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## EXPRESS TRUST: THE DARK HORSE OF THE LIBERAL PROPERTY REGIME

*Hanoch Dagan & Irit Samet*

*daganh@tauex.tau.ac.il*

*irit.samet@kcl.ac.uk*

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## ABSTRACT

*Trust sceptics are correct to revolt against the increasing abuses of the trust. But they are wrong to deem it beyond redemption. In this chapter, written for the PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TRUSTS, we develop a charitable interpretation of trust doctrine and of the legacy of the trust that offers a happy raison d'être around which it can, and should, be reconstructed. The trust, we argue, plays a distinctive role in a system of liberal (that is: autonomy-enhancing) property law. Pushing it to live up to this (implicit) promise offers an exciting reformist agenda in which many of its weeds are properly cleared.*

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## EXPRESS TRUST: THE DARK HORSE OF THE LIBERAL PROPERTY REGIME

*Hanoch Dagan\* & Irit Samet\*\**

### I. INTRODUCTION

#### *A. Redeeming the Trust?*

Public relations for express trusts have had to work extra-long hours as of late. What used to be viewed (by the few who dedicated some thought to the matter) as just one more way for holding assets, has become a moral pariah in the eyes of many. The background for this change in how trusts are viewed is the financial crisis, the rush to buttress the failing banks, and the devastating effect it had on the state coffers. These dramatic events led to an unprecedented public anger at individuals and corporations who are failing to pay their fair share of taxes. The trust has been dragged to the limelight as one of the most popular instruments for reducing tax bills by employing aggressive planning.

Many an author justifiably lament over how the device that was created to enable people to enjoy the many advantages of the ability to separate the benefit of an asset from its day-to-day management, has been utilised by unscrupulous advisors to shelter their clients from their civic duties.<sup>1</sup> As one critic puts it, '[in]

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\* Stewart and Judy Colton Professor of Legal Theory and Innovation & Director of the Edmond J. Safra Center for Ethics, Tel-Aviv University.

\*\* Professor of Law, Dickson Poon School of Law, King's College, London. Thanks to Greg Alexander, Ruth Chang, Jonathan Gingerich, Matt Kramer, Mark Lunney, Paul Miller, Yifat Naftali, Aruna Nair, James Penner, Tom Sinclair, and participants at the King's Private Law Forum, the Philosophical Foundations of Trust Law Workshop, and the UK Analytical Legal and Political Philosophy Conference for their helpful comments.

<sup>1</sup> This is nothing new: as Baker explains, '[a]nother unworthy purposes of the uses, noted in 1370, was to place land beyond the reach of creditors' (John H. Baker, *An Introduction to English Legal History*, 3rd edn (London: Butterworths, 1990), p.284). The abuse of trust has, however, significantly picked up in recent decades, and so has the public backlash against it, see for example, Andres Knobel, *Trusts: Weapons of Mass Injustice?* (Tax Justice Network,

today's world, the tenant and medieval crusader has been replaced by the oligarch, the international businessman and the celebrity, and increasingly the trust is employed in jurisdictions with low rates of taxation or low standards of regulation to keep assets and income away from the attention of creditors and the authorities'.<sup>2</sup>

The extent to which trust law, or Equity as a whole, is to blame for this unfortunate development, and what can be done to reverse the damage, is a question for another day.<sup>3</sup> What is germane for this chapter is the condemnation of attempts to use the private nature of trust to create illegitimate secrecy in ways that threaten to undermine distributive justice and interpersonal duties, which is beyond serious dispute. This widespread critique clearly justifies the current efforts, which – similarly to those that accompanied trust law right from the start, almost 650 years ago<sup>4</sup> – seek to devise effective countermeasures.<sup>5</sup> But does it justify more than that? Shouldn't these recurring episodes of abuse imply that a healthy legal system is better off without trusts?

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2017); Keynote by Justice Richard Snowden, "The Use and Abuse of Trusts and Other Wealth Management Devices" 31 *Trust Law International* 99; 'The Paradise Papers' - a special investigation by the Guardian and 95 media partners worldwide into a leak of 13.4m files from two offshore service providers and 19 tax havens' company registries which found that many of the schemes relied on the trust structure (<https://www.theguardian.com/news/series/paradise-papers>); A BBC Panorama exposed how wealthy business people used trusts and other tricks to keep hold of their wealth, while those they owe money to are left with nothing: <https://www.bbc.co.uk/programmes/b09m5wdd>.

<sup>2</sup> Snowden *ibid* p.99

<sup>3</sup> See more in Irit Samet, "On Trusts, Angels, Morality and Fusion: Reply to Critics" 21 *Jerusalem Review of Legal Studies* 50, section 2. Compare, Ying Khai Liew, "Justifying Anglo-American Trusts Law" 12 *William & Mary Business Law Review* 685 who is skeptical about such reforms.

<sup>4</sup> The first laws that undermined settlor's efforts to hide his assets from creditors behind a trust were enacted as early as 1376 (James Glister, James Lee and Harold Greville Hanbury, *Hanbury and Martin Modern Equity, Twenty-first edition. edn* (London: Sweet & Maxwell, 2018) 1-54, p.14).

<sup>5</sup> Some helpful suggestions can be found in Knobel, *Trusts: Weapons of Mass Injustice?* (Tax Justice Network, 2017).

In this chapter we argue that the trust can have a place of honour in the liberal polity as it serves an important role in liberal law's major obligation to enhance people's autonomy (or self-determination; we use these terms interchangeably). Our argument, if it succeeds, can rehabilitate trusts across diverse settings, from family to market. We also hope to show, however, that this distinctively liberal account of the normative basis of express trusts comes with a significant 'normative price tag'. For the trust to benefit from our 'rehabilitative' exercise – if its retention notwithstanding the critique is to rely on the autonomy-enhancing *telos* we ascribe to it – trust law must be loyal to this justificatory premise. As we will see, this premise supplies an *internal* reason for dismantling the abusive uses that trigger the current trust scepticism. It also bears on further reform suggestions with regards to such matters as the curtailment of discriminatory trusts, and protecting rights under trust in registered land.

