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From Trustees to Wealth Managers

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12 From trustees to wealth managers

Brooke Harrington

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Introduction

This chapter will address the question: why did trusteeship become a profession in its own right after centuries as a voluntary undertaking? The question ties into the core themes of this volume because trustees are central actors in the inter-generational transmission of wealth, and, as a result, shape patterns of inequality (Harrington, forthcoming a). Trustees – now more often known as wealth managers – create and oversee the structures that allow families to remain wealthy over multiple generations.

At present, the trustee is almost always a paid professional, but that is a relatively recent development. Throughout most of the history of trusts – that is to say, over centuries stretching back to the Middle Ages (Langbein, 1995) – family wealth has been entrusted to the care of unpaid friends and relatives. The legal recognition of this work as a distinct profession only began in the nineteenth century, and progressed so slowly that the group did not found a professional society until 1991.¹ Since then, there has been quick growth in the field, not just in the common law countries that recognize trusts, but worldwide: the professional association, known as the Society for Trust and Estate Practitioners (STEP), now represents over 17,500 members in 81 countries. How and why this change occurred will be the subject of this chapter.

In tracing the history of the profession, my argument will point out continuities between medieval and modern practice. This is not an original observation: Beckert (this volume) raises similar points in his ‘Are We Still Modern?’, and Haseler addresses the connection explicitly, arguing that the worldwide acceleration of wealth inequality ‘is taking us back in time, back to the values and society of the feudal world’ (2000: 72). However, this chapter contributes to the larger discussion by highlighting some sources of agency in the process: professional trustees, also known as wealth managers.

I will argue that not only are trusts themselves a holdover from the medieval period, but that the practices and norms that define the work of contemporary trustees remain closely tied to chivalric custom: an aristocratic code based on service, loyalty and honour, with the purpose of defending large concentrations of wealth and power from attack by outsiders. In the past, those large fortunes





1 consisted primarily of land, and were defended by force of arms. Today, the for-
2 tunes are financial, and the ‘income defence providers’ (Winters, 2011: 219) use
3 legal and organizational strategies as their weapons of choice. But the objectives
4 and results of this activity have remained remarkably consistent: the mainte-
5 nance of a highly-stratified social structure through the preservation of large
6 private accumulations of wealth.

7 This historical continuity stems from the fact that trusts have themselves
8 remained unchanged in important respects for seven centuries. Trusts emerged
9 first in England as a means of avoiding the inheritance restrictions and taxes that
10 were triggered by the death of a landowner. Wealthy individuals sought to pre-
11 serve their estates by transferring title during their lifetime to a trusted relative or
12 friend. The ‘settlers’ – so called because they had ‘settled’ land upon a trustee –
13 continued to enjoy the use of their property as before the transfer. The real bene-
14 fits of this arrangement did not become apparent until after a settlor’s death. For
15 one thing, there would be no tax due, because the legal owner of the land – the
16 trustee – was still alive. More importantly, as a living landowner, the trustee
17 could transfer title to a settlor’s younger sons, or continue to hold the property in
18 trust for a settlor’s widow, daughters or minor sons, who would otherwise be
19 dispossessed, since they could not inherit or own land in their own right. Thus,
20 for private purposes (and now even in some commercial uses) trusts are ‘essen-
21 tially a gift, projected on the plane of time and so subjected to a management
22 regime’ (Rudden, 1981: 610). During the feudal period, when wills were not
23 recognized as a valid means of transferring private property, trustees played an
24 indispensable role in inheritance practices. Perhaps surprisingly, this remains
25 true up to the present day, for reasons that will be discussed in greater detail
26 below.

27 What *has* changed, radically, since the Middle Ages is the kind of assets
28 trusts contain. And this, in turn, has driven significant changes in the nature of
29 the ‘management regime.’ The trustee’s original duties were quite simple: to
30 hold (and possibly transfer) legal title to a piece of property. But as the impact of
31 industrial capitalism changed the composition of wealth in the nineteenth
32 century, a passive role for trustees was no longer tenable; when it came to man-
33 aging financial wealth, they were obliged to take an active role. Thus, as trusts
34

35 ceased to be a conveyancing device for land and became instead a device
36 for holding a portfolio of financial assets. ... The transformation in the
37 nature of wealth that led to the management trust brought about a parallel
38 transformation in trusteeship.

(Langbein, 2004: 53)

39
40
41 The development of trusteeship from a private, voluntary, amateur undertaking
42 into a profession engaged with the public represents a point of inflection where
43 the secretive world of wealthy families meets the workaday world of the profes-
44 sions. Analysing this process sheds light not only on professionalization, but also
45 on socio-economic inequality.





The process occurred in two main phases. First, as wealth became more fungible, trusteeship changed from a passive activity – holding title to a piece of land – to one of active financial management. This development was made possible by legislative changes that acknowledged trustees as a ‘putative professional class’ (Marcus and Hall, 1992: 64), allowing them to be compensated for their work and to exercise increasingly wide discretion in the investment of trust assets. The second phase, which is still underway, has been characterized by collective action on the part of these professionals, including institution-building – such as the formation of STEP, and of university degree programs in wealth management – as well as lobbying to define and protect their jurisdictional boundaries (Friedson, 2001). These stages will be described in greater detail in the latter half of this chapter.

The trustee as kinsman and volunteer

The concept of exchanging land for service was not particular to trusts. In fact, the practice – known as *enfeoffment* – was common in feudal societies worldwide, from Europe to Central and East Asia (Yongjia, 2011; Barendse, 2003). But the unique aspect of Anglo-Saxon practice was in allowing two modes of possession to apply to a single property simultaneously, distinguishing legal from beneficial ownership. This makes the trust ‘the most distinctive achievement’ of Anglo-American law (Maitland, 2011 [1909]: 23).

