] The debtor had set up discretionary trusts in the Cayman Islands, containing some $24 million, and the creditor was seeking to enforce its judgment in the courts of that jurisdiction.[40] But the debtor argued that he held no interest in the trusts that could be attached by a creditor.[41] He did not have any *rights* as a beneficiary.[42] True, he was the object of a dispositive discretionary power, and the trustees could give him as much money as they wished; but, he said, he had no right to any particular sum.[43] The judgment creditor pointed out that the settlor also had a power of revocation, and if he were to exercise that power, he would be entitled to all the trust assets.[44] The courts of the Cayman Islands sided with the debtor.[45] But the final court of appeal from the Cayman Islands is the Judicial Committee of the Privy Council. This holdover of the British empire sits usually in London, and while it is not technically a court but an advisory body, it functions as a supreme appellate court. Its members are drawn primarily from the judges of the Supreme Court of the United Kingdom.[46] They took quite a different view of the power of revocation, holding that it was an asset of the debtor and therefore available to his creditors.[47] Through the use of the power of revocation, therefore, the creditor was able to access the trust assets even while respecting the formal structure of the trusts.

The Judicial Committee is still the final court of appeal not only for the Caymans, but also for the Cook Islands, the British Virgin Islands, Jersey, Guernsey, the Isle of Man, and a number of other financial centres.[48] Offshore jurisdictions may seek to reassure potential clients by pointing to a stable court system with internationally respected judges. But that stable court system may apply an approach that differs from what was imagined by the architects of the offshore system.

COOK ISLANDS FIN. SERVICES DEV. AUTHORITY, http://www.cookislandsfinance.com/legislation.php. The amendments in the Act of 1995–96, intended to overturn the decisions of the Court of Appeal, were made retroactive to 1989. International Trusts Amendment Act 1995–96 § 27(2) (Cook Islands).

39. Fonu v. Merrill Lynch Bank & Tr. Co. (Cayman) Ltd., [2011] UKPC 17, [2012] 1 WLR 1721, 1724 (appeal taken from Cayman Is.).

40. *Id.*

41. *Id.* at 1728.

42. *Id.*

43. *See id.*

44. *Id.*

45. *Id.* at 1725–26.

46. *See Biographies of the Justices*, Judicial Committee of the Privy Council https://www.jcpc.uk/about/biographies-of-the-justices.html.

47. *Fonu*, at 1736.

48. For a list, see https://www.jcpc.uk/about/role-of-the-jcpc.html.

B. Recognition of Foreign Trusts and Choice of Law

Let me turn to a second potential interaction between the offshore and the onshore, which arises from the rules of the conflict of laws. This was the focus of some of the debates in England following the creation of the STAR trust in the Cayman Islands. Whatever it was, it was what it was in the Cayman Islands; but what would happen if the matter arose in an English court? When a legal institution that belongs to a foreign legal system does not exist in the local law, the principles of the conflict of laws become crucial. And English law does not know a trust in which the beneficiaries have no rights of enforcement, which is one version of the STAR trust.

The matter becomes even more complicated when the foreign legal institution has characteristics that are viewed by the local court not only as foreign, but as contrary to the public policy of the forum. These are the kinds of issues that could arise with an asset protection trust, when its existence is being litigated outside of its home jurisdiction.

Onshore trusts jurisdictions do not have a tremendous amount of experience with this question, partly because until relatively recently, the law of trusts was fairly uniform throughout the common law world. Foreign law is rather easy to apply when it is the same as local law. It was the civil law countries that faced numerous difficulties in the conflict of laws when common law trusts, or trustees, appeared in their courts.[49] This led to The Hague Trusts Convention of 1985,[50] which the U.S. has signed but not ratified.[51] The Convention not only provides choice of law rules for trusts, it also requires jurisdictions where it is in force to recognize foreign trusts, including express choice of law clauses, at least as a starting point.[52]

It was ratified very quickly by the United Kingdom.[53] There are reasons to think that this might have been done a little carelessly. Even in 1985, it was perhaps easy to think that by committing itself to recognizing foreign trusts, the U.K. was not committing itself to anything new. It is a trust jurisdiction after all, and, one might say, it is the original home and source of the law of trusts. But did it commit itself to recognizing foreign trusts that could not be created under U.K. law? The matter is still not clear. Of course, the Convention, like all Hague Conventions, offers various escape hatches by

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49. Michele Graziadei, *Recognition of Common Law Trusts in Civil Law Jurisdictions Under the Hague Trusts Convention With Particular Regard to the Italian Experience, in* RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW 29, 40–44 (Lionel Smith ed., 2012); *see generally* Note, *Common Law Trusts in Civil Law Courts,* 67 HARV. L. REV. 1030 (1954).