We understand this chapter as an exercise in charitable interpretation and reconstruction of the law. Like other reconstructive efforts, our account builds on existing practices, reaffirms much of existing law, and offers targeted proposals for justified reforms. We do not pretend to divine the intention of the judges and lawmakers who developed the doctrine. Rather, we offer an understanding of the law of express trust firmly grounded in the most fundamental normative commitments of private law in a liberal polity.<sup>6</sup>

### *B. Express Trusts and Liberal Property*

Our thesis is that the state is justified in instantiating the instrument of the trust and in enforcing trusts as a fulfilment of its obligation to instantiate a property regime

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<sup>6</sup> Saying this does not commit us to the view that the law of trust is part of the law of property: what is important for us is the interaction between the law of trust and the law property; not the categorisation of the former (see Hudson and Mitchell's chapter in this volume Jessica Hudson and Charles Mitchell, "Justificanda" in Simone Degeling, Jessica Hudson and Irit Samet (eds), *The Philosophical Foundations of the Law of Express Trusts* (Oxford: OUP, 2022) pxx.

geared at promoting people's autonomy.<sup>7</sup> What started in the middle ages as an enforcement of duties of conscience by Chancery has morphed into a powerful tool in the hands of citizens who look for unconventional ways of holding and gifting property.<sup>8</sup> As a result, the state is now under a dual (over-determining) obligation to compel trustees to obey the terms of the trust, and third parties to respect it: as a duty of conscience of the kind that engages Equity, and as a right that plays a crucial role in an autonomy-enhancing system of property rights.

In these pages we focus on the second aspect of this state obligation. Our task is to explore the distinctive role the trust plays in realising the ideal of liberal property in common law jurisdictions, namely: the *unique* contribution of the express trust to the fabric of property law – and private law, more generally – in a liberal polity. Elucidating this role paves the way to the appreciation of the *limits* liberal law must place on the use of the trust; it shows, in other words, that certain uses pointed out by trust-sceptics must be deemed *ultra vires*, since they threaten to undermine, rather than serve, the liberal *telos* of express trusts.<sup>9</sup>

Our starting point is the liberal conception of property. Property empowers people to define and pursue their own goals; to self-determine. In a liberal polity, the commitment to individual autonomy, which must dominate property's justification, also shapes its constitution and thus grounds its most fundamental legal contours. A genuinely liberal property law refines its rules so that the private authority property instantiates is indeed circumscribed by this autonomy-enhancing *telos*. Furthermore, because property can serve people's self-

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<sup>7</sup> For a review of other justifications see, Robert H. Sitkoff, *Economic Analysis of Trust Law* (in this volume).

<sup>8</sup> One example is which the autonomy-enhancing commitment and thus power-conferring nature of the express trust transpires as the premise on which its conscience-based commitment and thus duty-imposing nature are founded is the introduction of self-declarations. Cf. Sinéad Agnew, *The Settlor's Conscience* (in this volume).

<sup>9</sup> This term is typically associated the limited legal capacity of some legal persons, but we use it deliberately here in order to convey the proposition that once the trust is interpreted in line with our theory, settlors and their lawyers would no longer be able to use that legal device in this way. (Consider, by [crude] analogy, the claim that, properly interpreted, trading in body parts is *ultra vires* [liberal] contract, since it abuses the very normative foundation on which contract's legitimacy is founded.)

determination – either on their own or with others – in diverse ways, liberal property law is structurally pluralist, that is: it offers an inventory of diverse property types which facilitate a plethora of forms that covers all major spheres of human action and interaction.

The structure of trusts, namely, the split of legal and equitable interest, opens up a whole new field of opportunities for owning, gifting and using property in creative and personalised ways. The trust is autonomy-enhancing because it dramatically increases the settlor's scope of options. The possibility of appointing herself as a trustee further augments her choices as it allows her to retain ongoing control over the property by including discretionary powers in the trust terms which she can exercise as she sees fit. The property-associated autonomy of potential beneficiaries is likewise enhanced, since they are able to deploy forms of sharing that are uniquely tailored to their size, and enjoy the property without the burden that is associated with managing and caring for it. Finally, settlors who nominate themselves as beneficiaries enjoy the combination of both good worlds: it is largely up to them to decide how much control of the property to leave in their hands qua beneficiaries, and how much to cede to the trustee;<sup>10</sup> they can be (almost) as creative as they wish when choosing forms of sharing the benefit of the property (or not share at all).<sup>11</sup>

Historically, the split of beneficial and legal interest was an ingenious solution to a different problem: the severe restrictions on property rights, which, in modern times morphed into a more balanced, but still restrictive regime, of *numerus clausus* (NC). The trust, we argue here, is still needed in order to mitigate the adverse effect which even a well-calibrated NC has on the autonomy of property holders. This concern acquires a special urgency in the context of registered land. Under the *numerus clausus* principle, private arrangements enjoy the status of property only if they are pigeonholed into the *delimited* menu of state-recognized forms. But liberal

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<sup>10</sup> Though at some point, if the trustee has no control the trust may collapse.

<sup>11</sup> To be sure, for the trustee the trust is – as it should be – autonomy-enhancing only indirectly: it allows her to offer her services in managing the trust estate, and then carefully delineates her authority so as to ensure that it is fully functional to the settlor's and/or the beneficiaries' self-determination. See Hanoch Dagan & Irit Samet, 'The Beneficiary's Ownership Rights in The Trust Res in A Liberal Property Regime' (work in progress).

property law requires more than a rich variety of such state-sponsored frameworks; it should also offer, wherever feasible, a residual category for freestanding forms of interaction. Such a category would allow autonomous individuals to reject the state's favoured frameworks and decide for themselves how to arrange their interpersonal relationships, while taking into account the interests of third parties.

The express trust, we argue, is a second-best means to comply with this injunction of a genuinely liberal property law, which makes it a, albeit imperfect, tool for fully realizing the autonomy-enhancing *telos* of liberal property in a system with a restrictive *numerus clausus* rule as we find in England.<sup>12</sup> English law, on which we focus, is second *best* because the trust complements law's inventory of property types by allowing the settlor to make good her wishes with regards to how she, or others, will enjoy the property in ways that diverge from the recipes favoured by property law. But it is only *second best* given the remaining gaps between trust law and the ideal residual property type for private arrangements.

If trust law is indeed, as this chapter argues, best justified by reference to its autonomy-enhancing service, its interpretation and reform should be guided by this foundational *telos*. Thus, an important part of our task is to examine what implications might an analysis of trust as a proud member of liberal property have on the way we approach some thorny issues in this intricate field of law. We do not claim that such an analysis can resolve all the difficult puzzles that engage trust

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<sup>12</sup> On its face, the text is both an understatement and an overstatement: it might appear to understate the status of autonomy by slighting other values, such as solicitude of the needs of others or cooperation and coordination; and it overstates autonomy by ignoring the autonomy-inhibiting potential of trusts relative to beneficiaries and third parties. We resist both objections. The understatement concern is dissolved once the values of community and utility are properly situated in a liberal system, where autonomy is law's ultimate commitment, and they are recognised (respectively) as constitutive and instrumental values, which are valuable due to their contribution to people's autonomy. See Hanoch Dagan, *A Liberal Theory of Property* 46-58 (CUP 2021). The overstatement concern, in turn, properly describes current doctrine, where trusts are also used in ways that are overall autonomy-inhibiting. But as we clarify in Part IV, this gap suggests that our liberal theory of express trusts can, and we think should, be used as a source for internal critique and (hopefully) reform of uses we came to accept as part of the legal landscape, but shouldn't.



lawyers and scholars. But, unlike some scholars of trust law,<sup>13</sup> we do argue that understanding the trust as serving a role in the liberal picture of property ownership sheds light on the way the trust should operate give this role.<sup>14</sup>

More precisely, the implications of our account are of two sorts. First, in the context of registered land, examining the trust vis-à-vis the ideal residual property type for private arrangements shows, as noted, that it is a *second* best. As we will explain in Part III, existing trust law does not fully perform the role of a residual property type, but it can – especially if properly calibrated – significantly contribute to limiting property law’s deficiency on this front.