The central constitutive act of becoming a trustee was not the property transfer, but the pledge itself: the promise to own land without appropriating it for one’s own benefit, and to honour the wishes of the settlor after his death. This practice was derived from the ceremony of vassalage, in which a knight pledged loyal service to a lord in exchange for protection. Originally, there was no property involved in these vassalage ceremonies, but only an exchange of oaths, often made in the presence of sacred objects such as saintly relics, which made promises permanent, irrevocable and secured by divine authority (Cervone, 2011).² Despite the absence of written contracts (which were often distrusted in any case – see Gurevich, 1977) spoken promises were sufficient to enact a trust. Indeed, as Barendse (2003) observes, they were sufficient to uphold the social structure itself: ‘The act of entrusting oneself was thus critical to feudalism’ (2003: 515).

Becoming a trustee of land, then, was one of several ‘performative utterances’ (Austin, 1961) through which medieval life was enacted – another example being the quintessential feudal speech act, ‘I dub thee knight’ (Beale, 2009). As we know from the work of MacKenzie *et al.* (2007), these speech performances remain vitally important in constituting present-day capitalist societies. Austin himself pointed to inheritance as one of the most significant occurrences of the phenomenon in contemporary practice. Among the very first instances he offers to define a speech act is: ‘I give and bequeath my watch to my brother’ (Austin, 1961: 5).

For the original trustees of the Middle Ages, land could *only* be put into trust by means of performative utterances because the law did not recognize the arrangement as a binding contract. Until the development of chancery courts in





1 the fourteenth century, there was no way to enforce such pledges legally (Fried-
2 man, 2009). As far as the medieval common law was concerned, whoever held
3 the title owned the land and could use it as he wished. Complaints against ‘faith-
4 less feoffees’ – trustees who broke their pledge and appropriated land entrusted
5 to them for their own use – are recorded as early as 1390 (Langbein, 1995). But
6 a betrayed trust beneficiary could do no more than lodge a complaint and hope
7 that the Lord Chancellor (who governed the Chancery Courts) would provide
8 justice. Beyond that, anyone who put a property into trust ‘had to depend on
9 literal trust and community opinion to ensure that the trustees discharged their
10 duties’ (Marcus, 1983: 231).

11 Remarkably, this honour system worked well enough to preserve many great
12 fortunes in England, America and other common law countries³ until well into
13 the nineteenth century. The work of trusteeship was undertaken almost as an act
14 of class solidarity against laws that threatened to dissipate dynastic wealth
15 through onerous tax burdens (known as ‘feudal incidents’) and the dispossession
16 of all but eldest males in a family through enforced primogeniture – a cata-
17 strophe for landowners without sons, as dramatized in the novels of Jane Austen
18 (notably *Pride and Prejudice* [1813] and *Persuasion* [1818]). Solidarity among
19 the Anglo-Saxon elites meant that trustees were often ‘friends and relatives of
20 the same social class’ as the settlor and beneficiaries (Stebbins, 2007: 3). Thus,
21 even into the twentieth century, ‘[a]lmost every well-to-do-man was a trustee’
22 (Maitland, 1936: 175). Elite solidarity, honour and oaths figured as prominently
23 under capitalism as they did among feudal landholders.

24 The effect, then as now, was to assert the rights – particularly the heritable
25 property rights – of elites against governing authorities. In medieval England,
26 knights were instrumental in creating a society in which aristocrats appropriated
27 nearly all the wealth and ‘became more powerful than any central institution’
28 (Berendse, 2003: 511). They protected the interests of landed elites at a time
29 when one’s position in the social structure was dependent upon property owner-
30 ship. This is how the term ‘estate’ – which first appeared in English in 1230,
31 with the meaning of condition or standing in the world – came by 1439 to mean
32 property and possessions.⁴ During the same period, trustees helped their peers
33 and fellow landowners deprive the Crown both of taxes and of its jurisdiction
34 over land, which had formerly been absolute (Waugh, 1986). As one authority
35 on the history of trusts put it, ‘Trustees of old were unpaid amateurs, that is,
36 family and community statesmen who lent their names and their honour to a
37 conveyancing⁵ dodge’ (Langbein, 1995: 638). Contemporary trustees, as I argue
38 elsewhere, stand in much the same relation to the present-day distribution of
39 financial wealth: preserving the concentration of assets and the socio-economic
40 status of an elite seeking to assert their autonomy from governance institutions
41 (Harrington, forthcoming a). But now, the governance institutions include the
42 bureaucratic nation-state and trans-national bodies such as the Organisation for
43 Economic Co-operation and Development (OECD), which has attempted to
44 curtail elites’ use of tax havens to evade taxation, inheritance rules, and other
45 laws (Sharman, 2006).⁶





However, I would argue that the effectiveness of honour and oaths in permitting trusteeship to endure as a voluntary undertaking suggests that there is more at stake here than a ‘conveyancing dodge’. This is not to downplay the materialist aspects of the role and its significant impact on wealth inequality (see Harrington, forthcoming a). Rather, I argue that the specific practices and norms that govern trustees are the products of medieval mores and culture. Ultimately, the ideal and the material aspects of their work are inextricable and mutually reinforcing, as has been observed of other feudal relationships: ‘The idea of feudal service was therefore *inseparable from that of spending and the distribution of wealth*: it was impossible otherwise to conceive of friendship and loyalty between knights’ (Gurevich, 1977: 19, emphasis added).

