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# ESSAY

## BURN THE REMBRANDT? TRUST LAW'S LIMITS ON THE SETTLOR'S POWER TO DIRECT INVESTMENTS

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### INTRODUCTION

The “organizing principle”<sup>1</sup> of the American law of gratuitous transfers, as formulated in the Restatement (Third) of Property: Wills and Other Donative Transfers, is that “the donor’s intention is given effect to the maximum extent

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<sup>1</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. a (2003).

allowed by law.”<sup>2</sup> For transfers in trust, one corollary of this principle of deference to transferor’s intent<sup>3</sup> has been the understanding that most trust law consists of default law, rules that the transferor (commonly called the “settlor” in trust parlance) can alter when creating the trust.<sup>4</sup> Nevertheless, trust law’s deference to the settlor’s wishes has limits, reflected in the rules of mandatory law that the settlor is not permitted to abridge.<sup>5</sup>

Among these long-established mandatory rules is the rule against capricious purposes. The Restatement (Third) of Trusts explains that “it is capricious to provide that money shall be thrown into the sea, that a field shall be sowed with salt, that a house shall be boarded up and remain unoccupied, or that a wasteful undertaking or activity shall be continued.”<sup>6</sup> The rationale for refusing to enforce such terms, the Restatement says, is that they “would divert distributions or administration *from the interests of the beneficiaries.*”<sup>7</sup> There is a well-known case law, sadly entertaining but fortunately small, in which the courts have struck or refused to enforce such eccentric directions in wills or trusts.<sup>8</sup>

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<sup>2</sup> *Id.* § 10.1.

<sup>3</sup> “A trust is created only if the settlor properly manifests an intention to create a trust relationship.” RESTATEMENT (THIRD) OF TRUSTS § 13 (2003).

<sup>4</sup> See UNIF. TRUST CODE § 105(a) (amended 2005), 7C U.L.A. 428 (2006 & Supp. 2009) (“Except as otherwise provided in the terms of the trust, this [Code] governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.”). I have elsewhere emphasized that the settlor/trustee relationship that is created in a conventional private trust agreement resembles the relations of the parties to a contract, because of the consensual character of trusteeship (the trustee must agree to serve) and the default character of the rules governing most trust terms. See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627, 650 (1995) [hereinafter Langbein, *Contractarian Basis*].

<sup>5</sup> See, e.g., UNIF. TRUST CODE § 105(b), 7C U.L.A. 428-29.

<sup>6</sup> RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (2003).

<sup>7</sup> *Id.* § 29(c) cmt. m (emphasis added); *accord id.* § 47 cmt. e; RESTATEMENT (SECOND) OF TRUSTS § 124 (1959).

<sup>8</sup> E.g., *Bd. of Comm’rs v. Scott (In re Scott’s Will)*, 93 N.W. 109, 110 (Minn. 1903) (voiding a testamentary direction to destroy money); *Brown v. Burdett*, (1882) 21 Ch. D. 667, 668, 673 (Eng.) (invalidating trust in which settlor ordered her house bricked up); *Aitken’s Trs. v. Aitken*, 1927 S.C. (H.L.) 374, 374 (Sess.) (Scot.) (refusing to enforce trust to erect bronze equestrian statues of testator); *M’Caig v. Univ. of Glasgow*, 1907 S.C. (H.L.) 231, 231 (Sess.) (Scot.) (invalidating trust to erect statues of the testator and other family members on lands devised by the testator). Courts sometimes rest the result in such cases on other grounds, such as nuisance or enforcement of a restrictive covenant. E.g., *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210 (Mo. Ct. App. 1975) (refusing to enforce direction to raze house worth \$40,000, on suit of neighboring owners). Case law is collected and discussed in 2 AUSTIN WAKEMAN SCOTT, WILLIAM FRANKLIN FRATCHER & MARK L. ASCHER, SCOTT AND ASCHER ON TRUSTS § 9.3.13, at 516-18 (5th ed. 2006) [hereinafter SCOTT & ASCHER, TRUSTS].

In recent years, the two most authoritative sources of American trust law – the Restatement (Third) of Trusts<sup>9</sup> and the Uniform Trust Code (“UTC” or the “Code”)<sup>10</sup> – have revised the rule against capricious purposes to clarify the principle that has always been its rationale. The Restatement version provides that “a private trust, its terms, and its administration must be for the benefit of its beneficiaries.”<sup>11</sup> The UTC codifies the benefit-the-beneficiaries standard, requiring that “[a] trust and its terms must be for the benefit of its beneficiaries.”<sup>12</sup>

In the December 2008 issue of the *Boston University Law Review*, Jeffrey Cooper published an article<sup>13</sup> in which he criticized both the benefit-the-beneficiaries standard and an article of mine, published in 2004,<sup>14</sup> discussing that standard.<sup>15</sup> My article suggested that the clarification of the rule against capricious purposes found in the Restatement and the UTC would have a salutary effect in one corner of trust investment law, by limiting the power of a trust settlor to insist that the trustee follow investment practices that are demonstrably harmful to the interests of the beneficiaries.<sup>16</sup> Cooper’s article sounds a contrary theme of extreme deference to settlor power. He contends that trust law has allowed the settlor “nearly unfettered latitude”<sup>17</sup> over the terms of the trust, and that trust law should “provide no aid in cases where a settlor intentionally and thoughtfully impaired beneficiaries’ economic rights.”<sup>18</sup>

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<sup>9</sup> The American Law Institute published Volumes 1 and 2 of the Restatement (Third) of Trusts in 2003 and Volume 3 in 2007. A projected final volume is in preparation. The reporter (principal drafter) is Edward C. Halbach, Jr., a distinguished scholar of trust law, who is dean and professor emeritus at the University of California, Berkeley School of Law.

<sup>10</sup> The Uniform Law Commission promulgated the Code in 2000 and has occasionally amended it since. As of 2009, the UTC had been enacted in twenty-two states and the District of Columbia. UNIF. TRUST CODE tbl., 7C U.L.A. 70 (Supp. 2009).

<sup>11</sup> RESTATEMENT (THIRD) OF TRUSTS § 27(2) (2003).

<sup>12</sup> UNIF. TRUST CODE § 404, 7C U.L.A. 484. Although the UTC was promulgated in 2000, before the RESTATEMENT (THIRD) OF TRUSTS § 27 (2003), UTC § 404 was based upon a preliminary draft of the Restatement provision. See UNIF. TRUST CODE § 404 cmt., 7C U.L.A. 484-85. The UTC identifies the benefit-the-beneficiaries requirement as a rule of mandatory law. *Id.* § 105(b)(2)-(3), 7C U.L.A. 428.

<sup>13</sup> Jeffrey A. Cooper, *Empty Promises: Settlor’s Intent, The Uniform Trust Code, and the Future of Trust Investment Law*, 88 B.U. L. REV. 1165 (2008).

<sup>14</sup> John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1107-19 (2004) [hereinafter Langbein, *Mandatory Rules*], expanding on an earlier article, John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641, 663-65 (1996) [hereinafter Langbein, *Trust Investing*].

<sup>15</sup> Cooper, *supra* note 13, at 1169-70, 1173-77, 1192-93, 1214.

<sup>16</sup> Langbein, *Mandatory Rules*, *supra* note 14, at 1107-19.

<sup>17</sup> Cooper, *supra* note 13, at 1168.

<sup>18</sup> *Id.* at 1166.

The present Essay responds to Cooper. Part I examines the balance that trust law strikes between implementing the settlor's donative intent and protecting the interests of trust beneficiaries in the transferred property. Part II probes Cooper's claims that trust law should not prevent a settlor from requiring trust assets to be invested in a fashion manifestly harmful to the interests of the trust's beneficiaries.