The other set of implications is broader and reformist. If our account is to escape the risks of apologizing for, or even legitimizing, prevailing practices in which trusts have become a key instrument for shielding people from their legal obligations, we must show that – when it is properly interpreted – the trust is not amenable to such abuses. Hence, in Part IV we demonstrate some rather significant reforms that reinterpreting the trust as liberal property’s missing piece requires.

Thus, as already noted and will be clarified shortly, liberal property delineates the private authority of each property type in line with its autonomy-enhancing function. This means that for liberal property the disturbing uses of the trust, which go well beyond its autonomy-enhancing function, are *necessarily* understood as *abuses* and should thus be treated as *ultra vires*. Moreover, because liberal property relies on respect for self-determination, it cannot authorise practices, such as discriminatory trusts, which are offensive to people’s self-determination. Accordingly, our account implies that liberal trust law must embrace – as limitations inherent in its animating principle, and not (or not only) as external

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<sup>13</sup> See J.E. Penner, “An Untheory of the Law of Trusts, or Some Notes Towards Understanding the Structure of Trusts Law Doctrine” (Oxford) 63 Current Legal Problems 653.

<sup>14</sup> The remaining indeterminacy is a feature, rather than a bug, of theories like our which aspire to apply across time and place. Theories of this type must leave room not just for local adjustments based on social, cultural, and economic circumstances, but also for democratic prescriptions.

constraints – whatever means currently on offer that can abolish or at least curtail these abuses.<sup>15</sup>

This substantive conclusion also entails institutional implications. It suggests that not only legislatures carry the burden of facing up these (and other) abuses of the trust. As the most traditional carriers of our private law, judges at least share the responsibility to the integrity of its institutions. Thus, they can – and dare we say should – participate in shepherding the development of trust law so as to remove mistakes and eccentricities and preserving ‘whatever is pure and sound and fine’.<sup>16</sup>

### *C. A Note on the Nature of the Beneficial Interest*

But before we proceed, we need to add a note on one conceptual debate that excites the trust scholarly community for the past century or so: namely, whether the beneficiary’s interest is of proprietary or personal nature. We explain elsewhere, why we think that the orthodox view according to which the beneficiary’s interest is the correct one.<sup>17</sup> However, we do not believe that it is necessary to endorse our, or any other set of arguments in favour of the orthodox view in order to accept the thesis we advance here. First of all, in order to assess whether the availability of an option to hold resources on trust satisfies the state’s duty to provide the citizens with an ‘out of the box’ category of property right, we explore the way the trust expands the property menu for settlors and thus (derivatively) for beneficiaries. Thus, the debate around the nature of the beneficiary’s interest does not concern the prime focus of our current investigation. But even with regards to the beneficiary’s autonomy, we believe that we can take on board both the proprietary and obligation analyses of the nature of his right; at least part of the way.

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<sup>15</sup> *Contra* Mark J. Bennett and Adam Hofri-Winogradow, ‘Against Subversion, a Contribution to the Normative Theory of Trust Law’, (2021) 41 Oxford Journal of Legal Studies 692, which misrepresents the autonomy-based theory of trusts.

<sup>16</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, CT: Yale University Press, 1921) at 179.

<sup>17</sup> Dagan & Samet (n 11). See there for sources and critique of the main views in the debate.

Recall that the 'out of the box' category of property right must be different from categories that feature on the *numerus clausus* list. We are interested in the question at what point the difference is such that the category no longer increases the autonomy of property holders to a sufficient degree. We therefore share with the parties to the obligation-proprietary debate the interest in the unique characteristics of the beneficiary's right. But the classification of that right as proprietary or personal is not really important to us here.

The position we endorse, to be sure, rules out the view that certain characteristics are essential features of property right, and that therefore their presence or absence in the beneficiary's right determines its classification as 'proprietary'. We do not think, for example, that the question whether the beneficiary's rights can be interpreted as including a right to exclude strangers from the trust *res* is determinative of whether it is a proprietary right. From the point of view of the liberal conception of property we adopt here, the plethora of rights that the beneficiary enjoys is enough to qualify it as a property right.

But our focus in this chapter is elsewhere: the question we ask is whether, and to what extent, the trust can serve as an instrument for the settlor to fulfil those plans, ideas and hopes for the property that she cannot realise by utilising the set of prêt-à-porter property rights designed by the state. Thus, our classification of rights under trust as property should not overly deter adherents to the obligation position. For they, like proponents of the orthodox analysis, recognise that, in principle, the rights of the beneficiary closely resemble what we expect to find in a property right.<sup>18</sup> If they share the liberal commitment to add as many strings as feasible to people's bows, they should still be interested in the question whether the trust realises this commitment in the context of 'out of the box' property. It may be the case that, for them, it would turn out to be that the state partly fulfils its duty to offer a miscellaneous category of property types by creating a *hybrid* property/personality mechanism (namely, the trust). But the extent to which the trust can fill this role in a liberal system of private law should, we hope, be an interesting question which we can explore together.

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<sup>18</sup> See for instance Frederic William Maitland, *Equity: A Course of Lectures*, 2nd edn (London: Cambridge University Press, 2011) p.115.

## II. A LIBERAL PROPERTY REGIME

Free individuals are entitled to plot their own course through life – to have some measure of self-determination. Autonomy requires appropriate mental abilities. It also necessitates a measure of independence. But autonomy is not guaranteed by merely a structure of negative rights.<sup>19</sup> As Joseph Raz famously argued, autonomy is also dependent upon both material conditions and a sufficiently heterogeneous inventory of alternatives.<sup>20</sup> This lesson explains why in a liberal polity people are entitled to a system of law *supportive* of their ability to shape a life they can view as their own, rather than merely one that respects their capacity for uncoerced choice.