The many obvious differences between the two eras make it easy to overlook some important similarities in the socio-economic roles of knights and trustees. Although trusteeship is now a paid profession in the main, the essential normative demands of honour, selfless service, prudence and loyalty – however often they may be violated in practice – remain unchanged in many respects from their origins in the relations among feudal nobles. Pledges and elite solidarity are still critical to the functioning of the socio-economic system (for a discussion of this in contemporary financial markets, see Greenspan 1999). Just as the structure of feudal society and the distribution of wealth was held together by ‘a web of oaths’ (Barendse 2003: 515), observers of modern capitalism have noted that ‘Wealth, in a commercial age, is made up largely of promises’ (Pound, 1922: 236) – promises made and kept by the professional class of wealth managers. Formerly, the standards of conduct for these actors were enshrined in ceremonies or in texts such as *Le Chanson de Roland* and the *Canterbury Tales*; now, they are written into statutes and codes of professional ethics.⁷

Consider, for example, the case of fiduciary laws, which – along with powers legislation – represent the two general rules governing trustee activity. Whereas powers legislation defines what trustees have the power to *do* (invest, vote securities, operate a business, litigate, employ agents, and so forth) fiduciary laws regulate *how* they do it: that is, they set behavioural standards. ‘Fiduciary’ is a general term describing a relationship that exists not only between trustees and beneficiaries, but also between attorneys and clients, as well as corporate officers and shareholders. In the language of principal-agent theory, such relationships are ‘characterized by unusually high costs of specification and monitoring. The duty of loyalty replaces detailed contractual terms’ (Easterbrooke and Fischel, 1993: 426–7).

For trustees, the basic standards of fiduciary duty are loyalty and care, and their purpose is to set conditions on the exercise of the trustee’s powers (Langbein, 1995). In this context, loyalty means putting the best interests of the beneficiaries first in all decisions, and avoidance of self-dealing or conflicts of interest (Fuller, 2005). Until legal changes in the Victorian era, the ban on self-dealing meant that trustees could not be paid for their work except in the rare instances where compensation was stipulated by the settlor and written into the trust instrument. As a late eighteenth-century treatise explained, ‘The courts of equity





1 look upon trusts as *honorary*, and as a burden upon the *honor* and *conscience* of
2 the person intrusted [the trustee], and not [to be] undertaken upon mercenary
3 motives' (Sanders, 1791: 194; emphasis and spelling in original). This created a
4 formidable, and intentional, barrier to professionalization.

5 The duty of care, formalized in statutes such as the Uniform Prudent Investor
6 Act in the United States, requires trustees to act with 'reasonable care, skill and
7 caution' and to 'manage trust assets as a prudent investor would' (American Bar
8 Association, 1994: 5).⁸ The standards are intentionally broad and open to inter-
9 pretation, precisely because of the risk and uncertainty involved in trust adminis-
10 tration. Included here are not only the risks of losses from investments, but the
11 unknowns that arise over the long time frames attendant upon multi-generational
12 property transfers. These are certainly not equivalent to the risks and uncertain-
13 ties that medieval knights faced in defending the property of their feudal lords,
14 but the analogies between the two conditions mean that in both cases, terms of
15 service cannot be specified beyond a general code of conduct.⁹

16 Perhaps the most famous statement of the code was provided in 1928 by
17 Justice Benjamin Cardozo, then serving on the highest court of the state of New
18 York. Cardozo, who was later elevated to the Supreme Court of the United
19 States, wrote for the majority in *Meinhard v. Salmon*,

20
21 A trustee is held to something stricter than the morals of the market place.
22 Not honesty alone, but the punctilio of an honor the most sensitive, is then
23 the standard of behavior ... the level of conduct for fiduciaries [has] been
24 kept at a level higher than that trodden by the crowd.

25
26 These are precisely terms that characterize medieval knights: punctilio (a regard
27 for formalities and etiquette); honour; honesty; and a sense of being above the
28 crowd, bound to a duty 'stricter than the morals of the marketplace'. In fact, it
29 reads like a contemporary description of the pilgrim knight in Chaucer's *Canter-*
30 *bury Tales*, who 'loved chivalry, truth, honour ... and all courtesy' (1994[1478]:
31 2).

32 33 **The medieval becomes modern**

34
35 But these historical continuities also raise the question: why did an adaptation to
36 feudal conditions survive the Middle Ages? That is, once feudal taxes and inher-
37 itance restrictions were lifted, what need did landed elites have for trusts and
38 trustees? By the end of the seventeenth century, land could be 'devised by will',
39 meaning that it was legally valid to transfer real property (not just money or
40 goods) to one's heirs through a testamentary document (Langbein, 1995: 638).
41 Furthermore, the development of offshore financial centres in the twentieth
42 century has made it possible for corporations based in places like the Caribbean
43 to provide most of the tax shelter functions once provided by trusts. These two
44 factors would seem to make the practice of putting assets into trust as obsolete as
45 the broadsword in an age of automatic weapons.