## I. BENEFIT THE BENEFICIARIES

### A. *The Dead Hand*

The rule against capricious purposes is an anti-dead-hand rule, which prevents the owner of property from doing by trust or by will something that the owner is free to do with his or her property while alive. Some years ago, Gareth Jones illustrated this point with an arresting example: "A settlor may destroy his own Rembrandt. But he cannot establish a trust and order his trustees to destroy it."<sup>19</sup> What explains this differing treatment of living and deceased transferors? One justification for reduced deference to the deceased transferor is that once in the grave, a decedent cannot reconsider a foolish course of conduct as its consequences emerge, or as circumstances change.<sup>20</sup> The Restatement (Third) of Trusts remarks: "[T]he 'rigor mortis' of deadhand control is not present while a property owner is able to respond to persuasion and evolving circumstances."<sup>21</sup> In a similar vein, Adam Hirsch and William Wang have pointed out that "the interpersonal costs that living persons pay for eccentric behavior,"<sup>22</sup> that is, the resentments that would be provoked among family members and other affected persons, restrain such conduct.<sup>23</sup> The requirement that a transferor must have transactional capacity also limits eccentric behavior among the living, in the sense "that an owner with capacity

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<sup>19</sup> Gareth H. Jones, *The Dead Hand and the Law of Trusts*, in DEATH, TAXES AND FAMILY PROPERTY 119, 126 (Edward C. Halbach, Jr. ed., 1977). Regarding the question of public or cultural protections of such privately owned property, see generally JOSEPH L. SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURES (1999).

<sup>20</sup> See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 18.3, at 544-46 (7th ed. 2007) (expressing concern with "[u]nforeseen contingencies that materialize[] after the testator's death").

<sup>21</sup> RESTATEMENT (THIRD) OF TRUSTS § 29(c) cmt. i (2003).

<sup>22</sup> Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 13 (1992). Robert Sitkoff has remarked "that the owner's failure to destroy the Rembrandt during his lifetime may belie a sense of ambivalence or irresolution about ordering its destruction." Langbein, *Mandatory Rules*, *supra* note 14, at 1110, n.34 (citing Letter from Robert Sitkoff to author 2-3 (May 27, 2003)). "By requiring that the settlor destroy the painting during [his] lifetime if at all, the rule forces him to experience its destruction and thus to demonstrate his resolution." *Id.* These and other factors are discussed in Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781 (2005).

<sup>23</sup> Hirsch & Wang, *supra* note 22, at 13.

to conduct his own affairs may destroy his Rembrandt, but destroying Rembrandts would be likely to cause capacity to be questioned.”<sup>24</sup>

B. *Equitable Title*

A quite distinct explanation for why the law restricts the unilateral dominion of the settlor of a trust who is deceased (or who, though living, has transferred the property to an irrevocable trust) is that trust law is also concerned with protecting the ownership interests of the beneficiaries. A trust is, by definition, a relationship in which the trustee holds and manages the trust property for the benefit of the beneficiaries.<sup>25</sup> Indeed, the settlor’s interest in the transferred trust property is so evanescent that trust law denies the settlor standing to enforce the trust (unless the settlor has retained a beneficial interest such as a life estate, in which case the settlor’s standing derives from and is limited to that beneficial interest, distinct from capacity as settlor).<sup>26</sup> Property still owned by an intending transferor is his or hers alone, but property transferred to a trustee in trust is held by the trustee under a fiduciary obligation for the beneficiaries of the trust.<sup>27</sup> This ownership interest of the beneficiaries is commonly expressed as “equitable title,”<sup>28</sup> and that entitlement sets outer limits on trust law’s willingness to enforce settlor-imposed terms that are harmful to the beneficiaries.<sup>29</sup> As David Hayton has written, these “limits to the free will of the settlor” arise from “the irreducible core content of trusteeship of property.”<sup>30</sup> The Uniform Trust Code requires as a rule of

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<sup>24</sup> Langbein, *Mandatory Rules*, *supra* note 14, at 1110, n.31. Regarding the capacity requirement for a valid trust, see RESTATEMENT (THIRD) OF TRUSTS § 11 (2003); for the capacity requirement for gratuitous transfers generally, see RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 (2003).

<sup>25</sup> RESTATEMENT (THIRD) OF TRUSTS § 2 (2003) (“A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of . . . one or more persons, at least one of whom is not the sole trustee.”).

<sup>26</sup> RESTATEMENT (SECOND) OF TRUSTS § 200 cmt. b (1959). I have criticized this rule for failing to recognize that the settlor as well as the beneficiary may have an interest in enforcing trust terms. Langbein, *Contractarian Basis*, *supra* note 4, at 664. The UTC abridges the rule for charitable trusts. See UNIF. TRUST CODE § 405(c) (amended 2005), 7C U.L.A. 486 (2006); *id.* § 706(a), 7C U.L.A. 575; see also *id.* § 411(a), 7C U.L.A. 497-98 (providing that settlor and beneficiaries may jointly compel termination of a trust “even if the modification or termination is inconsistent with a material purpose of the trust”).

<sup>27</sup> RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

<sup>28</sup> *E.g.*, *id.* § 2 cmt. d; *id.* § 40 cmt. b.

<sup>29</sup> Trust law “reflect[s] a compromise” in which the settlor’s donative freedom is “balanced against . . . the effects of deadhand control on the subsequent conduct or personal freedoms of others.” *Id.* § 29(c) cmt. i.

<sup>30</sup> David Hayton, *The Irreducible Core Content of Trusteeship*, in TRENDS IN CONTEMPORARY TRUST LAW 47, 48-49 (A.J. Oakley ed. 1996). Hayton’s observation about the “irreducible core” of trusteeship was echoed shortly thereafter in an opinion by Lord

mandatory law that a trust must create enforceable duties,<sup>31</sup> and the Code's official comment provides that "a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity."<sup>32</sup> In the leading American case of *Colonial Trust Co. v. Brown*,<sup>33</sup> the Connecticut Supreme Court sounded this rationale of beneficial entitlement, invalidating value-impairing restrictions that the settlor attempted to impose upon the development of commercial real estate that he left in trust.<sup>34</sup> The court explained that "the restrictions are opposed to the interests of the beneficiaries of the trust."<sup>35</sup>

In an insightful turn of phrase, Bernard Rudden has characterized "the normal private trust" as "essentially a gift, projected on the plane of time and so subjected to a management regime."<sup>36</sup> A transferor wishing to make a gift need not use the trust form. A transferor who chooses to use the trust form, however, must accept that minimum regime of fiduciary obligation that defines a trust.<sup>37</sup> Thus, Gareth Jones's paradox that the transferor may destroy his own Rembrandt but not require trustees to do it.<sup>38</sup>

### C. *Material Purpose*

There is an inherent tension in the trust relationship between deferring to settlor's intent and enforcing the beneficiaries' equitable title. English trust law is markedly more restrictive of settlor interference with beneficial title than

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Justice Millet: "There is an irreducible core of obligations owed by the trustee to the beneficiaries and enforceable by them which is fundamental to the concept of a trust. If the beneficiaries have no rights enforceable against the trustees there are no trusts." *Armitage v. Nurse*, [1998] Ch. 241, 253 (App. Ct. 1997) (Eng.).

<sup>31</sup> UNIF. TRUST CODE § 402(a)(4), 7C U.L.A. 481 ("A trust is created only if . . . the trustee has duties to perform."); *accord* RESTATEMENT (THIRD) OF TRUSTS § 2 (2003). To the same effect is the rule that merger of legal and equitable estates defeats a trust. UNIF. TRUST CODE § 402(a)(5), 7C U.L.A. 481.

<sup>32</sup> UNIF. TRUST CODE § 105(b)(1) cmt., 7C U.L.A. 429-30.

<sup>33</sup> 135 A. 555 (Conn. 1926).

<sup>34</sup> *Id.* at 564.

<sup>35</sup> *Id.*

<sup>36</sup> Bernard Rudden, Book Review, 44 MOD. L. REV. 610, 610 (1981).

<sup>37</sup> RESTATEMENT (THIRD) OF TRUSTS § 2 (2003). Under the UTC, a revocable inter vivos trust, which functions as a will substitute rather than as an inter vivos transfer, imposes no fiduciary obligation to beneficiaries other than the settlor during the lifetime of the settlor. UNIF. TRUST CODE § 603(a), 7C U.L.A. 553 ("While a trust is revocable [and the settlor has capacity to revoke the trust], rights of the beneficiaries are subject to the control of, and the duties of the trustee are owed exclusively to, the settlor."); *accord*, RESTATEMENT (THIRD) OF TRUSTS § 25 (2003).

<sup>38</sup> *See* Jones, *supra* note 19, at 126.