An important part of this task is assigned to public law: the most basic preconditions of personal self-determination are undoubtedly health, education, and means of subsistence. Nonetheless, private law also plays an irreducible role in empowering people. Private law's distinct responsibility is in forming and sustaining the variety of frameworks necessary for our ability to lead our chosen conception of life. Property law, more specifically, has a distinctive role in this fundamental obligation of the law.<sup>21</sup> Elsewhere, one of us develops a theory of liberal property and shows how this autonomy-enhancing *telos* is crucial to both ensuring property's legitimacy and elucidating property law's core features.<sup>22</sup> Here

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<sup>19</sup> H.L.A. Hart, 'Between Utility and Rights' (1979) 79 Colum. L. Rev. 828, 836.

<sup>20</sup> Joseph Raz, *The Morality of Freedom* (OUP 1986) 372, 398.

<sup>21</sup> As the text below clarifies, property's service to our autonomy is distinctive from what public law – say a public regime that secures stuff for us to use – can do because property's normative signature involves the private authority we have over resources. And, as is clarified elsewhere, while there are some continuities between property and contract (law's two major power-conferring instruments), their autonomy-enhancing potentials are not fully interchangeable. See Dagan (n 12) 25-26.

<sup>22</sup> Dagan (n 12). As the text implies and the following paragraphs briefly explain, because the burden of justifying the private authority property law authorizes and coercively enforces is awesome, property law can nonetheless be justified if, but only if, its architecture follows its (implicit) autonomy-enhancing *telos*.

we briefly sketch this theory, focusing on its aspects that are particularly pertinent to our account of the place of express trusts in a liberal scheme of property.<sup>23</sup>

### *A. Autonomy-Enhancing Property*

Property both empowers people and disables them, enhances their self-determination while also rendering them vulnerable. Appreciating both property's autonomy-enhancing service and the vulnerabilities it generates is key to the three guiding principles – the three pillars – of a liberal theory of property.

Property is conducive to people's self-determination because self-determination is an intertemporal achievement, consisting of planning and carrying out projects, which requires a temporal horizon of action. Property follows suit by conferring upon people some measure of private authority over resources: a normative power to determine what others may or may not do with the resource. This authority over things (both tangible and intangible) dramatically affects people's ability to plan and carry out – on their own or with the cooperation of others – meaningful projects.

Liberal law further augments property's autonomy-enhancing potential because it constitutes a *variety* of stable frameworks of interpersonal cooperation, as different property types support divergent forms of interpersonal relationships from which people can choose. Thus, properly configured, property law functions as an empowering device for self-authorship, enabling people to act upon their own goals and values, their objectives, and their life plans. By conferring on individuals the power to invoke various property types that facilitate differing life plans, a

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<sup>23</sup> In this chapter we do not have the space, nor do we see the necessity, to define the trust in precise terms. We do not dispute Mitchell and Hudson's argument in this volume that a successful justification must rely on a good understanding of the law. See Hudson and Mitchell, "Justificanda" (2022). But we believe that while the justification process can, and should, start off with a consensual, or even intuitive conception of the justificanda (of the kind they suggest at section B i of their chapter), it must remain open to revisit it in a Rawlsian spirit of reflective equilibrium. We therefore explicate the way in which noncontroversial rules of the law of trust reflect our theory, and set its boundaries. Later on (and in other pieces of work) we talk about the way in which the theory we suggest here can, in turn, help us to formulate a position on controversial aspects of the trust..

liberal property law makes a crucial contribution to people's ability to realize the right to self-authorship.

Alas, indispensable as it is, this autonomy-enhancing service is also the source of property's daunting legitimacy challenge. By proactively empowering owners, property law generates new normative powers, which imply new liabilities on others. Since the law of property renders non-owners vulnerable to such powers, it must be justified in principle to the subjects of the powers it creates. Without good justification, the demand (or even expectation) that non-owners defer to owners' authority regarding what to do with an object seems arbitrary and unjust.

In a liberal order, property law is justified in vesting private authority in owners insofar as this is critical to people's self-determination, which the state is obligated to facilitate, and everyone must respect. Non-owners are justifiably subjected to the powers of property because people's foundational right of reciprocal respect for self-determination implies that these instruments of self-determination deserve respect from others.

This means, however, that the legitimacy of any given property system hangs on its performance as to property's autonomy-enhancing *telos*. A genuinely liberal property law proactively augments people's opportunities for both individual and collective self-determination, while carefully restricting their opportunities for interpersonal domination. This is why – unlike property *simpliciter* – the notion of private authority cannot exhaust the idea of *liberal* property.

To be justified, property's empowerment potential must not be limited to a few; it must be available for the many. This requirement implies that in a liberal polity, property law must rely on a robust background regime, which should guarantee everyone the material, social, and intellectual preconditions of self-authorship. Such a regime is particularly necessary because property's justificatory challenge is not limited to the moment of its creation. Rather, it continuously resurfaces, partly due to certain features of property – notably accession – which imply that property leads to more property and thus tends to generate greater inequality and vulnerability. Because one can suspect that the marginal autonomy-enhancement of each additional unit of property is likely to be diminishing, a liberal property law imposes the costs of the ongoing maintenance of the background regime necessary for property's legitimacy on those who are particularly well-off. The duty

of the well-off to cover these costs is justified both by their (Rawlsian<sup>24</sup>) duty to support just institutions and as a precondition to the legitimacy of their own property rights.

A genuinely liberal law, however, is not contented with such a general background (public law) regime. The freestanding significance of property to self-determination implies that a liberal law properly-called also shapes its property regime in accordance with property's autonomy-enhancing *telos*. This is why a liberal property system must not instantiate only one form of property. In order to foster autonomy-enhancing pluralism, it offers a *variety* of frameworks for both individual and communal self-determination from which prospective owners (and other right-holders) can choose. A liberal property law is also always, as noted, attentive to the concerns of non-owners. This is why it must ensure that no private authority can be claimed that is in excess of what is required for owners' self-determination. Moreover, since owners' legitimate claims are premised on the maxim of reciprocal respect for self-determination, their authority must be consistent with the self-determination of others.

These short comments point out to the three pillars of liberal property – the features that distinguish it from property *simpliciter*: carefully delineated private authority, structural pluralism, and relational justice.

- (1) liberal property carefully circumscribes owners' private authority so that it is adjusted to its contribution to self-determination;
- (2) it includes a structurally pluralist inventory of property types so as to offer people real choice; and
- (3) it complies with the prescriptions of relational justice so as to ensure that ownership does not offend the maxim of reciprocal respect for self-determination on which property's legitimacy is grounded.<sup>25</sup>

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<sup>24</sup> John Rawls, *A Theory of Justice* (HUP 1971) 293-94.

<sup>25</sup> The notion of 'relational justice' in the liberal theory of property is close to, but nonetheless importantly distinct from, the relational egalitarianism of Elizabeth Anderson or Samuel Scheffler. See Hanoch Dagan & Avihay Dorfman, 'Justice in Private: Beyond the Rawlsian Framework' (2018) 36 L & Phil 171, 182-86.