50. Hague Convention on the Law Applicable to Trusts and on Their Recognition, July 1, 1985, 23 I.L.M. 1388 [hereinafter Hague Trusts Convention].

51. *Status Table 30: Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition*, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=59 (last visited May 20, 2018).

52. Hague Trusts Convention, *supra* note 50, art. 6.

53. Recognition of Trusts Act 1987 c. 14 (U.K.).

which a court can refuse to recognize foreign legal norms that would otherwise apply, on grounds such as public policy.[54] But the Convention may make it more difficult to refuse to recognize offshore trusts that have features unknown in the onshore.

There is a further concern about the Convention, arising out of the fact that it adopts as its starting point the principle that the settlor is free to choose the law that shall govern his or her trust.[55] That principle of freedom of choice of law may make sense for contracts, which have few effects beyond the parties. That is, if an American and a Canadian make a contract and stipulate that it shall be governed by the law of France, well, so be it. But it is not so clear that this freedom of choice makes as much sense for trusts, which always have significant effects on outside parties.[56]

Article 13 of the Convention is of particular interest in this context. It provides that a court need not recognize a trust in certain circumstances, one of which is where a governing law has been chosen to which the trust otherwise has no significant connection. This discretion arises if the jurisdiction to which the trust *is* objectively connected does not have trusts or does not have the category of trust involved.[57] Thus imagine that a Dutch settlor attempted to create a trust in the Netherlands, with Dutch trustees, Dutch property, and Dutch beneficiaries, but stated that the governing law of the trust was Iowa law. There is no trust in Dutch law. In such a case, Article 13 says that a Dutch court need not recognize the trust.

When the U.K. brought the Convention into its domestic law, it chose to omit Article 13, probably on the assumption that it was only an escape hatch for civil law countries. But recall, Article 13 also applies when the jurisdiction to which the trust is objectively connected does not have "the *category* of trust involved." What if an English settlor attempted to create, by express choice of law, a Cayman Island STAR trust in the UK? It is not clear that he would succeed, but it is also not clear that the UK Parliament understood the consequences of omitting Article 13.[58]

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54. Hague Trusts Convention, *supra* note 50, arts. 15, 16, 18 and 19.

55. *Id.* art. 6.

56. For a fuller argument, see generally Lionel Smith, *Stateless Trusts*, *in* THE WORLDS OF THE TRUST 89 (Lionel Smith, ed., 2013).

57. The English text of article 13 reads:

> No State shall be bound to recognise a trust the significant elements of which, except for the choice of the applicable law, the place of administration and the habitual residence of the trustee, are more closely connected with States which do not have the institution of the trust or the category of trust involved.

Hague Trusts Convention, *supra* note 50, art. 13. There is an equally authoritative French text.

58. It is not even clear that the U.K. complied with its obligations in this respect. A contracting state may, by a "reservation" choose not to implement certain provisions. Articles 16, 21 and 22 provide for reservations, and article 26 refers to this and says: "No other reservation shall be permitted." *Id.* art. 26.

In some other Hague Convention jurisdictions, this ability to choose foreign law for local trusts is accepted. It has caught on in Italy, even where Article 13 is in force, as most courts have chosen not to use the discretion that Article 13 offers.[59] More recently, when Switzerland ratified the Convention, it enacted the whole Convention but then, by domestic legislation, it expressly took away from its courts the discretion in Article 13.[60] This seems clearly to have been an intention to build on the Italian experience, and to tell anyone in Switzerland that they should feel free to choose any legal system to govern their Swiss trust.

The Hague Convention therefore offers another way for the offshore to come onshore. The Convention, which is in force in Australia and in most of Canada,[61] may make it more difficult for a local court to refuse to recognize foreign trusts, and it may allow a settlor, by a simple choice of law clause, to import the rules of a foreign legal system to govern his trust, allowing the creation of a trust unknown to domestic law.