Yet trusts remain a popular tool for wealth management – seemingly more popular than ever before. Because trusts conceal the amount and ownership of assets (Chester, 1982), the precise number of trusts and the value they contain is unknown; unlike corporations, their existence is not a matter of public record (Sharman, 2006). However, we do know that trusts are considered a mainstay – even a necessity – of financial planning for wealthy families and individuals (Collier, 2002; Hughes, 1997). And their use appears to be growing, possibly connected to the steep increase in the fortunes of the world’s wealthiest people, even after the 2008 financial crash (Cap-Gemini, 2011; Davies *et al.*, 2008). For example, since 2009, the number of billionaires in Russia and the Ukraine has tripled; during that period, trusts linked to those individuals and their families have purchased over \$1 billion in American real estate, including some of the most expensive residential properties ever sold (Barrionuevo, 2012). Of the \$84 billion in capital flight from Russia in 2011 – driven, apparently, by fear of asset seizure by the government – much has gone into trusts that purchase not only US real estate, but also yachts, art collections and other valuables, all made impervious to confiscation by situating legal ownership with the trustee in a jurisdiction likely to be cooperative with the beneficial owner’s objectives.

In the event that trust structures are exposed to public scrutiny, as happens in some court cases, their number and complexity are often staggering. For example, a 2002 lawsuit revealed that the \$15 billion fortune of Chicago’s Pritzker family was held in 2,500 different trusts, as well as 60 companies (Jaffe and Lane, 2004). More recently, documents related to tax evasion charges filed by the US Securities and Exchange Commission against the billionaire Wyly brothers of Dallas revealed that they held at least \$750 million of their fortune in ‘an elaborate sham system of trusts and companies’ based in the Isle of Man and the Cayman Islands (Wyatt, 2010: B1). These structures allowed the Wyllys to control their companies without paying the taxes associated with legal ownership; in addition, they enjoyed the beneficial use of mountain ranches in Colorado, as well as a multi-million dollar collection of art, jewellery and antiques all legally owned by the trusts – again, avoiding millions in taxes.

These cases point up another puzzle of the longevity of trusts: why haven’t corporations supplanted them as asset-holding structures? Clearly, wealthy people like the Pritzkers and the Wyllys *do* use corporations to some extent, but the evidence suggests that they and other families continue to rely heavily on trusts to contain their fortunes. Moreover, rather than corporations replacing trusts, firms have taken to using trusts themselves. In fact, Langbein (1997) estimates that commercial trusts now outnumber personal trusts by a factor of nine to one. As he writes elsewhere,

Although feudal law no longer needs evading, the trust has endured because it has changed function. The trust has ceased to be a conveyancing device for holding freehold land and has become instead a management device for holding financial assets.

(1995: 637)





1 The advantages of the trust structure are compelling enough that trusts are now
2 the central organizational tool underlying pension funds, mutual funds, bond
3 issues, and even regulatory compliance, such as the resource pools created to
4 pay for decommissioning nuclear plants.

5 What are these advantages? One or more of the following considerations
6 usually come into play:
7

- 8 1 *Taxation*. In some cases, trusts remain a more effective way to avoid taxes –
9 both for individuals and corporations – than alternative structures. In most
10 onshore jurisdictions, assets held in corporations are subject to two rounds
11 of taxation. The first is corporate tax, which the firm pays. The second
12 round, known as capital gains tax, is triggered when an individual takes
13 profits from the corporation, for example by selling stock. In many jurisdic-
14 tions, trusts are not taxed as entities, so their assets are subject to taxation
15 only when a beneficiary receives a distribution.¹⁰
- 16 2 *Privacy*. In most onshore jurisdictions, corporations must be registered pub-
17 licly, and are subject to regulations – such as the requirement to audit
18 accounts – which increase administrative costs (cutting into profits) and
19 expose the firm to scrutiny from outsiders. Trusts are not subject to these
20 rules. This reduces management costs compared to corporations, increases
21 their value as a tax avoidance mechanism (assets that are not visible to regu-
22 lators are difficult to tax), and affords a measure of political protection. For
23 wealthy people who live in unstable countries, holding assets in trust can
24 reduce their visibility as targets of extortion and kidnapping attempts. For
25 businesses, trusts ‘obscure concentrations of economic power, which arouse
26 alarm, suspicion and public odium’ (Gadhoum *et al.*, 2005: 342).
- 27 3 *Inheritance*. Once it became legal in the late seventeenth century to transfer
28 property by testament (Langbein, 2004), there was still the problem that
29 women could not own property in their own name; this left widows and
30 unmarried daughters of landowners in danger of losing their homes and live-
31 lihoods if the male head of a family died. Thus, some of the restrictions that
32 gave rise to trusts in the first place remained significant for elites. As an
33 eminent scholar of the common law wrote, ‘And now we come to the origin
34 of the Trust ... the Englishman would like to leave his land by will. He
35 would like to provide for his daughters and younger sons. That is the root of
36 the matter.’ (Maitland, 1936: 157). In addition, some landowners were con-
37 cerned for their married daughters, whose assets became property of their
38 husbands; to protect a married woman financially, her father might put her
39 share of the family fortune into trust, making it untouchable by a spendthrift
40 husband or his creditors (Sanders, 1791). Trusts are still used as a work-
41 around in countries that do not permit women equal inheritance rights with
42 men, or which mandate forced heirship, such as the German *Pflichtteil*
43 (Beckert, 2007). Finally, the twenty-first-century prevalence of long-term
44 cohabitation, same-sex partnerships and multiple marriages (which may
45 each produce children and step-children), have given trusts increasing





importance in bridging the gap between law and practice. Trusts can be used to secure the inheritance rights of unmarried partners who might otherwise receive nothing, as well as to sort out the claims of children from multiple relationships (Walker, 2008).¹¹

Thus, even despite the rise of corporations and the legalization of property transfers by will, neither trusts nor trusteeship died out. In essence, the trust structure proved extremely flexible as a tool for contending with changes in the nature of capitalism itself. As wealth became more fungible, with property increasingly superseded by financial assets, trusts provided elites with a means of control that was not easily duplicated through contracting or incorporation. But trusts require trustees, and it is to the changes demanded of them that we shall turn now.