Because liberal property's second pillar is key to the unique autonomy-enhancing function of the express trust, the following discussion focuses on structural pluralism. We revisit, however, liberal property's first and third pillars later on in the chapter, since these commitments are key to justifying some of the existing limitations of the trust, to explaining why the illicit uses of the trust should be analysed as corruptions of this property type, and to point out to further necessary reforms.

### *B. Structural Pluralism*

Property manifests itself in law in a nuanced, contextualized, and multifaceted fashion. The profound heterogeneity of property types causes difficulties for monistic theories that look for *the* structural core of property, most notably the many variants of the Blackstonian school, in which property stands for "sole and despotic dominion."<sup>26</sup> These theories tend to present one property type – the fee simple – as the core or the default of our understanding of property, while suppressing other property types as mere variations on a common theme, or marginalizing them as peripheral exceptions to this one solid core.

For liberal property, by contrast, this multiplicity is a virtue rather than a concern since it ensures an inventory of alternatives from which people can choose.<sup>27</sup> Property law *should* be heterogeneous because there are many ways in which property can support people's self-determination, either on their own or – quite often – with others. The internal life of property is accordingly structured through sophisticated governance mechanisms that facilitate various forms of interpersonal relationships, which would not be possible without an enabling legal infrastructure.

Instead of overemphasizing the common denominator of these diverse types, liberal property celebrates the pluralistic architecture of property law and its many options. It conceptualizes these types as default frameworks of interpersonal interaction regarding various resources. This understanding implies that these

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<sup>26</sup> 2 Bl Comm 1765-69 \*2.

<sup>27</sup> For an extended analysis on which this section draws, see Dagan (n 12) at Ch 4.



property types need to be properly standardized and their interpretation and evaluation should, by and large, look to their specific “local” animating principles. (Think, for example, of the different DNAs of condos, co-ops, joint tenancies, leaseholds, and for that matter the fee simple absolute.)

At its best, this plurality of types enables property law to offer varying balances between the different (intrinsic and instrumental) values that property can serve – independence, personhood, community, and utility – in diverse social settings and with respect to a variety of resources. Each of these property types constitutes a distinctive framework of private authority; each offers its own recipe for some temporally extended control that people can have over a resource, either as individuals or as members of a community of owners. When the law’s menu of property types is sufficiently rich for each major sphere of human action, it offers people a range of meaningful choices for resource governance and co-governance that supports self-determination.

The obligation of the liberal state to facilitate meaningful choices in important spheres of life implies a duty to facilitate people’s autonomy by ensuring this *intra-sphere multiplicity*, namely, to actively shape distinct property types that function as *partial functional substitutes*. This duty is not limited to satisfying demand for more types, as it may be in utility-based accounts. Rather, property plays a crucial role in delivering on the liberal promise of self-determination. The state can betray this mission not only by having bad or too much property law. The absence of law, or an attempt to limit property’s heterogeneity, will have the same effect.

Some liberal friends of the dominion conception of property accept the normative significance of pluralism, but insist that it need not affect the law. Law in this view can – and, for some, should – largely adhere to the monistic conception of property as sole and despotic dominion. To be sure, no one seriously thinks that property always entails unqualified dominion. But for some theorists, property’s architecture is one of a clear core, in which property is defined by owners’ right to exclude (or its cognates), and some possible exceptions (say: easements) situated at property’s periphery. Pluralism, in this view, does not require more than a few

basic forms as long as individuals can use their freedom of contract and further tailor their interpersonal arrangements so that they best serve their own purposes.<sup>28</sup>

Alas, such a hands-off approach to property law would have failed to deliver on property's autonomy-enhancing promise. To see why the rich diversity of property arrangements that pluralism requires will not spontaneously emerge without the active support of viable legal institutions (or law-like social conventions), we need to appreciate the insights of both lawyer-economists and critical scholars.

Economic analysis of private law investigates its incentive effects, and forcefully demonstrates how many of our existing practices rely on legal devices which serve to overcome numerous types of transaction costs: information costs (symmetric and asymmetric), bilateral monopolies, cognitive biases, and heightened risks of opportunistic behavior that generate endemic vulnerabilities in most cooperative interpersonal interactions.

Merely enforcing the parties' expressed intentions would not be sufficient to overcome these inherent impediments of such endeavors. If many (most?) of the types property law currently offers (let alone the further types an even more autonomy-friendly law would develop) are to become or remain viable alternatives, law must provide the background reassurances tailored to the specific category of interaction at hand, which are necessary for its success. Even where parties are guided by their own social norms, law often plays an important role in providing them background safeguards, a safety net for a rainy day that can help establish trust in their routine, happier interactions.

Moreover, law's effects are not only material. Because private law tends to blend quietly into the backdrop of our lives, its categories play a crucial role in structuring our daily interactions. Thus, alongside these material effects, many of our conventions – including many social practices we take for granted as the options we currently have (think: a condo or a corporation) – become available to us only due to cultural conventions that often, especially in modern times, are legally constructed.

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<sup>28</sup> Robert Nozick, *Anarchy, State, and Utopia* (Basic Books 1974) 150-57, 159-64, 167-72, 329; Thomas W. Merrill, 'Property as Modularity' (2012) 125 Harv. L. Rev. Forum 151, 157-58.

Hence, if these notions were not legally coined, people would not only have to consider the transaction costs of constructing these arrangements from scratch; they would also face ‘obstacles of the imagination’ just coming up with the options in the first place. Indeed, the property types law establishes play an important cultural role. Like other social conventions, they serve a crucial function in consolidating people’s expectations and in expressing the animating principles of the categories of interpersonal relationships they participate in constructing.

Both the material and the cultural functions of private law imply that freedom of contract, though significant, cannot possibly replace active legal facilitation if the liberal state’s obligation to enhance autonomy by fostering diversity and multiplicity of property forms is taken seriously. Lack of active legal support is often tantamount to undermining – maybe even obliterating – many cooperative forms of interpersonal relationships and thus people’s ability to seek their own conception of the good.

Thus, what explains and justifies liberal property’s structural pluralism is the way it provides a set of viable frameworks – of property types – from which people can choose. Property law offers a variety of forms which are all heavily relying on enabling legal infrastructure; co-ops, common-interest communities, joint tenancies, and leaseholds are only some examples of the existing inventory of land-ownership. Nothing short of the robust legal edifice of structural pluralism will do if property law is to be guided by the autonomy-enhancing *telos*.