As mentioned above, The Hague Convention is not in force in the US. In some states, the governing law of a trust will be determined by the rules of the common law. At least for trusts of movable property, those rules also favor allowing the settlor to choose the governing law.[62] The common law rules, however, may be less favourable to a settlor who wishes to choose a legal system to which the trust has little objective connection.[63] But the majority of states have enacted the Uniform Trust Code ("UTC").[64] Like the Convention, section 107 of the UTC proposes a very strong rule in favor of allowing the settlor to choose the governing law of his or her trust, for both movable and immovable property.[65] It is true that the UTC provides an exception in cases where the choice of law "is contrary to a strong public policy of the jurisdiction having the most significant relationship to the matter at issue."[66] Even so, the UTC rule is probably more friendly to settlor choice of law than the

59. *See* Alexandra Braun, *Italy: The Trust Interno, in* THE INTERNATIONAL TRUST 787, 787–92 (David Hayton ed., 3d ed. 2011); Graziadei, *supra* note 49, at 58–78.

60. Swiss Private International Law Act, 18 December 1987, art. 149c(2).

61. *See supra* note 51.

62. 7 SCOTT, *supra* note 11, §§ 45.3–45.5.

63. *Id.* §§ 45.3.1, 45.4.1.3, 45.4.2.1, 45.5.1.1, 45.5.2.1.

64. *See generally* UNIF. TRUST CODE (UNIF. LAW COMM'N 2010).

65. *Id.* § 107. I say "very strong" because the commentary to the section states:

> Paragraph (1) allows a settlor to select the law that will govern the meaning and effect of the terms of the trust. The jurisdiction selected need not have any other connection to the trust. The settlor is free to select the governing law regardless of where the trust property may be physically located, whether it consists of real or personal property, and whether the trust was created by will or during the settlor's lifetime.

Id. § 107 cmt.

66. *Id.* § 107(1).

Convention itself.[67] This, again, opens the possibility that a settlor can "onshore" an offshore trust jurisdiction by choosing a foreign legal system to govern his or her trust.[68]

C. *ONSHORE LEGISLATION*

Let me turn to the third, and perhaps the most obvious, way in which offshore innovations come into contact with the onshore. The most obvious way is that onshore jurisdictions may react by making comparable legislative changes to their own legal orders.

One of the most well-established of these is the decision in several jurisdictions in Canada and the U.S. to abolish the rule against perpetuities.[69] This began some time ago, partly in an attempt to simplify the law. But in some cases, I think, it was a question of giving the people what they want. The common law rule had already been reformed in almost every jurisdiction,[70] but the modified rule is still complicated; moreover, usually you have to understand the old rule in order to understand the modified rule. It is much simpler to get rid of it. In the next Section, however, I will argue that although this may be simpler, it may not be wiser.

Another example is that in 1997, Alaska was the first state in the United States to follow the Cook Islands in enacting legislation allowing the creation of asset protection trusts.[71] There are now several states with comparable legislation: an article that appeared in *Forbes* in 2016 stated that at that time that there were 16 states with asset protection trusts.[72] The author said at the

67. I say this because the Convention possesses not only the discretion in article 13, discussed above, but also exceptions in articles 15, 16, 18 and 19. *See* Hague Trusts Convention, *supra* note 50. Article 18 is an exception for public policy in the sense that this expression is used in the conflict of laws, which is what the UTC refers to as "strong public policy." *Id.* art. 18. Note, however, that some State enactments of this UTC provision have modified it so as to place greater restrictions on settlor choice of law. 7 SCOTT, *supra* note 11, § 45.3.1.

68. Furthermore, to the extent that U.S. state law itself continues to enact offshore structures into onshore law it will become increasingly difficult to argue that the choice of law should be overridden as contrary to public policy. *See infra* Section V.B.