American law. The classic English case of *Saunders v. Vautier*<sup>39</sup> held that a trust settlor may not impose a condition of postponed enjoyment on an adult beneficiary's interest in trust.<sup>40</sup> In that case, the chancery court refused to enforce a trust term requiring that the trust income accumulate until the beneficiary reached age twenty-five, holding instead that the beneficiary was entitled to have the proceeds when he turned twenty-one (the then age of majority).<sup>41</sup> The court reasoned that because the beneficiary alone had equitable title, the settlor could not impose trust terms interfering with the beneficiary's ownership interest.<sup>42</sup>

American trust law, under the leadership of the Massachusetts Supreme Judicial Court<sup>43</sup> in the case of *Clafin v. Clafin*,<sup>44</sup> rejected the rule in *Saunders v. Vautier* in favor of what has come to be known as the material purpose doctrine.<sup>45</sup> Under the *Clafin* rule, American courts enforce a settlor-imposed trust term so long as the court concludes that the term in question serves "a material purpose of the trust."<sup>46</sup> Explaining the decision in *Clafin*, the Massachusetts court emphasized the settlor's purpose in imposing the condition of postponed enjoyment: "[T]here is not the same danger that [the beneficiary] will spend the property while it is in the hands of the trustees as there would be if it were in his own."<sup>47</sup> The logic of the American material purpose rule is, therefore, protective. Our courts enforce settlor-imposed restraints in circumstances in which the purpose of the restraint is to benefit the beneficiary. Speaking of the trust modification rule, which permits a court to alter a trust term unless the term embodies a material purpose, the Restatement says: "Material purposes are not readily to be inferred. A finding of such a purpose generally requires some showing of a particular concern or objective

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<sup>39</sup> Cr. & Ph. 240, 41 Eng. Rep. 482 (Ch.) (1841). For a recent defense of *Saunders v. Vautier*, see Paul Matthews, *The Comparative Importance of the Rule in Saunders v. Vautier*, 122 LAW Q. REV. 266, 293-94 (2006).

<sup>40</sup> 41 Eng. Rep. at 485.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> The Massachusetts Supreme Judicial Court exerted enormous influence on American trust law in the nineteenth century, pioneering not only the material purpose doctrine, but also the prudence standard for trust investing, see *Harvard Coll. v. Amory*, 26 Mass. (9 Pick.) 446, 460-61 (1830); the enforcement of spendthrift trusts, see *Broadway Nat'l Bank v. Adams*, 133 Mass. 170, 174 (1882); and the so-called "Massachusetts Rule" for the treatment of corporate dividends in trust accounting, see *Leland v. Hayden*, 102 Mass. 542, 552 (1869).

<sup>44</sup> 20 N.E. 454 (1889).

<sup>45</sup> *Id.* at 456.

<sup>46</sup> See UNIF. TRUST CODE § 411(b) (amended 2005), 7C U.L.A. 498 (2006); accord, RESTATEMENT (THIRD) OF TRUSTS § 65(2) (2003).

<sup>47</sup> *Clafin*, 20 N.E. at 456.

on the part of the settlor, such as concern with regard to a beneficiary's management skills, judgment, or level of maturity."<sup>48</sup>

What then of a trust for Barbara, the beneficiary, with instructions to the trustee to burn the trust-owned Rembrandt? That term is quite "material" in the sense of being consequential to Barbara, but not in the sense that the material purpose doctrine comprehends. Under the material purpose doctrine, the court asks whether a disputed trust term has a purpose that is material to the best interests of the beneficiaries of that trust. Trust law rightly presupposes that in making a gift in trust rather than as an unconditioned transfer, and in specifying the trust's terms, the settlor is highly likely to be acting for the benefit of the beneficiaries. The trust form is commonly chosen for purposes that are protective: to obtain professional investment management,<sup>49</sup> to postpone enjoyment until the beneficiaries are more mature, to shield potential spendthrifts by restraining their powers of alienation,<sup>50</sup> to divide beneficial interests among multiple and sometimes successive descendants, and so forth. If the settlor cares enough for particular persons to choose them as the beneficiaries of the trust, the inference is strong that the settlor has their interests at heart when tailoring the trust terms. On the other hand, as the capricious purpose cases show,<sup>51</sup> that inference is not always correct. The settlor who directs that the house be razed or bricked up or that the money be burnt<sup>52</sup> is manifestly not acting in the interests of the beneficiaries, and that is the reason why trust law will not enforce the settlor's direction.

The principle of deference to the donative freedom of the settlor in selecting those persons who will be the beneficiaries of the trust is, just as Cooper says, "nearly unfettered."<sup>53</sup> In a private trust, no objective standard such as "material purpose" intrudes on the settlor's decision to prefer Barbara over Brutus.<sup>54</sup> If the settlor chooses to exercise that freedom by making a transfer in trust, the settlor has chosen to impress the property with fiduciary obligation for the beneficiary, and the rule against capricious purposes protects against

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<sup>48</sup> RESTATEMENT (THIRD) OF TRUSTS § 65 cmt. d (2003).

<sup>49</sup> A theme of John H. Langbein, *Rise of the Management Trust*, 143 TR. & EST. MAG., Oct. 2004, at 52, 52-56.

<sup>50</sup> As allowed, for example, under UNIF. TRUST CODE § 502, 7C U.L.A. 523.

<sup>51</sup> See cases cited *supra* note 8.

<sup>52</sup> See cases cited *supra* note 8.

<sup>53</sup> Cooper, *supra* note 13, at 1168.

<sup>54</sup> By contrast, the law of charitable trusts does impose objective standards of public benefit on attempted charitable trusts. See, e.g., UNIF. TRUST CODE § 405(a), 7C U.L.A. 485; RESTATEMENT (THIRD) OF TRUSTS § 28 (2003) (replicating, in significant part, the Statute of Charitable Uses, 1601, 43 Eliz., c. 4). In *Westminster Bank v. Pinion (In re Pinion)*, [1965] 1 Ch. 85 (App. Ct. 1964) (Eng.), expert evidence was taken regarding the artistic and cultural merit of a purported museum that the settlor undertook to found as a charitable trust. *Id.* at 89-92. The court refused to enforce the trust, Lord Justice Harman saying that he could "conceive of no useful object to be served in foisting upon the public this mass of junk. It has neither public utility nor educative value." *Id.* at 104.



trust terms manifestly harmful to the beneficiary. In the case of the Rembrandt transferred in trust for Barbara as beneficiary with instructions to the trustee to burn the Rembrandt, the reason that the court will not enforce the term is that, as a matter of objective rationality, the term is manifestly not to her benefit. What the Restatement (Third) of Trusts and the Uniform Trust Code have done in articulating the benefit-the-beneficiaries standard is simply to clarify that long implicit principle.

D. *Mandatory Law*<sup>55</sup>

1. UTC Section 105(b)

The rule against capricious purposes is one of a number of rules of trust law that are mandatory, that is, not subject to variation or countermand by the settlor. The UTC contains a menu-type provision, section 105(b), which collects cross-references to the various mandatory rules found in the Code.<sup>56</sup> Cooper is seriously misleading in contending that this provision “fundamentally departs from prior law by establishing fourteen ‘mandatory rules’ that a trust settlor cannot waive.”<sup>57</sup> Section 105(b) is indeed innovative as a matter of organization or display, by collecting these cross-references in a single place,<sup>58</sup> but apart from some reforms in the details of disclosure law,<sup>59</sup> the mandatory rules scheduled in section 105(b) are old hat. For example, the UTC forbids the settlor from establishing a trust for illegal purposes,<sup>60</sup> or from interfering with the court’s power to require a bond.<sup>61</sup> Equally longstanding are the mandatory rules identified in section 105(b) that forbid the settlor to countermand the trustee’s duty to act in good faith,<sup>62</sup> or the Code’s limits on

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<sup>55</sup> I have suggested that the mandatory rules of trust law can be categorized as being of two sorts: (1) anti-dead-hand rules that defeat the settlor’s intent; and (2) intent-implementing rules designed to protect the settlor as well as the beneficiaries from misunderstanding or imposition. See Langbein, *Mandatory Rules*, *supra* note 14, at 1105-06, 1119-27.

<sup>56</sup> UNIF. TRUST CODE §105(b), 7C U.L.A. 428-29.

<sup>57</sup> Cooper, *supra* note 13, at 1173 (citation omitted).