### *C. Residual Category*

Securing a multiplicity of property types is not an add-on feature of liberal property. Rather, for a property regime which takes its liberal *telos* and legitimacy challenge seriously, this multiplicity is essential. Structural pluralism, in other words, is a fundamental design principle of a genuinely liberal property law. For each major category of human action and interaction, liberal property must instantiate and support a sufficiently diverse repertoire of property types, each governed by a distinct animating principle, meaning a different value or balance of values.

A rich variety of state-designed frameworks is a necessary feature of both liberal property and liberal contract.<sup>29</sup> If properly constituted, it is likely to facilitate the self-determination of most people. But even if perfected along these lines, private law would still fall short of its liberal promise. In a liberal society, people should be able to create their own idiosyncratic frameworks of interpersonal interactions and not merely pick and choose from state-designed frameworks. The practical significance of this option is surely impacted by the quality and diversity of these frameworks (and it may further vary across resources). But its normative significance is not similarly contingent. If (but only if) people comply with private law's *grundnorm* of respect for each other's self-determination, a genuinely liberal law should support parties' ability to reject its default frameworks – even if its property law offers a properly diverse repertoire of property types – and tailor their arrangements according to their particular needs and circumstances.

Accordingly, an autonomy-enhancing private law should offer, wherever feasible,<sup>30</sup> a residual category allowing autonomous individuals to 'invent' their own private forms of interaction. Contract law complies with this requirement. It has long discarded a system that only recognized 'nominate' contracts.<sup>31</sup> Although the familiar contract types probably fit the needs of most contractors, both common law and civil law systems (in which the distinction between nominate and

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<sup>29</sup> For liberal contract, see Hanoch Dagan & Michael A. Heller, *The Choice Theory of Contracts* (CUP 2017); Hanoch Dagan & Michael Heller, 'Choice Theory: A Restatement' in Hanoch Dagan, Benjamin Zipursky (eds) *Research Handbook on Private Law Theory* (Edward Elgar, 2020) 112.

<sup>30</sup> The qualified language is not coincidental. As the previous paragraph clarifies, while there is always a principled gap between law's menu of state-shaped property type and the liberal ideal of property, its practical significance – and thus its urgency – admittedly depends on the specific legal system's performance of designing such the menu in line with liberal property's prescriptions. This means that absence of a residual category does not necessarily renders a property regime illiberal; it's normalizing effects can be mitigated if the state-designed inventory fully complies with the prescription of intra-sphere multiplicity, and if it includes – as liberal property theory further prescribes – minoritarian or utopian property types. Dagan (n 12) 78, 107, 109.

<sup>31</sup> Reinhardt Zimmerman, *The Law of Obligations: Roman Foundations of the Civil Tradition* (OUP 1990) 534-35.

innominate contracts still persists) properly allow, and indeed support, freestanding bargains that do not fit into these conventional categories. Property law, by contrast, fails to offer a salient and vibrant residual category of private arrangements, at least in systems that uphold the prevailing understanding of the *numerus clausus* principle.

To clarify: property's autonomy-enhancing *telos* fully justifies the *numerus clausus* as a principle of standardisation. Law's list of property types is commendable because it facilitates stable categories of state-supported property types by standardizing their incidents. For law to consolidate people's expectations in compliance with the prescriptions of structural pluralism (as well as those of the rule of law<sup>32</sup>), it must recognize a necessarily limited number of categories of relationships and resources. But the conventional understanding of the *numerus clausus* principle goes further. It stands for the proposition that "property rights exist [only] in a fixed number of forms," so that private arrangements can enjoy the status of property *only if* they are pigeonholed into the delimited menu of the state-designed property forms.<sup>33</sup> This additional, normalizing<sup>34</sup> dimension of the *numerus clausus* principle is, we argue, unjustified.

Liberal property, to be sure, does not require law to adopt a *numerus apertus* (open list) principle, allowing 'fancy rights' to be registered or recorded on par with law's standardised types and thus require every third party to further inquiries.<sup>35</sup>

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<sup>32</sup> Dagan (n 12) 159-73.

<sup>33</sup> Thomas W. Merrill & Henry E. Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 Yale L.J. 1, 3; Law of Property Act 1925, ss 1, 4(1). English courts worried lest unrestricted freedom for estate owners to invent proprietary rights would 'impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote' (*Keppell v Bailey* (1834) 2 My & K 517 at 536, 39 ER 1042 at 1049 per Lord Brougham LC); *Ackroyd v Smith* (1850) 10 CB 164 at 188, 138 ER 68 at 77-78 per Cresswell J.; *Camden LBC v Shortlife Community Housing Ltd* (1992) 90 LGR 358 at 373 per Millett J; *Lloyd v Dugdale* [2002] 2 P & CR 13 at [52(4)] per Sir Christopher Slade.

<sup>34</sup> Cf Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Print 1996) 413, 416.

<sup>35</sup> Yun-chien Chang & Henry E. Smith, 'The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms' (2015) 100 Iowa L. Rev. 2275, 2287-

What is needed instead is that, like contract law, property law would also include *one* residual category for private arrangements in addition to the state-shaped property types. Such a category would flag to third parties that the property at hand is subject to an unconventional arrangement and provide effective notice as to its content. Moreover, both the risks of possible misunderstandings due to its idiosyncrasy or ambiguity, as well as the costs of administering such a residual property type, should be allocated to the parties to such an arrangement rather than to third parties.

We by no means deny that property law is justified in proscribing idiosyncratic arrangements insofar as they entail negative external effects, both social (e.g., segregation) and economic (e.g., fragmentation), or impinge on individual rights (either those of the parties themselves or of third parties). But these concerns are (or at least should be) addressed even respecting state-shaped property types. They can, and should, similarly limit the ability of people to tailor their property arrangements in accordance with the way they prefer to shape their interpersonal relationships. (This proposition is the starting point of our discussion in Part IV.) But they do not establish an a priori obstacle to such private orderings.

Hence, the significance to people's autonomy of opening up such a residual category for freestanding forms of interaction requires a liberal polity to reconsider the hostility of *numerus clausus* toward tailor-made property rights. But wouldn't designing such a category and making it sufficiently salient and vibrant be too costly? Conventional wisdom suggests that it would; given the communication costs such idiosyncrasies impose on third parties – who need to determine the attributes of property rights in order to avoid violating them or to acquire them from present owners – the ability to create these rights comes, in this view, at too high a price.<sup>36</sup> We do not belittle this concern, but nonetheless think that, as with

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88; Ben McFarlane, "The Numerus Clausus Principle and Covenants Relating to Land" in Susan Bright (ed), *Modern Studies in Property Law*, vol 6 (Oxford: Hart, 2011) Michael Weir, "Pushing the Envelope of Proprietary Interests: The Nadir of the Numerus Clausus Principle?(Australia)" 39 Melbourne University Law Review 651.