69. Angela M. Vallario, *Death by a Thousand Cuts: The Rule against Perpetuities,* 25 J. LEGIS. 141, 148–62 (1999); 2 SCOTT, *supra* note 11, § 9.3.9 (listing 22 states which have "actually or effectively" repealed the rule, and noting that "[o]ne might even venture the observation that, for better or for worse, the rule against perpetuities is currently in free fall"). Despite this profession of neutrality, the author a few words later describes the situation as a "race to the bottom." *Id.* In Canada the rule has been abolished in Manitoba (Perpetuities and Accumulations Act, C.C.S.M. 1992, c. P33 (Can.)), Saskatchewan (Trustee Act, 2009, S.S. 2009, c. T-23.01, §§ 57–60 (Can.)), and Nova Scotia (Perpetuities Act, S.N.S. 2011, c. 42 (Can.)).

70. 2 SCOTT, *supra* note 11, § 9.3.9.

71. John K. Eason, *Policy, Logic, and Persuasion in the Evolving Realm of Trust Asset Protection,* 27 CARDOZO L. REV. 2621, 2623 (2006).

72. One other state, Michigan, has since joined this club. 2016 Mich. Pub. Acts No. 330 (enacting the Qualified Dispositions in Trust Act).

start: "In the current issue of *Forbes* . . . , I explain how this stiff-your-creditors ploy is legal but controversial."[73]

What else has been welcomed onshore? As we have seen, U.S. law used to follow the traditional rule that it is not possible to create a purely private purpose trust without beneficiaries.[74] At most, an attempt to do so can create a power, which by definition is not a trust since it is not obligatory. On the other hand, the Uniform Probate Code and the Uniform Trust Code aim legislatively to validate non-charitable purpose trusts as obligatory trusts, starting from the long-established exceptional cases of provisions to care for animals and graves, but building on that to contemplate an open-ended category of non-charitable purpose trusts.[75] I believe that there are now at least five states that have adopted legislation of this kind.[76] In my view, these trusts have a benign aspect and a not-so-benign one. I will come back to this.

The next question is whether there is any reason to be concerned about onshore jurisdictions adopting what might be called the client-centred innovations that are found in the offshore.

V. SHOULD WE GIVE THE PEOPLE WHAT THEY WANT?

A. WHAT IS THE POINT OF THESE OLD RULES?

It is essential to constantly update the law. Rules do not justify themselves. Oliver Wendell Holmes had an extraordinary gift with words, but one of my favorite quotations from his writings is this:

> It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.[77]

But this tells us only where the inquiry begins. What are the reasons for a rule? If we change or abolish it without understanding that, we take a risk of going down a road that we did not foresee.

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73. Ashlea Ebeling, *Comparing Domestic Asset Protection Trust States*, FORBES (July 6, 2016, 6:01 AM), https://www.forbes.com/sites/ashleaebeling/2016/07/06/comparing-domestic-asset-protection-trust-states.

74. *See supra* note 11 and accompanying text.

75. UNIF. PROBATE CODE § 2-907 (UNIF. LAW COMM'N 2010); UNIF. TRUST CODE §§ 408-409 (UNIF. LAW COMM'N 2010). The Uniform Law Commission of Canada has promulgated a Uniform Trustee Act. *See* UNIF. TRUSTEE ACT (UNIF. LAW CONFERENCE OF CANADA 2012), *available at* http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0029.pdf. By its section 74, this model law validates non-charitable purpose trusts, but only for a limited range of purposes. *Id.* § 74. The provision in question has not, however, been adopted in any province.

76. Al W. King III, *Trusts Without Beneficiaries—What's the Purpose?*, WEATLHMANAGEMENT.COM (Feb. 2, 2015), http://www.wealthmanagement.com/print/20170 (listing Delaware, New Hampshire, South Dakota, and Wyoming). Idaho's enactment of the Uniform Probate Code adds it to this list. IDAHO CODE § 15-7-601 (2017).

77. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

It is arguable that this is part of what happened with the rule against perpetuities. The rule, we must remember, is a rule that limits the duration of contingent interests. It has nothing to say about vested interests.[78] But only ascertained and living people can have vested interests. The result is that the rule controls the projection of possibilities into the future. It is not simply a kind of ordeal for first year law students in their course on property law. Well, it is that; but it is not *simply* that. Like all sound legal rules, it is an implementation of something that we think is important. To make the things that we think are important into part of our legal system, we have to turn them into rules. And that is what we did with the rule against perpetuities.