Stage one: from voluntarism to professionalization

During the nineteenth century, processes that had been underway in economic history since the Age of Exploration produced great merchant fortunes in Europe and North America. The basis of wealth shifted decisively from land to capital – a more fungible source of wealth requiring a different kind of attention and maintenance than landed estates. In England, the nineteenth century saw the repeal of the Bubble Act, allowing corporations – and corporate investment – to flourish as never before. Suddenly, trustees had tremendous amounts of cash to manage, and hundreds of joint stock companies in which to invest. Yet they did not have the right to invest in those securities unless specifically authorized to do so by the trust instrument. Most trust instruments, in the interests of protecting beneficiaries from ‘faithless feoffees,’ gave no such powers, leaving the trustee to act simply as a passive title holder for real estate.

A major step forward in the professionalization process occurred when the courts stepped in to expand trustees’ powers of investment. In the UK, where trust law originated, this did not occur until the Trustee Investment Act of 1889, which allowed trustees to invest in UK government bonds or English land, even if the trust instrument did not confer powers of investment. As investment opportunities expanded, trustees were offered options sanctioned by the courts and the legislature for putting the trust capital to work. These so-called ‘legal lists’ were usually limited to local real estate or government bonds. The limitations did not cause as much consternation as might be supposed, since the failure of the South Sea Company in 1720 (Harrington, forthcoming b) continued to cast long pall over trust finances, such that ‘Trust practitioners argued that it was imprudent for a trustee to invest trust funds in equities on the stock market, even if he had power to do so’ (Parkinson and Jones, 2008: 111). Thus, when granted the express power to invest in stocks later in the nineteenth century and early twentieth century, trustees frequently played it safe by eschewing stocks on the ‘legal lists’ in favour of the old standbys: land and bonds. It took more than a century – until the Trustee Act of 2000 – before the UK courts awarded trustees full





1 discretion to invest in equities, as if they were the beneficial owners of the assets
2 (Parkinson and Jones, 2008).

3 These limitations on the autonomy of trustees were matched by the require-
4 ment of full personal liability for any losses incurred to the trust. That is, a
5 trustee was required by law to repay from his own personal assets any loss in the
6 value of the trust caused by his actions and decisions – even if the loss was
7 incurred by accident and in good faith (Stebbins, 2007). The risk of personal
8 bankruptcy kept many trustees from investing in stocks, particularly since the
9 courts maintained that trustees should neither be paid nor delegate any decision-
10 making to specialists, such as accountants. In sociological terms, the role of the
11 trustee was governed by the logic of the gift rather than the logic of compensa-
12 tion (Zelizer, 1996). Indeed, because trusts originate legally in the concept of the
13 gift (see Rudden, 1981), the ordinary requirements of ‘consideration’ (i.e.
14 payment) to establish a contract did not apply (Langbein, 1997). Trustees were
15 thus ‘economically celibate’ (Hall, 1973: 282), barred from earning a fee for
16 their efforts on behalf of settlors and beneficiaries. This, combined with the
17 burdens of full liability and limited investment discretion, helped maintain the
18 ‘the whole tradition of the trust as a personal relationship’ (Stebbins, 2007: 7),
19 grounded in moral obligation and voluntarism, as opposed to professional
20 service.

21 The process of acknowledging professional characteristics in the role of the
22 trustee – specifically, autonomy and expertise (Freidson, 2001) – began almost
23 60 years earlier in the US, when the Supreme Court of Massachusetts established
24 the ‘prudent man rule’ in the *Harvard College v. Amory* decision of 1830. On
25 the one hand, the rule simply codified the heretofore informal practices of elite
26 solidarity, since ‘prudence’ was defined by the courts in terms of the behaviour
27 of ‘businessmen from the upper circles of Boston society’ (Friedman, 2009:
28 115). But the decision also represented a substantive and historical advance in
29 the professionalization process. By acknowledging that trustees could exercise
30 some independence and expert judgement in deploying trust assets, the Massa-
31 chusetts courts provided an essential element in the constitution of all profes-
32 sions: recognition by the state (Macdonald, 1995).

33 The timing and location of this first public acknowledgement of trustees as an
34 emergent professional group was not coincidental: the American northeast,
35 unlike Great Britain and continental Europe, had no history of land being tied up
36 for generations in the hands of hereditary nobility or by plantation farming.
37 Instead, the region grew wealthy through whaling, as well as through the global
38 trade in textiles, rum and slaves. These businesses generated a huge profit, and
39 with it, the need for advice on the disposition of cash reserves greater than most
40 families could spend in a generation.

41 In other words, the profession of trust and estate planning emerged concu-
42 rrently with the transformation of capitalism itself. In some respects, the trustees
43 employed by nineteenth century Brahmin families had the same goals and
44 motives as their medieval counterparts – notably, the maintenance of class soli-
45 darity. Not only were trustees generally men of the same rank as the families they





served, but they were instrumental in creating a network of self-reinforcing elite institutions:

As managers of private capital, they served a critical role as mediators who funneled the wealth of private fortunes into key Boston financial institutions. ... The professional trustee – private or corporate – completes the institutional integration of a stable capitalist class.