<sup>36</sup> Merrill & Smith (n 33) 26-34.

any efficiency analysis, the answer to this question is contingent on the facts and likely to change from one context to another.

Commentators focus in this context on both the verification costs that such an additional property type imposes on third parties and the processing costs of such novelties by the relevant recording office.<sup>37</sup> But one should be more specific here. Evaluating the significance of this concern requires an assessment of the *marginal* verification and processing costs as well as the costs of the pertinent technologies that can facilitate such a reform on the one hand and the possible benefits its reform may yield on the other. This empirical inquiry, which needs to be closely tailored to the particular features of the existing system and device a way to compare monetary costs with benefits to autonomy, is well beyond the scope of this chapter. But two quick observations suggest that a summary dismissal of the autonomy-based plea for a residual property type on grounds of excessive information costs would be imprudent, at least insofar as English law is concerned.

First, the marginal cost of such a reform seems quite limited given the open-endedness of one tool that is already available for tailoring property rights, namely: the restrictive covenant, which entails rather significant verification costs.<sup>38</sup> Second,

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<sup>37</sup> See respectively Henry Hansmann & Reinier Kraakman, 'Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights' (2002) 31 J. Legal Stud. 373, 374-75, 380-84, 416-17, 419; Merrill & Smith (n 33) 33, 43-45.

<sup>38</sup> See McFarlane, "The Numerus Clausus Principle and Covenants Relating to Land" (2011), pp.317-26; Chris Bevan, "The Doctrine of Benefit and Burden: Reforming the Law of Covenants and the Numerus Clausus Problem" 77 Cambridge Law Journal. One difference between 'fancy' rights like easement or covenant and the trust is the price the buyer pays if she does not find out about them in time, or misinterprets what they imply. Whereas in the former she has to learn to live with the interest that encumbers her land, in the case of trust she has to give it up if it was transferred to her in breach of trust. However, this difference loses much of its edge if we take note of the following points: (A) a misunderstood burden on the land can have a serious adverse effect on the buyer's enjoyment, and (or) on its value. (B) the effects of misunderstood trust terms can be mitigated by requiring guarantee from the trustees or the settlors or beneficiaries (depending who is eager to get the sale going) or by purchasing an insurance (indeed of the kind that is widely available to cover the risk posed by unclear covenants). (C) As long as the buyer understands the risk (and since land conveyancing usually involves legal professionals, they will alert the buyer to the situation), it should be her choice whether to

unlike most American jurisdictions, England applies a registration (rather than merely recordation) system,<sup>39</sup> which is thus much more amenable to such a reform. Indeed, there are registration systems which allow such entries and, as one observer notes, ‘the[ir] economy has not collapsed and legal certainty and third-party protection [there] remain assured’.<sup>40</sup>

These systems, such as the Spanish one, typically employ professionals – notably notaries and legally-trained registrars – as gatekeepers, who ensure that the property right at hand does not fall within an existing type, that it is clearly defined and sufficiently detailed, and that it does not impose external costs.<sup>41</sup> While transfer of property rights in England does not require a notary seal, a process of professional assessment of the viability of newly-designed property rights can be easily established. A specialist desk in the land registry that would be in charge of reviewing applications for registration of ‘fancy’ rights, or a requirement of independent professional review of such cases, would ensure that only rights that do not create externalities for third parties and comply with the requirements of liberal property discussed in Part IV would be registered.

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take it. The point of autonomy enhancement is to open up valuable options, not perfect ones.

<sup>39</sup> On the American predicament, see Nadav Shoked, ‘Who Needs Adverse Possession?’ (2021) 89 Fordham L. Rev. 2639, 2665-68.

<sup>40</sup> Bram Akkermans, *The Principle of Numerus Clausus in European Property Law* (2nd edn, Intersentia 2014) 553. For similar argument in the Australian context see Brendan Edgeworth, “The Numerus Clausus Principle in Contemporary Australian Property Law” 32 Monash University Law Review 387.

<sup>41</sup> Christoph U. Schmid & Christian Hertel, ‘Real Property Law and Procedure in the European Union: General Report’ (2005), 15, 50, 53, <https://www.eui.eu/Documents/DepartmentsCentres/Law/ResearchTeaching/ResearchThemes/EuropeanPrivateLaw/RealPropertyProject/GeneralReport.pdf>; Isabel V. González Pacanowska & Carlos Manuel Díez Soto, ‘National Report on the Transfer of Movables in Spain’ in Wolfgang Faber & Brigitta Lurger (eds), 5 *National Reports on the Transfer of Movables in Europe: Sweden, Norway and Denmark, Finland Spain* (2011) 393, 429-31; Javier Gómez Gállego, ‘The Property Registry’ (ELRA, 23 April 2010) <<http://www.elra.eu>> accessed 23 September 2020.



We do not make any strong claim about one-on-one application of the Spanish model to the English system. The volatile nature of legal transplants would render this kind of claim presumptuous.<sup>42</sup> But the principle stands, every system must find a way to allow property dark horses as long as they do not trample the rights of third parties.

### III. THE DARK HORSE

When trust features on the law books it typically functions as a vehicle for realising the state's duty to facilitate the creation of such unorthodox forms of property. In English law, which we focus on here, the trust indeed fulfils this role in two ways: first, due to its *structure*, namely, the split between beneficial and legal interest, the trust is a platform of an almost infinitive flexibility in tailoring property holding and gifting. Second, given the fairly strict *numerus clausus* that informs the land registration system, the trust functions as a substitute, albeit imperfect, for an open-ended category of registrable property forms. Historically, the need to break through the rigid stricture of medieval land law gave rise to the invention of the split interest device. But, like other legal devices, the trust has now taken a life of its own and its contribution to the autonomy of property holders has gone well beyond a key to the stocks of state-sponsored property types (be they medieval or modern). In what follows, we begin with some observations regarding the contribution to autonomy which is facilitated by the structure of the trust, and then turn to a more extensive discussion of the way in which the trust stands for the open-ended registration category, which is a more innovative, and controversial claim we make here.

#### *A. Established Autonomy-Enhancing Uses*

It is, we think, beyond controversy that the trust *can* play a highly positive role in modern economy, as it facilitates numerous types of transactions and modes of holdings that could not materialise by combining the standard building blocks of

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<sup>42</sup> Gunther Teubner, "Legal Irritants: Good Faith in British Law or How Unifying Law Ends up in New Divergencies" 61 *Modern Law Review* 11

property.<sup>43</sup> There are a number of familiar ways in which the trust participates in the state autonomy-enhancing mission. The trust can boost autonomy by alleviating beneficiaries of the need to invest the time that is required to manage their wealth (and learning how to do so)<sup>44</sup>; and specific forms of trusts, governed by specific sets of rules, likewise perform significant autonomy-enhancing roles, such as securing employees' retirement via pension funds or facilitating options for acting altruistically via charitable trusts. Moreover, trust devises open a wide range of possibilities for the acquisition, investment and disposal of property for commercial purposes. Original or unconventional ideas on how to run one's business or assets, which cannot be carried out by using the ordinary framework of shares in a limited company, may well be realizable within a structure of trust.