I am a proud member of the American Law Institute ("ALI"), and I am in favor of the position that the ALI took on this issue some years ago, which is now also reflected in the third Restatement Third, Property: Wills and other Donative Transfers.[79] That is a position that is opposed to the abolition of the rule against perpetuities,[80] although the Restatement proposes its retention in a modified form.[81] Yes, clients might want to get rid of it, but clients are, quite rightly, only concerned with their private interests. That is the history of every legal system. You cannot design a legal system based entirely on what clients want, any more than you can design a law school curriculum based solely on what law students want. What they want is very, very important. But there is more at stake.

So, let me turn to non-charitable purpose trusts. I have been thinking about these for a long time, since the problem was explained to me some 30 years ago as a law student. But I now think that there is more to the issue of non-charitable purpose trusts than meets the eye. There is what might be called the benign view and the more hardened, or cynical, view. I don't mean that the first view is either simplistic or inaccurate. I now think, however, that it is incomplete in failing to see the implications of non-charitable purpose trusts ("NCPTs").

The benign view goes like this. There are quite technical definitions of what counts as charity, and there are some exceptional cases that have been allowed for valid NCPTs—the care of a named animal, and the erection and maintenance of a monument.[82] Now why should a settlor—often a testator—be penalized for falling technically outside of these rules? A testator wants to devote some money to the care of lost cats in his city, and this is not charitable.

78. Vallario, *supra* note 69, at 144.

79. 3 RESTATEMENT (THIRD) PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 27.1 (AM. LAW INST. 2011).

80. *Id.*

81. *Id.*

82. Some authors are now of the view that these are not actually valid as non-charitable purpose trusts, but as (non-obligatory) powers, which entails that the relevant property is held in trust for some other beneficiary, whose interest is defeasible by the exercise of the power. Matthews, *supra* note 13, at 8; 2 SCOTT, *supra* note 11, § 12.10.

It seems harsh. George Bernard Shaw wanted to improve the English alphabet, a goal which all of us could probably support. He tried to leave the residue of his estate for the development and promotion of a new alphabet.[83] But in litigation his trust failed; it was not charitable.[84] Much of what is written about non-charitable purpose trusts is based on the view that people often have benign goals, whether it be helping cats or improving the alphabet, and we should support them in trying to achieve those goals. A text I read recently warned advisors to be cautious of the rule against perpetuities, where it still exists, even where a non-charitable purpose trust is permitted, as in the case of a trust to care for a specific animal.[85] This advisor pointed out that while dogs and horses may not be so fortunate, a macaw can live for 60 years and a tortoise even longer.[86]

There is a story that goes with this view as to why non-charitable purpose trusts are invalid. This is the story that I learned in law school. It presents the problem as one that is technical or formal. A trust is, traditionally, an obligation with respect to the benefit of property. An obligation presupposes that someone has the corresponding right. If the trustee has an obligation to the beneficiaries, the beneficiaries have the corresponding rights; that is, the rights to enforce the trust. If the trust is for a purpose, like caring for a macaw, no one has the corresponding right. Thus, there is a technical problem, an obligation without anyone to enforce it.

In this spirit, there are laws—including the UTC, the Uniform Probate Code, and the Canadian Uniform Trustee Act—that aim to solve the problem by allowing or requiring the naming of an enforcer.[87] But I would make two observations on this. First, it only moves the problem, it does not eliminate it. The problem, remember, is that the trustee was supposedly obliged to use the trust property in furtherance of the non-charitable purpose; but there was no one who could make him do so. Thus, he was not really obliged, and since a trust is an obligation, there was no trust. Now look at the proposed solution. The settlor names Jane as the enforcer of the non-charitable purpose trusts. Jane can force the trustee to use the property in furtherance of the non-charitable purpose trusts. Does this solve the problem? Yes and no. The trouble is that the real core of the problem remains. What *interest* does Jane have in enforcing the trust? She is not a beneficiary. She gets nothing by enforcing. She may or may not enforce it. If she does not, no one can force

83. *Re Shaw*, [1957] 1 W.L.R. 729 (Ir.).

84. *Id.*

85. King, *supra* note 76.

86. *Id.* Where non-charitable purpose trusts are allowed and the rule against perpetuities is retained, the rule has to be changed from a rule against the duration of contingent interests to a rule that simply limits the duration of the trust, since in such a trust no one holds either contingent or vested interests.