(Marcus and Hall, 1992: 65)

Despite this continuity of aims, however, trustees faced significant new demands under industrial capitalism. As wealth took on new forms, moving from material property to merchant capital, the need for expert assistance in managing wealth increased as well. The job required time and expertise far beyond those demanded of the traditional, unpaid trustee of real property. Thus, as the remnants of the old feudal economic system gave way to a new mode of creating wealth, trusteeship became a very different kind of job. After centuries of stability, major transformations occurred within a few decades:

the typical trustee at the end of the Victorian period was quite different from that at the beginning of the reign. He had become the manager of a fund, of a portfolio of investments, rather than the guardian of a family's landed estate. ... It was a skilled occupation undertaken for profit.

(Stebbins, 2007: 4)

The mobility of present-day wealth means that assets belonging to a single cluster of related individuals may be spread all over the world, subject to multiple regimes of taxation, inheritance rules and other regulations. In this context, the wealth manager's job becomes finding the optimal mix of organizational structures, legal strategies and financial planning to meet the client's needs. Those needs may involve intergenerational transfers or tax reduction, but are often much broader than that, encompassing the long-term (as in dynastic trusts designed to endure far beyond the settlors lifetime), as well as issues of culture and religion – particularly important matters for those living on the Arab peninsula, who are not taxed, but who are instead subject to the restrictions of Shari'a law on investment and on the rights of women (Nasr, 2009).

Thus, the job of the trustee has been transformed by the increasing complexity of elites' investments, tax sheltering strategies and organizational structures for holding assets (Beaverstock *et al.*, 2004). Over the past 20 years – coincident with the creation of STEP – the business of hiding wealth from tax and other regulatory authorities has become 'multifaceted and global in its operation' (Winters, 2011: 219). Over the same period, there has been a dramatic increase in coordination among disparate industries offering products and services designed to help the wealthy stay that way, including banks, law firms, accounting agencies and insurance providers, as well as numerous boutique firms and individual practitioners (US Senate, 2003).

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1 This global expansion and coordination demands a new kind of professional
2 expertise, as ‘transnational’ and ‘hypermobile’ (Bauman, 2000; Sklair, 1997) in
3 its orientation as the capital and clientele it serves. If, as Marcus and Hall write,
4 the trustee is ‘the concrete human incarnation of this abstract functioning of law
5 and money’ (1992: 70), it was perhaps inevitable that the internationalization of
6 capital would drive professional transformation (for example, Fourcade, 2006).
7 If the trustee was the creation of the nation-state – a consequence of the trust
8 laws designed to protect and perpetuate elites (Marcus and Hall, 1992) – then
9 wealth management is the product of the supra-national space created and inhab-
10 ited by the world’s wealthiest families.

11 **Stage two: from trustees to wealth managers**

12 While the initial phase of professionalization was driven by lawyers – who still
13 make up more than half of STEP’s current membership – it later received a
14 significant assist from accountants, who constitute about 20 per cent of the pro-
15 fessional society’s members. Indeed, the first step toward collective action as a
16 profession was taken by Liverpool accountant George Tasker. Despite the
17 increasing professional recognition trustees enjoyed in the nineteenth and twen-
18 tieth centuries, most practitioners were isolated from one another, and their work
19 was seen as one of the ‘havens for age and obscurity’ in the financial sector
20 (STEP, 2006: 1). Tasker decried this state of affairs in a November 1990 letter to
21 the editor of *Trusts & Estates* magazine – at the time, the only publication
22 linking the diverse group of professionals engaged in wealth structuring and
23 management. His letter drew hundreds of responses, with many suggesting
24 that readers meet to share experiences and best practices. In early 1991, 82
25 practitioners attended the inaugural meeting of the Society for Trust and Estate
26 Professionals in central London. One year later, STEP enrolled its 1,000th
27 member.

28 From these initial steps have sprung a host of other institution-building activ-
29 ities and political activism, both behalf of the profession and for its wealthy
30 clients. For example, STEP is active in lobbying and legislation, and has been
31 working with UK lawmakers to shut down amateur – or ‘cowboy’ – will writers
32 by restricting the trade to professionals, such as STEP members (Devine, 2011).
33 The Society is also very active in offshore jurisdictions, where members regu-
34 larly cooperate with elected officials to draft financial laws (Palan *et al.*, 2010).
35 On the global front, STEP has been a key player in the struggle tax havens have
36 waged against blacklisting by the OECD; the Society’s members crafted some of
37 the rhetoric that won the battle of words, forcing a retreat on the part of the
38 OECD, which had proposed sanctions against some jurisdictions (Sharman,
39 2006).

40 As STEP’s membership has grown, the organization has also been increas-
41 ingly active in establishing its boundaries as a knowledge system. Because most
42 of those who practice trust and estate planning are also members of other profes-
43 sions, STEP has developed the TEP certification – short for Trust and Estate
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Practitioner – to designate those specializing in services to wealthy clients. This has become the de facto standard credential in the profession, recognized worldwide, much like the CPA for accountants (Harrington, forthcoming a).¹² The TEP also serves symbolically to unite a global profession (Fourcade, 2006): a necessity given the wide range of backgrounds among STEP’s 17,500 members, spread across 81 countries. The credential is earned through a series of five week-long seminars, which are as much a socialization process as a knowledge-delivery system.

The ties between the profession and higher education are still developing. While professional knowledge is distinctively ‘centered in and allied with the modern university’ (Larson, 1977: 50), formal degree programs in trust and estate planning have only been established recently. Law schools, of course, have offered specialized courses on trust law for decades. But it was not until the Autumn of 2011 that a university offered a degree devoted to the subject. The University of Manchester, in cooperation with STEP, will confer the first BSc degrees in Management of Trusts and Estates in the Spring of 2013, representing another milestone in the professionalization process.