<sup>58</sup> The UTC follows the model of the UNIFORM PARTNERSHIP ACT § 103(b) (1997), 6, pt.1 U.L.A. 73-74 (2001), in collecting and cross-referring in a single section to all the mandatory provisions of a comprehensive statute that deals prevalingly with default law. See UNIF. TRUST CODE §105(b), 7C U.L.A. 428-29.

<sup>59</sup> UNIF. TRUST CODE §105(b)(8), 7C U.L.A. 428; *id.* § 813(a), 7C U.L.A. 609.

<sup>60</sup> *Id.* §105(b)(3), 7C U.L.A. 428; *id.* § 404, 7C U.L.A. 484.

<sup>61</sup> *Id.* §105(b)(6), 7C U.L.A. 428; *id.* § 702, 7C U.L.A. 563-64.

<sup>62</sup> *Id.* §105(b)(2), 7C U.L.A. 428; *id.* § 801, 7C U.L.A. 587.

exculpation clauses,<sup>63</sup> or the requirements for trust creation,<sup>64</sup> or the statute of limitations.<sup>65</sup> These rules do not “fundamentally depart[] from prior law.”<sup>66</sup>

## 2. Default Law

Among the requirements for trust creation – mandatory under the UTC and long before – is the principle that “[a] trust is created only if . . . the trustee has duties to perform.”<sup>67</sup> This principle, which overlaps the benefit-the-beneficiaries standard, sets outer limits on the power of a settlor to countermand even those rules of trust law that are default rules, notably the law of fiduciary administration. The two core rules of trust fiduciary law – the duty of loyalty (to administer the trust solely in the interests of the beneficiaries)<sup>68</sup> and the duty of prudent administration (the care norm, which requires the exercise of reasonable care, skill, and caution)<sup>69</sup> – are default rules.<sup>70</sup> Yet although the settlor can alter these rules, the settlor cannot eliminate them. A trust term providing that the trustee owes no duty of loyalty would leave the interests of the beneficiaries unprotected against a trustee who set out to loot the trust. Such a term would violate both the principle that fiduciary duties may not be entirely eliminated,<sup>71</sup> and the rule against capricious purposes, that is, in UTC parlance, the rule that a trust and its terms must be for the benefit of the beneficiaries.<sup>72</sup> Trust law’s mandatory rule<sup>73</sup> limiting the extent of exculpation clauses<sup>74</sup> reinforces this principle by striking any trust term that “relieves the trustee of liability for breach of trust

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<sup>63</sup> *Id.* §105(b)(10), 7C U.L.A. 428; *id.* § 1008, 7C U.L.A. 654.

<sup>64</sup> *Id.* §105(b)(1), 7C U.L.A. 428; *id.* § 402, 7C U.L.A. 481.

<sup>65</sup> *Id.* §105(b)(12), 7C U.L.A. 428-29.

<sup>66</sup> Cooper, *supra* note 13, at 1173. For discussion of earlier trust law on many of these rules, see UNIF. TRUST CODE § 105(b) cmt., 7C U.L.A. 429-32.

<sup>67</sup> UNIF. TRUST CODE § 402(a)(4), 7C U.L.A. 481; *accord* RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

<sup>68</sup> UNIF. TRUST CODE § 802(a), 7C U.L.A. 588; *accord* RESTATEMENT (THIRD) OF TRUSTS § 78 (2007).

<sup>69</sup> UNIF. TRUST CODE § 804, 7C U.L.A. 601 (“A trustee shall administer the trust as a prudent person would, by considering the purposes, terms, distributional requirements, and other circumstances of the trust. In satisfying this standard, the trustee shall exercise reasonable care, skill, and caution.”); *accord* RESTATEMENT (THIRD) OF TRUSTS § 77(1)-(2) (2007).

<sup>70</sup> *See* UNIF. TRUST CODE §105(a), 7C U.L.A. 428 (providing that all rules except those made mandatory under § 105(b) are default rules); *infra*, text at notes 121-126.

<sup>71</sup> *See supra* note 67.

<sup>72</sup> UNIF. TRUST CODE § 404, 7C U.L.A. 484.

<sup>73</sup> *Id.* § 105(b)(10), 7C U.L.A. 428.

<sup>74</sup> *Id.* § 1008, 7C U.L.A. 654.

committed in bad faith or with reckless indifference to the purposes of the trust or the interests of the beneficiaries.”<sup>75</sup>

Similarly, although the prudence norm is a default rule that the settlor “may modify or relax,”<sup>76</sup> the Restatement (Third) of Trusts emphasizes that “trust terms may not altogether dispense with the fundamental requirement that trustees not behave recklessly but act in good faith, with some suitable degree of care, and in a manner consistent with the terms and purposes of the trust and the interests of the beneficiaries.”<sup>77</sup>

These limits on settlor autonomy in the realm of default law have virtually no effect in routine trust practice, because it is the rare settlor so perverse as to attempt to alter the default rules in a manner so harmful to the trust’s beneficiaries. The typical settlor strains to benefit the beneficiaries, not harm them. But when such a case arises, trust law protects the beneficiaries. The official comment to the Uniform Trust Code plainly states that Code rules that would otherwise be default law, may not be “overridden” when doing so would conflict with “the trustee’s fundamental obligation to act in good faith, in accordance with the purposes of the trust, and for the benefit of the beneficiaries.”<sup>78</sup> A trust term exonerating recklessness or bad faith is unenforceable for the same reason that the term directing the burning of the Rembrandt is unenforceable. Trust law’s deference to the settlor’s direction presupposes and presumes that the direction is beneficiary-regarding, which it virtually always is. But if trust beneficiaries (or trustees acting on behalf of trust beneficiaries) can carry the burden of showing that a trust term is contrary to the interests of the beneficiaries, the otherwise default character of the rule in question is no defense. The relatively few rules of mandatory law merely set outer limits against trust terms so harmful that they would undermine fiduciary obligation.

## II. INVESTMENT DIRECTIONS

Because trust investing is a branch of fiduciary administration, trust investment law reflects the twin principles discussed above: (1) routine deference to settlor direction, subject, however, to (2) outer limits against terms harmful to the interests of the beneficiaries.<sup>79</sup> In my 2004 article, I suggested that the greater clarity of the benefit-the-beneficiaries standard (by comparison with the older formulation in the rule against capricious purposes) would help the courts respond appropriately to those rare cases in which a

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<sup>75</sup> *Id.* § 1008(a)(1), 7C U.L.A. 654. The rule is longstanding; the Code’s version follows RESTATEMENT (SECOND) OF TRUSTS § 222 (1959).

<sup>76</sup> RESTATEMENT (THIRD) OF TRUSTS § 77(2) cmt. d. (2007); *see also id.* § 29(c) cmt. m. (2003) (“[A] trust provision may not be enforced if to do so would undermine proper administration of the trust.”).

<sup>77</sup> RESTATEMENT (THIRD) OF TRUSTS § 77(2) cmt. d. (2007).

<sup>78</sup> UNIF. TRUST CODE art. 8 general cmt., 7C U.L.A. 587.

<sup>79</sup> *See supra* notes 1-7 and accompanying text.

settlor attempted to impose manifestly harmful investment directions.<sup>80</sup> By contrast, Cooper's 2008 article contends that trust law should "provide no aid"<sup>81</sup> in such cases.

I offered two examples of investment folly on the part of a trust settlor that, under the benefit-the-beneficiaries standard, should be struck.<sup>82</sup> For convenience, I shall refer to these examples as the Enron Case and the IBM Case. The Enron Case concerned "a modest trust fund for the support of [the settlor's] otherwise destitute widow and orphans"; the settlor required the fund to be invested entirely in shares of the bankrupt Enron Corporation.<sup>83</sup> The settlor left an account of his thinking, in which he explained that he thought that the shares were undervalued and had "the potential to increase greatly in value."<sup>84</sup> Such an instruction involves two fundamental blunders from the standpoint of trust default law. Following the settlor's direction would subject the portfolio to excessive risk relative to the risk tolerance of the trust's extremely needy beneficiaries and contrary to the trustee's duty to pursue an "investment strategy having risk and return objectives reasonably suited to the trust."<sup>85</sup> Furthermore, by concentrating the portfolio in a single issue, this program would subject the portfolio to the risk of massive underdiversification, contrary to the trustee's duty to diversify trust investments.<sup>86</sup> Accordingly, I concluded: "No court would enforce such a direction, even though the principles of trust investment law with which the direction conflicts (especially the duty to diversify trust investments and, more generally, the duty of prudent investing) are default rules that the settlor may waive."<sup>87</sup> Because the "underdiversification and volatility levels would be so contrary to the risk-and-return profile of the beneficiaries[,] . . . the direction could not satisfy an objective standard of benefit under the benefit-the-beneficiaries rule."<sup>88</sup> Like the direction to burn the Rembrandt, the investment direction in the Enron Case is so capricious – that is, so objectively harmful to the interests of the beneficiaries – that no court would enforce it. Revealingly, Cooper's 2008 critique of my article is wholly silent about the Enron Case. Despite Cooper's claim that trust law should "provide no aid in cases where a settlor intentionally and thoughtfully impaired beneficiaries' economic rights,"<sup>89</sup>

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<sup>80</sup> Langbein, *Mandatory Rules*, *supra* note 14, at 1111-17.