87. UNIF. TRUST CODE § 409(2) (UNIF. LAW COMM'N 2010); UNIF. TRUSTEE ACT (UNIF. LAW CONFERENCE OF CANADA 2012), *supra* note 75, § 74(11)(b).

her to. Does this sound familiar? Just as in the original story the trustee had no real obligation because no one could force him to apply the money to the designated purpose, so with an enforcer, no one can force the enforcer to enforce. We have not created a genuine trust; all we have done is shifted the problem.[88] You can see that naming someone who can force Jane to enforce the trust will not take us anywhere useful.

My second observation is that there is a deeper problem with non-charitable purpose trusts, or in other words there is a much more substantial reason why the law has traditionally not allowed them. In general, you can do what you want with your property, as long as it is yours. And one thing you can do is to give it away. If you do that, your creditors can't touch it, because it's not yours any more. But at the same time, you can no longer decide what to do with it. It belongs to someone else, which incidentally means, speaking generally, that *their* creditors may be able to have access to it.

Let me put this another way. In one of his papers on mandatory rules in trust law, Professor Langbein said it was a puzzle that if a person owns a Rembrandt painting, he could one day decide to burn it; but if he settles the painting on trustees to hold in trust for beneficiaries, a trust term to burn the Rembrandt will be ineffective.[89] To me this is not such a puzzle, because once he has settled the property in trust, he does not own it any more. A trust, as Professor Langbein tells us, exists for the benefit of the beneficiaries.[90] A trust to burn the Rembrandt without regard to the interests of beneficiaries would, by definition, be a non-charitable purpose trust.

Where non-charitable purpose trusts are valid, it must be the case, apart from the law on fraudulent conveyances, that once you set up such a trust, the assets are no longer yours and no longer available to your creditors. But at the same time, you have not given them to anyone. You have given the management of them to the trustees, but you have not given the benefit of them to any person. So, what have you done? You have affected that property to a purpose of your own choosing, in such a way that you are considered to have given it away, so that your creditors cannot touch it. But no one else can take the benefit of that property. What you have done, in economic terms, is to create a fund of property that is unowned. You have set the destiny and created the charter for that fund, thus enjoying, for as long as the trust lasts, one of the prerogatives of ownership. But your creditors are deprived of that property even while it goes to fulfill your choices, your goals, and your purposes.

In my view, quite apart from technical issues of enforcement, it is not obvious that this should be allowed. In my old-fashioned way of looking at

88. *See generally* Kelvin F.K. Low, *Non-Charitable Purpose Trusts: The Missing Right to Forego Enforcement*, *in* TRUSTS AND MODERN WEALTH MANAGEMENT 486 (Richard Nolan, Kelvin F.K. Low & Tang Hang Wu eds., 2018).

89. Langbein, *Mandatory Rules*, *supra* note 5, at 1110–11.

90. *Id.* at 1112.

things, it is either yours or it isn't, and you can't have it both ways. What kinds of non-charitable purposes might be pursued? There is an old Scottish case, preserved in *Scott and Ascher on Trusts,* about a testator who tried to create a trust to put up monuments to himself all over the country.[91] It's like the Rembrandt: You can build statues with your own money. It is not so obvious that you should be able to launch your property towards that goal, while depriving your creditors of it. Now, burning Rembrandts and even building statues may count as capricious purposes and so be invalid. I note, however, that the Delaware statute only says that the purpose must be "not impossible of attainment."[92] What other purposes will we see? Perhaps, the protection of the settlor's family, or the growth of the trust fund, or the promotion of the settlor's values. Worthy purposes, but normally ones that you pursue with your own wealth, or perhaps by creating trusts for the *persons* you wish to protect.