Since the boundaries around professional identity are still being established, the names used to define the profession are also in flux. Some, like the founders of STEP, emphasize their historical roots by calling themselves ‘Trust and Estate Practitioners,’ thereby associating themselves with the feudal traditions of trusts and estates. Yet contemporary practice for STEP members often involves not only trusteeship but oversight of family businesses, coordination of many different types of income-generating assets around the world, and the ever-important consideration of the tax consequences attendant upon ownership and trading. As a result, one practitioner put it, the job requires one to be: ‘part lawyer, part tax adviser, part accountant and part investment adviser rolled into one’ (Parkinson, 2008: 20; see also Langbein, 1995, 2004).

Thus, members of the emergent profession sometimes refer to themselves as ‘tax planners’, ‘private bankers’, ‘family office managers’, or ‘wealth preservation specialists’. In many cases, the job combines features of all those terms, including tax planning, private banking, family office services (coordination and distribution), and long-term preservation. In the few scholarly references to the emergent profession, some use the term ‘transaction planners’ (Langbein, 1995: 630), while others prefer the more politically pointed ‘income defence providers’ (Winters, 2011: 219). However, consensus seems to be developing around the term ‘wealth managers’ (for example, Del Col *et al.*, 2003), even among many STEP members (for example, Pexton, 2010).

A much-discussed article in the *STEP Journal* stated the case for the new nomenclature, beginning with a definition of wealth management as comprising: ‘the whole spectrum of the client’s assets and other financial affairs. Wealth management is seen as the overarching role pulling together the advice of various investment, tax, and other experts into a coherent plan’ (Sternberg and Maslinski, 2008: 29). The article then alludes to the considerable overlap in terminology within financial services, and the larger struggle for legitimacy (and





1 profits) among the banks, trust companies and individual practitioners competing
2 for the business of wealthy clients. In a pointed jurisdictional claim (Abbott,
3 1988), Sternberg and Maslinski write:

4
5 It is perhaps debatable whether private bankers and other so-called wealth
6 managers are actually better equipped to deliver this service – the term
7 ‘wealth management’ sits more comfortably with the remit of the traditional
8 responsibilities of a trustee.

9 (2008: 29)

10
11 With the erosion of client confidentiality in many of the world’s historic wealth
12 management centres – such as Switzerland and Liechtenstein – wealth manage-
13 ment may itself give way to another, more up-to-date term. While trusts are
14 expected to remain in widespread use, they may be applied to new ends, as they
15 have been in the past. As tax avoidance becomes more difficult to accomplish
16 within the bounds of the law, trusts may be used to move wealth around the
17 world for other purposes, such as coordinating payments to and from large inter-
18 national work projects involving expatriate staff from many different countries
19 of origin – a task of surprising complexity, given the patchwork of banking and
20 tax laws globally. Another potential future for the profession is expansion into
21 the management of elites’ social capital, protecting reputations and ‘good names’
22 as part of a family legacy, in addition to financial wealth; this has led to specula-
23 tion that the title ‘trusted adviser’ will supplant that of wealth manager (McKen-
24 zie, 2010). Finally, wealth managers will likely play a leading role in one of the
25 fastest-growing areas in the financial industry: Islamic finance, which requires
26 practitioners to blend the intricacies of Shari’a law with those of modern
27 Western finance. In this case, the goals are not tax-related but rather geared to
28 the avoidance of religious improprieties, such as lending or borrowing money at
29 interest, or interactions between women and men who are not related to them;
30 the latter opens up a significant market for female wealth managers in the
31 Islamic world (Nasr, 2009; Maurer, 2005).

32 33 34 **Conclusion**

35 As the essays in this volume illustrate, inheritance of wealth poses a major chal-
36 lenge to post-Enlightenment ideals of justice and meritocratic achievement. In
37 the *Communist Manifesto*, ‘abolition of the right of inheritance’ ranks third on
38 Marx and Engels’ list of the ten most important steps necessary to realize ‘the
39 forcible overthrow of the whole extant social order’ (1978[1848]: 499).¹³ This
40 high ranking is a measure of the significance of inherited wealth in sustaining
41 and reproducing the socio-economic order of capitalism. It also suggests why
42 resistance to change in the right of inheritance has been so robust. Despite
43 the many changes capitalism has undergone since publication of the *Manifesto*
44 in 1848 – co-opting much of Marx and Engels’ social programme, including
45 the creation of a graduated income tax, child labour laws and free public





education – the right of inheritance retains an almost unique position as a vestige of the Middle Ages in the modern era.

This chapter has focused on the professionals who enact and embody these medieval traditions. Known first as trustees, and now by a variety of other names reflecting their new responsibilities, they have much in common with the feudal knights whose code of chivalric service and loyalty became the basis for the fiduciary role essential to trusts. The historical continuities also include the similar impact of knights and trustees on maintaining elite solidarity and socio-economic inequality. Both sets of actors have been instrumental in enabling wealthy families to maintain and transmit their fortunes intergenerationally, without submitting to taxation or other regulatory restrictions.

Trusts remain indispensable as devices for managing inheritance and maintaining the autonomy of private fortunes; but they are now part of a much larger portfolio of undertakings that require coordination across multiple domains. Rather than making the job of the trustee obsolete, these changing conditions in the economic and legal environment have led to professionalization of a role formerly occupied by amateurs and unpaid volunteers. In response to the increasing complexity of the world’s largest private fortunes, trustees have moved from what was once a tightly constrained role with no reliance on outside experts permitted, to a much broader set of responsibilities commonly known as wealth management, which requires oversight of many different structures and types of wealth, along with coordination of other professionals’ contributions into a cohesive global strategy. The formerly passive work of the trustee has evolved into a form of relational contracting whose aims are long-term, complex and carry unforeseen consequences.