<sup>81</sup> Cooper, *supra* note 13, at 1166.

<sup>82</sup> Langbein, *Mandatory Rules*, *supra* note 14, at 1111-15.

<sup>83</sup> *Id.* at 1111.

<sup>84</sup> *Id.*

<sup>85</sup> UNIF. PRUDENT INVESTOR ACT § 2(b) (1994), 7B U.L.A. 20 (2006).

<sup>86</sup> *See id.* § 3, 7B U.L.A. 29 ("A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.").

<sup>87</sup> Langbein, *Mandatory Rules*, *supra* note 14, at 1111-12 (citations omitted).

<sup>88</sup> *Id.* at 1112.

<sup>89</sup> Cooper, *supra* note 13, at 1166.

Cooper makes no effort to defend the objectively stupid investment provision in the Enron Case.

My second example of an investment direction meriting judicial intervention, the IBM Case,<sup>90</sup> is what has attracted Cooper's ire. I supposed a situation in which the settlor, a long-time employee of IBM, died, leaving in trust as his only substantial asset a block of IBM stock.<sup>91</sup> The trust contained a term forbidding the trustee from selling the shares.<sup>92</sup> I noted that "because the settlor's death result[ed] in a stepped-up basis" for tax purposes, the IBM shares could be sold without tax cost.<sup>93</sup> I posited further that the settlor left a letter explaining his decision to impose this trust term, in which he said: "I worked for IBM for 35 years, they were wonderful to me, they helped me buy the stock, and the stock zoomed in value throughout my career. You just cannot do better."<sup>94</sup> The main difference between the Enron Case and the IBM Case is that the shares of bankrupt Enron are far riskier than those of the blue chip IBM. What the two cases share is that each settlor has mandated massive underdiversification in circumstances in which there is no offsetting justification of merit. I explain below why such underdiversification has come to be understood as inflicting "uncompensated risk," and why in consequence such a trust term should be treated as capricious, hence unenforceable under the benefit-the-beneficiaries standard.<sup>95</sup>

Cooper defends the trust term in the IBM case, reasoning that "[t]he settlor's prohibition on the sale of IBM stock meets the traditional standard for enforceability: it is neither illegal, immoral, nor against public policy. It is merely foolish."<sup>96</sup> This argument is quite wrong: When foolishness becomes seriously value-impairing to trust beneficiaries, it does not "meet the traditional standard for enforceability." Rather, foolishness, which is a synonym for capriciousness, is unenforceable for the same reason as the trust term to burn the Rembrandt.

#### A. *The Duty to Diversify Trust Investments*

In the 1990s, the prudence norm of trust investment law underwent revision in response to major changes in the investment practices of fiduciary

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<sup>90</sup> Posited initially in Langbein, *Trust Investing*, *supra* note 14, at 663-65; further developed in Langbein, *Mandatory Rules*, *supra* note 14, at 1111-13.

<sup>91</sup> Langbein, *Trust Investing*, *supra* note 14, at 664; *see also* Langbein, *Mandatory Rules*, *supra* note 14, at 1112-13.

<sup>92</sup> Langbein, *Trust Investing*, *supra* note 14, at 664; *see also* Langbein, *Mandatory Rules*, *supra* note 14, at 1112-13.

<sup>93</sup> Langbein, *Trust Investing*, *supra* note 14, at 664; *see also* Langbein, *Mandatory Rules*, *supra* note 14, at 1112-13.

<sup>94</sup> Langbein, *Trust Investing*, *supra* note 14, at 664; *see also* Langbein, *Mandatory Rules*, *supra* note 14, at 1112-13.

<sup>95</sup> *See infra* Part II.A.1.

<sup>96</sup> Cooper, *supra* note 13, at 1175.

investors.<sup>97</sup> The changed investment landscape resulted from empirical and theoretical advances in the understanding of securities markets and portfolio construction, a body of knowledge now commonly called Modern Portfolio Theory (“MPT”).<sup>98</sup> Thus far, six Nobel Prizes in economics have been awarded for the research underlying MPT.<sup>99</sup>

### 1. Why Diversification Matters

Two discoveries have been among the central findings of MPT: (1) the difficulty that an investor faces in attempting to outperform the broad market averages;<sup>100</sup> and (2) the large and essentially costless gains to be had from diversifying a portfolio across many different asset classes, and across many different issuers within an asset class.<sup>101</sup> MPT divides the risk of securities ownership into compensated and uncompensated risk.<sup>102</sup> For example, the investor who buys bonds issued by weaker issuers (so called junk bonds) assumes greater risk of default than the investor who only buys Treasuries. The junk bonds pay higher interest rates, compensating the investor for bearing the greater risk. But no one pays the investor for concentrating a portfolio in too small a range of asset classes or issuers. Thus, underdiversification causes the portfolio to bear uncompensated risk, risk that could be largely eliminated by spreading the investments across a wider range of asset classes and issues.<sup>103</sup> Discussing the IBM Case in my 2004 article, I gave examples of the dangers of underdiversification:

Even a blue chip can suffer catastrophic and wholly unpredictable losses – as happened, for example, to the shares of the Union Carbide Company in the wake of the 1984 Bhopal disaster or to Texaco, then independent and one of the major international oil companies, when a

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<sup>97</sup> I have reviewed these developments in Langbein, *Mandatory Rules*, *supra* note 14, at 1113, and more extensively in Langbein, *Trust Investing*, *supra* note 14, at 642, 645-49. For earlier accounts, see generally BEVIS LONGSTRETH, *MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE* (1986); JAMES H. LORIE & MARY T. HAMILTON, *THE STOCK MARKET: THEORIES AND EVIDENCE* (1973); John H. Langbein & Richard A. Posner, *Market Funds and Trust-Investment Law*, 1976 AM. B. FOUND. RES. J. 1.

<sup>98</sup> Langbein, *Trust Investing*, *supra* note 14, at 642. For a lawyers’ guide, see generally JONATHAN R. MACEY, *AN INTRODUCTION TO MODERN FINANCIAL THEORY* (2d ed. 1998).

<sup>99</sup> Franco Modigliani (1985), Harry M. Markowitz (1990), Merton H. Miller (1990), William F. Sharpe (1990), Robert C. Merton (1997), and Myron S. Scholes (1997). See All Laureates in Economic Sciences, [http://nobelprize.org/nobel\\_prizes/economics/laureates](http://nobelprize.org/nobel_prizes/economics/laureates) (last visited Oct. 25, 2009).

<sup>100</sup> Langbein, *Trust Investing*, *supra* note 14, at 655-58.

<sup>101</sup> *Id.* at 646-49.

<sup>102</sup> *Id.* at 648.

<sup>103</sup> *Id.* Empirical research indicates that the uncompensated risk of underdiversification within an equity portfolio can be largely eliminated in a carefully constructed portfolio of approximately twenty different issues. RICHARD A. BREALY ET AL., *PRINCIPLES OF CORPORATE FINANCE* 162 (8th ed. 2006).

fluke lawsuit forced it into bankruptcy in 1987. Such changes of fortune can occur more slowly, but be equally catastrophic for a trust fund that is locked into a declining company. For example, in the 1970s and 1980s the mass merchant Kmart was a revered blue chip; no one could have predicted that the success of an upstart Arkansas retailer called Wal-Mart would ultimately send Kmart into bankruptcy in the year 2002. . . . We have lately seen accounting frauds reduce huge firms such as Enron and WorldCom to bankruptcy, frauds that sophisticated investment professionals failed to detect until the harm was done.