Now if you think about a trust like that, particularly when it may be combined with the abolition of the rule against perpetuities, you will see that there is not that much difference between a non-charitable purpose trust and a Cayman Islands STAR trust. Recall that what was, and is, controversial in onshore terms about the STAR trust is that even if it has beneficiaries, they have no rights of enforcement. That seems to be directly contrary to the fundamental nature of a trust, which I touched on at the start: it must benefit the beneficiaries. That is part of the irreducible core. But in Delaware, it seems, I can create a purpose trust whose purpose is the protection of my family.[93] This trust does not even have beneficiaries, in the trust law sense of persons with rights of enforcement and rights to benefit. None of my family members can demand information or hold the trustees to account. Who can? The named enforcer—if he chooses. That is exactly the same answer given to that question in Cayman law for the STAR trust. But remember, no one can make the enforcer do anything, even though he is the only one who can make the trustees do anything.

I come then to the asset protection trust. I have argued that the traditional rules against non-charitable purpose trusts are not purely technical rules, that they have a sound foundation in legal policy and in commitments we have already made to the shape of our legal order. In the light of that, you can probably guess what I am going to say about asset protection trusts. Obviously, such a thing could not be created at common law. What are we to make of the legislated version that seems to be spreading in the onshore?

A debt is not what philosophers call a natural kind. It is not a thing, like igneous rock or cartilaginous fishes, that can be described by external characteristics which are understood to reflect some facts about natural history. A debt is a creation of the legal system. It is artificial. It exists only in

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91. 1 SCOTT, *supra* note 11, § 12.11.7.

92. DEL. CODE ANN. tit. 12, § 3556(a) (2017).

93. *Id.*

our minds. That does not mean that it is not real. It is as real as we make it real, like ownership of land or the freedom of the press. But there is something paradoxical in the asset protection trust, because it is also a creation of the legal system, and what it does is participate in a kind of self-destruction of legal values. One and the same legal system says that a person owes money but does not have to pay.[94]

Now of course every legal system is likely to have a system of exempt assets. This is tied to the salutary policy of the fresh start, whether we are technically in a regime of bankruptcy or not. Some level of human dignity can be protected while still treating creditors' claims seriously. The justice of exemptions from creditors' claims is tied to the need to be able to earn a living, and to have a place to live, and to make a fresh start. But it is a universal truth that just because something is good, it does not follow that more of it is better.

I am a guest here, but I am an academic lawyer, and I suppose that I was not invited just to give compliments, so I hope you will allow me to say this. Giving people the ability to exempt their own assets from creditors, without limit, strikes me as difficult to defend. Jurisdictions that enact such legislation can expect, at the very least, that they may have an experience similar to that of the Cook Islands, in which judges who are schooled in a particular understanding of the legal order may not be very enthusiastic about trusts that aim to shield assets from creditors, including even spouses and dependent children.[95]

It makes me wonder, why even use a trust structure? These asset protection trust laws aim to allow people to keep the benefit of assets while exempting them from creditor access. That goal does not have anything particular to do with the law of trusts. We have individual retirement accounts ("IRA"). Why not simply create IAPA's, "individual asset protection accounts"? Jurisdictions that aim to try to profit from debtor's desires not to pay their debts could simply add a fee, perhaps measured as a percentage of assets, and the assets in the IAPA would be exempt. At least the trust, an institution that has done a lot of good in the history of the world as well as a certain amount of not-so-good, would be spared from affiliation with this development.

B. Competing With the Offshore?

I know very well that these statutory innovations come from a desire to compete with the offshore. Just as the offshores have been competing between and among themselves for some decades, now some onshore jurisdictions want to join in the same game. Bring it on . . . bring it onshore.

Let us assume that everything I have just said is well known: that is, we are going into this competition fully understanding the consequences, and the

94. *See generally* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603 (2006).

95. *See, e.g.*, Tangwall v. Wacker, No. S-16153, 2018 WL 1125033 (Alaska, Mar. 2, 2018).

reasons for the traditional rules that are being abandoned. Still, there is reason to be cautious. There is a saying in some parts of Canada, and perhaps the U.S., that addresses this need for caution and sounds a cautionary note. In the version I learned it, the saying is not suitable for this polite audience, but I might edit it in the following way. The saying advises, "Never get in a spraying match with a skunk." There are some battles that you will never win.

It is possible, of course, to try to measure the effects of interjurisdictional competition. One can ask, for example, whether these laws are bringing trust funds into a particular jurisdiction, and such studies have been conducted here in the United States.[96] But there is a reason that the kind of competition that we are considering here is often called a "race to the bottom."[97] And I have to ask you to consider whether, in this case, there is any bottom.