The change might more properly be called a ‘revolution’ (Langbein, 1995: 644), since it paralleled developments in capitalism itself, such as the transformation of wealth from real property to financial assets, and the ‘emancipation’ of trustees and corporations from legal restrictions. At the beginning of the nineteenth century, both trustees and corporations were held in close check by the courts and legislatures. Modern capitalism only came into being when lawmakers granted ‘corporations legal powers almost coextensive with those of natural persons ... to engage in any lawful line or lines of business’ (Clark, 1986: 676). Trustees, who received legal recognition as a profession at about the same time, were instrumental in financing these firms – establishing a capital circuit between elites’ private and corporate wealth (Zelizer, 2005). If, as Zelizer theorizes, a circuit is a set of transactions occurring within and dependent upon a closely bounded set of social ties, contemporary wealth managers form a sort of human chain linking the themes central to this volume: inheritance, inequality and the contemporary economic system. But paradoxically, they also link us to a feudal past that is in many ways incompatible with the political and social ideals of the present. The difficulties of resolving this conflicted position are apparent in the profession’s struggle to name and define itself – a process shadowed by the increasing public discourse on the injustice of escalating global inequality.

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Notes

- 1 ACTEC, the American Council of Trust and Estate Counsel, was founded in 1949, but represents only lawyers in North America – both a professional and geographical subset of the trustee population; as of 2011, its membership base includes just 2,600 individuals.
- 2 In reality, of course, such oaths were famously and repeatedly violated. One of the best known examples is depicted in the Bayeux Tapestry, which shows the English Earl Harold Godwinson swearing an oath on sacred relics to support William of Normandy's claim to succeed Edward the Confessor as King of England; Harold's violation of this oath by claiming the English Crown for himself is portrayed in the Tapestry as the catalyst for the Battle of Hastings (Terkla, 1995).
- 3 Trusts are not recognized by the civil law governing continental Europe, as well as much of South America and the Middle East; however, citizens of civil law countries can (and often do) establish trusts in common law jurisdictions.
- 4 'estate, n.' *OED Online*, March 2012, Oxford University Press, Available www.oed.com/viewdictionaryentry/Entry/64556 (accessed 23 March 2012).
- 5 A legal term for the transfer of title to a property.
- 6 This struggle endured for centuries, long past the Middle Ages; in the sixteenth century, for example, Henry VIII proposed the Statute of Uses to put elites' landholdings back within absolute royal control, and thus within the Crown's revenue system. We are now witnessing a similar back-and-forth between international governing bodies and global socio-economic elites, in which ownership and taxation rights over primarily financial assets are at stake.
- 7 The medieval imprint continues to be visible in the language of trusts. For example, the notion of 'indenture' – an instrument used by a lord to retain the services of an aide (Waugh, 1986) – carries over into the present-day 'trust indenture'. See, for example, the Trust Indenture Acts in US law, which govern commercial trusts containing bonds and other debt instruments.
- 8 Fiduciary administration of trusts is also governed by many subrules, including the duty to keep and render accounts, enforce and defend claims against trust assets, and to minimize costs (Langbein, 1997).
- 9 Despite their breadth, the rules remain meaningful and enforceable, as evidenced by the many successful lawsuits brought against trustees for breach of fiduciary duty; for several interesting cases, see Harper (2010).
- 10 In some countries, such as the United States, trusts can be taxed as entities, although they may still enjoy tax-favoured status compared to alternative structures (Patterson, 2005). Generally speaking, trusts are not taxed in the civil law countries. However, tax laws are changing rapidly, driven in part by nation-states' need for revenues following the 2008 global financial crisis and the ensuing European debt crisis. For example, France passed a law in 2011 taxing trusts benefiting French residents, or containing assets situated in France (Innocent, 2012).
- 11 This occurs even in countries that are otherwise among the most legally progressive. A recent and much-publicized case concerns the late Swedish author Stieg Larssen,





- author of the best-selling Millennium trilogy. His partner of 32 years, Eva Gabrielson, received nothing upon his death because Swedish law does not grant inheritance rights to unmarried partners. Instead, the multi-million dollar estate went to the only heirs recognized by the state: Larssen's father and brothers. Since Larssen's death in 2004, Gabrielson and his family have been locked in increasingly costly and bitter litigation over the inheritance (McGrath, 2011).
- 12 While there are other accreditations available for wealth management, none are as widely held or as widely recognized as the TEP. This is in part because many of the other credentialing programs are offered by firms rather than professional societies, and are open only to those who already hold law or accounting degrees. Credentials that seek to cover similar intellectual territory as the TEP certificate include: the Accredited Wealth Management Adviser, offered by the College for Financial Planning; the Certified Estate and Trust Specialist, offered by the Institute of Business and Finance; and the Chartered Trust and Estate Planner, offered by the American Academy of Financial Management. More information on credentials available in wealth management can be found on the website of the US Financial Industry Regulatory Authority (FINRA): <http://apps.finra.org/DataDirectory/1/prodesignations.aspx>.
- 13 By the time of the Basle Congress of the First International in 1869, Marx had changed his mind, shifting his attention 'upstream' of inheritance rights to private property in general. Abolish private ownership, he argued, and the problem of inheritance 'would die of itself' (Cunliffe, 1990: 229).

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