Because it is so hard to foresee the next Bhopal or WorldCom, the prudent fiduciary investor diversifies so broadly that if catastrophe befalls one of the holdings in the portfolio, the loss will be lessened (and often somewhat offset by the performance of other portfolio companies, because competitors commonly prosper when a rival falters).<sup>104</sup>

Modern Portfolio Theory isolates three distinct components of the risk of owning any security: market risk, industry risk, and firm risk.<sup>105</sup> “Market risk is common to all securities,” and cannot therefore be diversified away; “it reflects general economic and political conditions,”<sup>106</sup> such as the credit market collapse of 2008-2009. “Industry risk, by contrast, is specific to the firms in a particular industry or an industry grouping.”<sup>107</sup> Firm risk involves factors that affect only a particular firm, such as the impact of the Bhopal disaster on shares of Union Carbide.<sup>108</sup>

The capital market investigators have . . . been able to compute the approximate weight of [these] three elements that comprise the risk of securities ownership. In round numbers, market risk has been reckoned at 30 percent; the risk of industry and other groupings at 50 percent; and firm risk at 20 percent. These numbers underlie the intense [concern] with diversification as the means of reducing the risk of investing.<sup>109</sup>

Industry risk and firm risk, constituting some seventy percent of the risk of securities ownership, can be largely eliminated through diversification, and essentially without cost.<sup>110</sup>

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<sup>104</sup> Langbein, *Mandatory Rules*, *supra* note 14, at 1113-14 (citations omitted).

<sup>105</sup> Langbein, *Trust Investing*, *supra* note 14, at 647.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 647-48 (citing R.A. BREALEY, AN INTRODUCTION TO RISK AND RETURN FROM COMMON STOCKS 117 (2d ed. 1983)). “Brealey’s actual numbers are 31% market risk; 12% industry risk; 37% other groupings; and 20% firm risk. The passage in the text consolidates industry and other groupings and rounds it to 50%.” Langbein, *Trust Investing*, *supra* note 14, at 647, n.47.

<sup>110</sup> *Id.* at 647-48.

## 2. The Trust Law Duty

In response to the lessons of MPT, the duty to diversify trust investments has been intensified, both in revisions to the Restatement (Third) of Trusts finalized in 1992,<sup>111</sup> and in the Uniform Prudent Investor Act of 1994 (“UPIA”).<sup>112</sup> The UPIA is now in force in all but a few states.<sup>113</sup> The Uniform Trust Code of 2000 incorporates the UPIA by reference.<sup>114</sup> Section 3 of the UPIA provides: “A trustee shall diversify the investments of the trust unless the trustee reasonably determines that, because of special circumstances, the purposes of the trust are better served without diversifying.”<sup>115</sup> Jurisdictions that had resisted the duty to diversify in prior law, notably New York<sup>116</sup> and Pennsylvania,<sup>117</sup> capitulated and enacted versions of the uniform act.<sup>118</sup>

Like the rest of trust investment law, the duty to diversify is a default rule. The UPIA permits a trustee to decide not to diversify, but only for good reason (“special circumstances” in which “the purposes of the trust are better

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<sup>111</sup> See RESTATEMENT (THIRD) OF TRUSTS § 227(b) (1992) (integrating the requirement of diversification into the definition of prudent investing). This provision has now been recodified without change as RESTATEMENT (THIRD) OF TRUSTS § 90(b) (2007). For the reporter’s discussion of the reforms, see generally Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 27 REAL PROP. PROB. & TR. J. 407 (1992).

<sup>112</sup> UNIF. PRUDENT INVESTOR ACT § 3 (1994), 7B U.L.A. 29 (2006).

<sup>113</sup> The Act is in force in forty-five states and the District of Columbia. *Id.* tbl., 7B U.L.A. 1-2 (2009 Supp.). The remaining states have nonuniform versions. See Max M. Schanzenbach & Robert H. Sitkoff, *Did Reform of Prudent Trust Investment Laws Chance Trust Portfolio Allocation?*, 50 J. L. & ECON. 681, 686 & n.13, 708-09 tbl.A1 (2007). The Act made a number of reforms in addition to strengthening the duty to diversify. See UNIF. PRUDENT INVESTOR ACT, prefatory note, 7B U.L.A. 3; John H. Langbein, *The New American Trust-Investment Act*, 8 TR. L. INT’L 123, 123-24 (1994). A few states have nonuniform provisions weakening the duty to diversify. *E.g.*, DEL. CODE. ANN. tit. 12, § 3303(a) (2007); N.H. REV. STAT. ANN. § 564-B:9-901(b) (2007); 20 PA. CONS. STAT. ANN. §§ 7204-7205 (West 2005); S.D. CODIFIED LAWS § 55-5-8 (2004 & Supp. 2009).

<sup>114</sup> The Code supplies an otherwise blank Article 9, whose prefatory comment advises enacting jurisdictions on how to recodify the UPIA as UTC Article 9. UNIF. TRUST CODE art. 9 general cmt. (amended 2005), 7C U.L.A. 642 (2006).

<sup>115</sup> UNIF. PRUDENT INVESTOR ACT § 3, 7B U.L.A. 29. Section 4 of the Act, dealing with the duties of a trustee receiving assets at the inception of a trusteeship, allows “a reasonable time . . . [to] review the trust assets and make and implement decisions concerning the retention and disposition of assets, in order to bring the trust portfolio into compliance.” *Id.* § 4, 7B U.L.A. 33.

<sup>116</sup> See *In re Adriance’s Estate*, 260 N.Y.S. 173, 181 (Sur. Ct. 1932). For the modern position in New York, enforcing the duty to diversify, see *In re Estate of Janes*, 681 N.E.2d 332, 336 (N.Y. 1997).

<sup>117</sup> See *In re Saeger’s Estate*, 16 A.2d 19, 21-22 (1940).

<sup>118</sup> See N.Y. EST. POWERS & TRUSTS LAW § 11-2.3(b)(C) (McKinney 2008 & Supp. 2009); 20 PA. CONS. STAT. ANN. §§ 7204-7205.



served”).<sup>119</sup> The official comment to the Act identifies two such circumstances: (1) the case in which the tax advantages “may outweigh the advantages of diversifying the holding”; and (2) some cases in which a trust “retain[s] a family business.”<sup>120</sup>

### 3. The Relationship of Mandatory and Default Law

Cooper bases his argument for deference to the settlor’s direction in the IBM case on an extreme textualist interpretation of the default character of the duty to diversify.<sup>121</sup> Emphasizing that “the UPIA is a pure default statute,”<sup>122</sup> Cooper reasons that because the UPIA does not repeat the UTC’s benefit-the-beneficiaries requirement, the UPIA should be read by implication to conflict with and exclude that rule.<sup>123</sup> Cooper’s mistake is to treat a specialized statute, such as the UPIA, as though it were meant to operate in isolation from the rest of trust law. The UPIA addresses investment issues; it does not restate the whole of trust law. Indeed, the UPIA does not restate any of the longstanding rules of mandatory law, such as the rule against illegal purposes. For the same reason that the UPIA’s default rules of investment practice do not, by implication, validate trust terms directing a trustee to invest in a bordello or in narcotics trafficking,<sup>124</sup> Cooper is wrong to claim that the UPIA, by implication, repeals or is irreconcilable with the rule against capricious purposes (now formulated as the benefit-the-beneficiaries requirement) as that rule applies to investment directions. The UPIA does not speak to or bear on the scope of the mandatory rules found in the UTC or in the trust law of non-UTC jurisdictions.

The duty to diversify remains default law, which the UPIA authorizes the settlor to abridge in those “special circumstances, [in which] the purposes of the trust are better served without diversifying.”<sup>125</sup> There is always a presumption that the donor who establishes a trust is acting for the benefit of the beneficiaries, but that presumption can be overcome in the rare case in which evidence establishes that a trust term will harm the interests of the beneficiaries. What has changed in recent decades is the growing

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<sup>119</sup> UNIF. PRUDENT INVESTOR ACT § 3, 7B U.L.A. 29.

<sup>120</sup> *Id.* § 3 cmt., 7B U.L.A. 29.