I have a friend who spent some time practicing law in the Bahamas, and who in 2012 sent me a legislative bill from that jurisdiction, which is now a law, along with a client newsletter issued by another firm.[98] Both the substance and the tone of that newsletter gave me pause. The tone was this: "Our client was concerned that persons other than him had decision-making power in his trust structure, and was concerned about personal liability for himself and his family members, and about publicity. He wanted total control without any concomitant risk of liability, and total privacy. So, we, the firm, came up with a new legal entity, and we got the legislature to enact it."[99] That is where this race leads, and anyone who plays the game needs to be aware of that. You can't win unless you are willing to give up a great deal.

As to the substance, the new bill creates something called an Executive Entity ("EE"). Imagine that you want a trustee or a protector, or a corporate director. You want to control this person, but you do not want anyone you

96. *See generally* Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356 (2005).

97. *See generally* Sterk, *supra* note 13.

98. The law is the Executive Entities Act 2011 (Bah.), http://www.bfsb-bahamas.com/legislation/2011/ExecutiveEntitiesAct2011.pdf. The newsletter, *Executive Entities: LG Designs an Executive Entity for the Bahamas for Use in Offshore Trust Structures*, on file with the author, was published on January 23, 2012 by the law firm Lawrence Graham LLP, which was later absorbed into another firm.

99. This is a paraphrase, but I believe it is a fair one. Here is some of the text. In the existing structure, the client's son was the enforcer of a non-charitable purpose trust:

> Our Private Capital team proposed the concept [of the EE] to the Bahamas Financial Services Board as a solution to our clients' concerns regarding who should be the decision makers within their wealth structures. Our Private Capital team devised the concept of an executive style entity while reviewing a client's trust structure . . . . The client liked the [existing structure], but was very concerned that [it] gave too much power to his son. . . . It also exposed his son to personal liability as a fiduciary and the structure to unwelcome scrutiny through the professional trustee . . . . The BEE [Bahamas EE] not only solves all the concerns of our client, but it has, in so doing, created a most versatile and useful tool for offshore trust structures; wherever they may be.

know to be potentially responsible for its actions. The EE was created specifically for you. It is a legal person, but it has no shareholders, who might be held liable for its actions. It does not even have any assets; the EE is forbidden to hold property. It just does what it is told.

Remember what I said earlier about the non-charitable purpose trust: it is a collection of assets, affected to a purpose, but belonging to no one. In other words, assets divorced from any legal person. The EE is perhaps the logical opposite: a legal person, but one that is incapable of holding assets. Give the people what they want!

The story of the Bahamian EE is just one example of how, in the offshores, legislative reform is often instigated by the legal profession. The profession passes the wishes of clients on to the legislature, which typically fulfills those requests. In my view, this is not how a jurisdiction should approach law reform. But this is exactly where one will be led if one decides to compete with the offshores.

VI. CONCLUSION

My conclusions will not surprise you. Client-driven law reform is necessarily short-sighted. Clients know what they want. They do not much care what is good for the whole system. The offshores have their own issues and their own goals.

Some of the recent law reform in U.S. trust law is driven by interjurisdictional competition. I have expressed my concerns about such competition. The American Law Institute aims "to clarify, modernize, and otherwise improve the law."[100] My hope is that, just as it did in the case of the rule against perpetuities, the ALI will have something to say about asset protection trusts.

And, perhaps, about non-charitable purpose trusts. The problems with such trusts are less obvious. They do not create a self-evident incongruity within the legal order. They seem to promise a benevolent way to give people what they want. As I have suggested, however, I have come to see them as problematic. In a less obvious way than asset protection trusts, they allow people to take the benefit of property while shielding it from their lawful creditors.

For my part, I still believe in what we read in the first book of the Institutes of Justinian, published on the 21st of November, 533: "The commandments of the law are these: live honourably; harm nobody; give everyone his due."[101] These are only aspirations, of course, too general to be rules of law. But we should never abandon our aspirations.

100. *About ALI*, ALI, https://www.ali.org/about-ali (last visited Apr. 11, 2018).

101. J. INST. 1.1.3, *translated in* PETER BIRKS & GRANT MCLEOD, JUSTINIAN INSTITUTES (1987).