<sup>121</sup> Cooper, *supra* note 13, at 1180-81.

<sup>122</sup> *Id.* (citing UNIF. PRUDENT INVESTOR ACT § 1(b), 7B U.L.A. 15-16). Section 1(b) provides that “[t]he prudent investor rule, a default rule, may be expanded, restricted, eliminated, or otherwise altered by the provisions of a trust.” UNIF. PRUDENT INVESTOR ACT § 1(b), 7B U.L.A. 15-16.

<sup>123</sup> By “completely overrid[ing] the default posture of the UPIA,” the benefit-the-beneficiaries rule “convert[s] the previously default duty to diversify into a mandatory one that . . . the settlor cannot abrogate.” Cooper, *supra* note 13, at 1180-81.

<sup>124</sup> For the rule against illegal trust purposes, see UNIF. TRUST CODE § 404, 7C U.L.A. 484 (2006).

<sup>125</sup> UNIF. PRUDENT INVESTOR ACT § 3, 7B U.L.A. 29.

understanding of the extent to which diversification is beneficial and costless (“the only free lunch in economics”<sup>126</sup>), and these factors bear on the question of whether a trust term is seriously harmful.

In the IBM Case, in which there is a direction not to diversify a trust fund concentrated entirely in the shares of a single, liquid, widely-held security, no offsetting benefit arises from the failure to diversify.<sup>127</sup> The settlor directed the trust to bear the uncompensated risk intrinsic to underdiversification without compensating advantage.<sup>128</sup> Attempting to defend that direction, Cooper asks us to imagine a variant in which the settlor justifies the direction by explaining, “I worked for IBM for thirty-five years and I believe that company is poised to enter a period of unprecedented growth. The market fundamentally misperceives the company’s business prospects and its stock is grossly undervalued.”<sup>129</sup> According to Cooper, this direction must now be followed, because the settlor has “offer[ed] a logical rationale for why diversification would not maximize his beneficiaries’ wealth.”<sup>130</sup> But Cooper supplies no basis for his assertion that this recital constitutes “a logical rationale.”<sup>131</sup> In truth, this supposed “rationale” is quite illogical. It presupposes that a now-deceased former employee of IBM (an immense, publicly-traded company, which is followed by dozens of professional securities analysts, and which operates in rapidly changing technology-based fields) possesses material information or insight of enduring value that the securities markets have mispriced. Indeed, Cooper asserts that this improbable recital evidences the settlor’s “understanding of financial markets and investment strategy.”<sup>132</sup> The more likely inference, based on what is now known about the difficulty of identifying mispriced securities<sup>133</sup> and the enormous advantages of diversification, is that the settlor’s recital is the product not of his “understanding of financial markets and investment strategy,” but rather of his sentimental affection for bygone days. The settlor’s well-intentioned but primitive views on investment matters do not justify investment directions that are otherwise objectively foolish by the standards of the field. The question whether an investment direction is capricious is intrinsically objective. Sincere belief in folly does not make folly any less foolish.

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<sup>126</sup> This is an oft-repeated turn of phrase that I have not been able to trace to its source. See, e.g., Aaron Pressman, *Your Post Sub-Prime Portfolio*, BUS. WK., July 14, 2008, at 48.

<sup>127</sup> See Langbein, *Mandatory Rules*, *supra* note 14, at 1112-13; Langbein, *Trust Investing*, *supra* note 14, at 664.

<sup>128</sup> See Langbein, *Mandatory Rules*, *supra* note 14, at 1112-13; Langbein, *Trust Investing*, *supra* note 14, at 664.

<sup>129</sup> Cooper, *supra* note 13, at 1175.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> See *supra* note 100 and accompanying text.

#### 4. When Other Factors Outweigh Diversification

The duty to diversify has remained a default rule in the prudent investor reforms, because, despite the advantages of diversification, there are various circumstances in which a prudent fiduciary may conclude that other considerations outweigh diversification. I pointed to several such examples in my 2004 article, including the case in which the tax cost of diversifying low basis assets is thought too high.<sup>134</sup> I also raised the case in which “the trust in question is but one of many for the same beneficiaries, or when the trust otherwise represents only a small portion of the total wealth available to the beneficiaries,” so that “the trustee may appropriately take into account the beneficiaries’ other trust and nontrust resources in deciding whether and how to diversify the trust.”<sup>135</sup> Inexplicably, Cooper has chosen to charge me with disregarding this conventional point: He contends that restricting the settlor’s power to impose foolish directions against diversification would prevent such standard one-asset trust arrangements as life insurance trusts,<sup>136</sup> which are commonly part of larger estate planning arrangements. In truth, there need be nothing in tension with the duty to diversify when a single-asset trust is deployed as part of a suitably diversified, multi-asset estate plan. Of course, life insurance is commonly held for purposes remote from investment, such as providing liquidity for survivors during estate administration and funding estate taxes.

Another characteristic circumstance also mentioned in my 2004 article, in which other values often overcome underdiversification is the situation in which trust assets are not being held for investment or are being held only partially for investment.

Such “programmatically” investing is common in certain kinds of charitable trusts – for example, in a trust that holds land as a bird sanctuary or nature preserve. There are analogues to programmatic investing in personal trusts, as when the settlor directs that the family

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<sup>134</sup> Langbein, *Mandatory Rules*, *supra* note 14, at 1114 & n.50. There are strategies involving the use of risk collars and derivatives in order to reduce the risk of underdiversification in such cases. *E.g.*, George Crawford, *A Fiduciary Duty to Use Derivatives?*, 1 STAN. J. L. BUS. & FIN. 307, 315-16, 322, 331-32 (1995). There are also many circumstances in which a prudent fiduciary will decide that paying taxes is wiser than bearing the underdiversification risk. Oddly, Cooper points to a tax-saving technique, the grantor retained annuity trust (“GRAT”), as being imperiled by restraints on foolish settlor directions against underdiversification. Cooper, *supra* note 13, at 1198-1201. But there is a world of difference between the uncompensated risk resulting from the underdiversification in the IBM Case, and the compensated risk found in the GRAT.

<sup>135</sup> See Langbein, *Mandatory Rules*, *supra* note 14, at 1114 & n.49. The UPIA’s prudent investor factors “include[] attention to ‘other resources of the beneficiaries’ among the ‘circumstances that a trustee shall consider in investing and managing trust assets.’” *Id.* (quoting UNIF. PRUDENT INVESTOR ACT § 2(c)(6) (1994), 7B U.L.A. 20 (2006)).

<sup>136</sup> Cooper, *supra* note 13, at 1196-98.

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residence be retained as a home for the widow or that vacation property be held for the recreational use of family members.<sup>137</sup>

#### 5. Family Enterprises

By comparison with the Enron Case or the IBM Case, in which the settlor's direction to hold a completely underdiversified portfolio is indefensible, cases involving a direction to retain a family enterprise present more varied circumstances. I have pointed to cases in which such directions to retain may indeed be beneficiary-regarding:

[A] family firm sometimes occupies a market niche that produces returns superior to those readily available to fiduciaries in the investment markets. There are circumstances in which a family firm that would not realize much if sold or liquidated can continue to be a profitable source of employment and income for family members. Sometimes what motivates the settlor's direction to retain is the belief that operating the family firm can be the source of influence, prestige, and perquisites for family members that may outweigh the superior expected investment returns of a diversified portfolio. We see such thinking in the strategies that have been used to perpetuate family control of such prominent institutions as the *New York Times* and the Ford Motor Company, as well as many smaller and less storied firms.<sup>138</sup>

There are, however, much more problematic circumstances in which a settlor insists on retaining a family firm that is failing, or that needs capital or managerial resources beyond the family's ability to provide. In such circumstances, the settlor's direction to retain a family firm can be as capricious as the direction to build statues of himself.<sup>139</sup> Cooper, however, refuses to distinguish between sound and perverse directions in such cases – between cases in which a direction to retain does or does not violate the benefit-the-beneficiaries rule. Indeed, he endorses the validity of the trust of a hypothetical settlor who admitted that self-glorification motivated his direction to retain a family business (“I built this business over thirty-five years and it

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<sup>137</sup> Langbein, *Mandatory Rules*, *supra* note 14, at 1114-15. For drafting precepts in such cases, see generally Wendy S. Goffe, *Keeping the Cabin in the Family: A Guide to Joint Ownership and Use*, 31 ACTEC J. 89 (2005) (American College of Trust & Estate Counsel). “Among circumstances that a trustee shall consider in investing and managing trust assets . . . [is] an asset's special relationship or special value, if any, to the purposes of the trust or to one or more of the beneficiaries.” UNIF. PRUDENT INVESTOR ACT §2(c)(8), 7B U.L.A. 20.

<sup>138</sup> Langbein, *Mandatory Rules*, *supra* note 14, at 1115-16 (citations omitted). For a recent instance in which a court sustained the prudence of a trustee's decision to retain close corporation shares after carefully considering alternatives, see *In re Hyde*, 845 N.Y.S.2d 833, 838 (Sup. Ct. 2007).

<sup>139</sup> See cases cited *supra* note 8.

has become a great source of pride.”).<sup>140</sup> The benefit-the-beneficiaries rule requires that a prudent trustee who is directed by trust terms to retain a troubled family enterprise should investigate whether doing so would be sufficiently inimical to the interests of the beneficiaries of the trust that the trustee should petition the court for instruction.<sup>141</sup>

#### 6. Imaginary Horribles

Cooper’s article tails off with a variety of arguments having the common thread that the benefit-the-beneficiaries standard risks affecting the behavior of large numbers of beneficiaries, settlors, and trust drafters. These claims are highly suspect for the simple reason that most trust settlors are too wise to want to impose such terms, and most trust lawyers are wise and effective enough to discourage the remaining few.

Among Cooper’s claims of this sort is the old standby warning about opening the floodgates of litigation.<sup>142</sup> Cooper cautions that subjecting settlor directions to the benefit-the-beneficiaries standard would “foster significant fiduciary litigation.”<sup>143</sup> This prediction is highly improbable. Settlor directions mandating underdiversification occur quite rarely, because, as mentioned, most settlors and trust counsel know better. Moreover, the benefit-the-beneficiaries rule does nothing more than clarify the old rule against capricious purposes, which has produced only a tiny case law.<sup>144</sup>

Another such claim is the argument that the benefit-the-beneficiaries standard, which is meant to prevent foolishness at the outer limits of trust practice, will so restrict the discretion of trust investors that they will all be forced to invest alike.<sup>145</sup> This claim is improbable not only because such settlor directives occur with great rarity, but also because the claim runs counter to one of the central achievements of the prudent investor reforms.

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<sup>140</sup> Cooper, *supra* note 13, at 1175.

<sup>141</sup> Most such cases can be resolved under the deviation doctrine, on the basis that changed circumstances justify departure from the trust terms. Under the doctrine, the court may modify or authorize deviation from a trust provision “if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust.” RESTATEMENT (THIRD) OF TRUSTS § 66(1) (2003). “If a trustee knows or should know of” the existence of such circumstances, “and of the potential of those circumstances to cause substantial harm to the trust or its beneficiaries, the trustee has a duty to petition the court for appropriate modification of or deviation from the terms of the trust.” *Id.* § 66(2); *see also id.* § 71 (2007) (providing that a trustee may apply for judicial instruction in case of reasonable doubt).

<sup>142</sup> Cooper, *supra* note 13, at 1184-85.

<sup>143</sup> *Id.* at 1185.

<sup>144</sup> Regarding the case law dealing with the rule against capricious purposes, see 2 SCOTT & ASCHER, TRUSTS, *supra* note 8, § 9.3.13, at 516-18. For case law regarding other mandatory rules, see *id.* §§ 9.2-9.3.12, at 471-516; *id.* § 9.3.14, at 518-20.

<sup>145</sup> Cooper, *supra* note 13, at 1186-87.

The UPIA emphasizes the importance of tailoring each trust portfolio to the risk and return characteristics of that particular trust.<sup>146</sup>

Cooper's unfounded assumption about the frequency of these rare cases underlies various other speculative claims – that seeking to avoid the benefit-the-beneficiaries requirement will cause trust settlors to select trustees “too ignorant to understand”<sup>147</sup> the benefit-the-beneficiaries rule, induce settlors to skew beneficiary designations towards more docile donees,<sup>148</sup> or cause settlors to go situs shopping for more permissive jurisdictions.<sup>149</sup> Because the mandatory rules now codified in the UTC have been part of trust law for so long, including the forerunner of the benefit-the-beneficiaries standard, Cooper has a bit of explaining to do about why these litigation floodgates have yet to feel the waves he predicts.

#### CONCLUSION

I have sounded four main themes in this Essay. First, the benefit-the-beneficiaries rule found in the Restatement (Third) of Trusts and the UTC is not the radical and worrisome innovation that Cooper paints it to be, but is in fact a modest and helpful clarification of a longstanding and wholly benign rule of trust law, the rule against capricious purposes.<sup>150</sup>

Second, trust law strikes a balance between deferring to settlor's intent and enforcing the minimum fiduciary obligations that inhere in the trust form.<sup>151</sup> Trust law grants the settlor virtually unbounded freedom to select beneficiaries and apportion beneficial shares, but it does not permit the settlor to destroy the fiduciary obligation. One of the longstanding mandatory rules of trust creation is that a trust must create enforceable duties.<sup>152</sup> Accordingly, “a settlor may not so negate the responsibilities of a trustee that the trustee would no longer be acting in a fiduciary capacity.”<sup>153</sup> The mandatory rules of trust law reflect both anti-dead-hand principles rooted in public policy, and principles such as the benefit-the-beneficiaries rule that protect the equitable title of beneficiaries. The mandatory rules set outer limits on settlor autonomy, requiring objective standards of rationality in matters of trust administration, in contrast to the settlor's complete and subjective dominion in selecting beneficiaries and delimiting beneficial shares. The law of trust administration is default law, but

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<sup>146</sup> UNIF. PRUDENT INVESTOR ACT § 2(b) (1994), 7B U.L.A. (2006) (establishing trustee's duty to formulate “investment strategy having risk and return objectives reasonably suited to the trust”).

<sup>147</sup> Cooper, *supra* note 13, at 1202.

<sup>148</sup> *Id.* at 1203.

<sup>149</sup> *Id.* at 1204-05.

<sup>150</sup> See *supra* Part I.A-C.

<sup>151</sup> See *supra* Part I.C-D.

<sup>152</sup> UNIF. TRUST CODE § 402(a)(4) (amended 2005), 7C U.L.A. 481 (2006); *accord* RESTATEMENT (THIRD) OF TRUSTS § 2 (2003).

<sup>153</sup> UNIF. TRUST CODE § 105(b)(1) cmt., 7C U.L.A. 429.

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the rule against capricious purposes, now reformulated as the benefit-the-beneficiaries standard, imposes an overriding requirement of objective benefit. The settlor is rightly presumed to be acting in the interest of the beneficiaries, and almost always is. But the crackpot settlor who insists on having the Rembrandt burnt is not, and neither is the settlor who insists on inflicting the uncompensated risk of a one-stock portfolio, be it Enron or IBM.

Third, the mandatory rules of the UTC do not “fundamentally depart[] from prior law,”<sup>154</sup> but constitute a codification, in some cases with light refinement, of trust law’s few but longstanding restrictions on settlor autonomy.<sup>155</sup> Neither the mandatory rules of the Code, nor the comparable rules of the common law of trusts in non-Code jurisdictions, undermine the default character of the rules of trust administration and trust investment. Rules of mandatory law, such as the requirement that trust terms benefit the beneficiaries, merely set outer limits against trust terms so harmful that they would otherwise undermine fiduciary obligation. The settlor who is forbidden to direct the trustee to burn the Rembrandt is still allowed to impose any investment or administrative regime that does not offend outer limits of rationality.

Finally, claims about the woeful systemic consequences of enforcing the benefit-the-beneficiaries requirement are conjectural and unsound.<sup>156</sup> In quantitative terms, neither the rule against capricious purposes, nor its reformulation as the benefit-the-beneficiaries requirement, have in the past or will in the future play any serious role in trust practice, because the vast preponderance of trust settlors and their counsel are far too sensible to come anywhere near violating the rule.

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<sup>154</sup> Cooper, *supra* note 13, at 1173.

<sup>155</sup> See *supra* Part I.D.

<sup>156</sup> See *supra* Part II.