Take, for example, the syndicated loan, which plays a major role in financing the capital markets of Europe by providing an important source of large-scale lending.<sup>45</sup> The syndicated loan is a fundraising scheme in which a security trustee coalesces a group of lenders to provide loans on the same terms and conditions under a single contract to satisfy the funding needs of clients. A trustee holds the various security interests created on trust for the various creditors, who can change, as required, along the life of the loan. This trust structure empowers: it enables small players to take part in big security deals that would otherwise be beyond their reach by precluding the need to grant security separately to all creditors which would have been costly and possibly even impractical.<sup>46</sup>

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<sup>43</sup> See examples in D. Schenkel Kent, "Trust Law and the Title-Split: A Beneficial Perspective" 78 UMKC Law Review 181, 181, 183, 196.

<sup>44</sup> Hanoch Dagan & Sharon Hannes, 'Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution' in Andrew Gold & Paul Miller (eds), *Philosophical Foundations of Fiduciary Law* (2014) 91.

<sup>45</sup> In 2017 alone, €720 billion was raised across all of Europe according to the European Commission (EC) (EU loan syndication on competition and its impact in credit markets European Commission report, available in <https://ec.europa.eu/competition/publications/reports/kd0419330enn.pdf>).

<sup>46</sup> The Crest Depository Interest (CDI) can serve as another example for an 'out of the box' use of the trust. The CDI is a UK financial security that represents a stock traded on a stock exchange outside the UK. The underlying shares are held on trust for the owners of the

In other cases, structuring property rights as trusts can significantly reduce information and other transaction costs that are associated with ordinary forms of property, thereby enlarging the range of viable options for realising one's property rights. One example is the 'land pool' that is mostly used by small farmers who wish to develop their land by transforming its use from farming to housing.<sup>47</sup> Converting the use of large-scale tracts of green field is often seriously complicated by multiple ownerships. The land pool device enables multiple owners to co-operate in order to obtain planning permission and ultimately sell the entire lot to a developer: small owners (whose number can be in the hundreds) transfer their landholdings into a common trust, which owns the entire site and in which they each become beneficial owner in proportion to their original acreage or value; when any part or all of the trust's land is sold, they receive their due share of the proceeds. This trust structure allows small farmers to follow a life-changing decision to convert their land to be used for a far more socially beneficial activity like tree planting or house building without falling prey to prohibitive transaction costs. As in our previous example, the trust device assists small and medium size entities to flourish, thus demonstrating its great 'leveling up' potential.

The trust can only function as the organising framework for these and other worthwhile schemes due to the almost boundless elasticity in the instructions settlors can give to trustees on how to manage and distribute the property. But the autonomy-enhancing potential of the trust can be further realised by using the

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CDI. Since international shares cannot be settled directly in CREST, without a CDI it is not possible to deal and settle in GBP in the same way as UK shares. *See more at* <https://the-international-investor.com/investment-faq/crest-depository-interest-cdi>. For more examples, see M&H 1-62-1-84; David Hayton 'The Trust as the Modern Vehicle for Investment and Estate Planning in Common Law and Civil Law Countries' available on <https://ccj.org/wp-content/uploads/2016/11/The-Trust-as-the-Modern-Vehicle-for-Investment-and-Estate-Planning-in-Common-Law-and-Civil-Law-Countries.pdf>.

<sup>47</sup> Or woodlands, see report by rewilding Britain on the great advantages to the environment and society by such move away from farming, available in <https://www.rewildingbritain.org.uk/>. On a parallel structure in the USA, and the way it can be used to promote environmental reforms see Jessica Grannis, "Community-Driven Climate Solutions: How Public-Private Partnerships with Land Trusts Can Advance Climate Action" 44 Wm. & Mary Envtl. L. & Pol'y Rev. 701.

number of ways open to settlors who wish to retain some power over the settled property after the trust is up and running. One important component of this added layer of empowerment is the duty of trustees of a discretionary trust to consult with the settlor before making significant exercise of their allocation powers.<sup>48</sup> Settlors may further augment their control by composing a 'letter of wishes' and/or appointing a 'protector' to the trust.

Thus, a settlor who wishes to extend her control over the management of the trust, can use a letter of wishes and inform the trustees of considerations that ought to be taken into account when exercising their discretionary powers of allocation, investment, or administration.<sup>49</sup> A letter of wishes is not binding on the trustees, but they have to take it into account, and where professional trustees are concerned, their reputation is dependent on the satisfaction level of their clients, which is likely to be in the red if their wishes are ignored.<sup>50</sup> In turn, by appointing a protector – who can be the settlor herself or any individual (or company) – the settlor can restructure the power relations within the trust. For the protector can be vested with the power to veto, scrutinise and police the trustees' decisions to distribute the property or invest it in a certain way, with the power to replace the trustees or to change the law governing the trust by appointing foreign trustees.<sup>51</sup> Both the 'letter of wishes' and the 'protector' devices can be (and are) abused<sup>52</sup>; but when properly

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<sup>48</sup> *Abacus Trusts Co V. Barr* [2003] Ch.409 at [23-25].

<sup>49</sup> For more details on the way this device can be used, see Stephen Moverley Smith and Andrew Holden, "Letters of Wishes and the Ongoing Role of the Settlor" 20 *Trusts & Trustees* 712.

<sup>50</sup> As Lord Hoffmann explains in *Re TR Technology Investment Trust plc* [1988] BCLC 256: 'The business of providing offshore financial services requires a reputation for probity, efficiency and discretion in executing such trusts in accordance with the confidential wishes of clients' (at 264).

<sup>51</sup> The 'protector' function gives rise to complicated issues that are way beyond our interests here, see for example in Paul B. Miller, "Regularizing the Trust Protector" 103 *Iowa Law Review* 2097; Donovan W. M. Waters, "The Protector: New Wine in Old Bottles?" in A. J. Oakley (ed), *Trends in Contemporary Trust Law* (Oxford: OUP Clarendon Press, 1996).

<sup>52</sup> We discuss such abuses in Hanoch Dagan and Irit Samet, "What's Wrong with Massively Discretionary Trusts" *Law Quarterly Review* For a preview, see *infra* section IV.A.

used, they can raise a positive contribution to the potential of trust to achieve its liberal *telos*.

These and other trust arrangements, which expand the horizons of the way property rights can be used, allocated, created and terminated, support our claim that the trust goes a long way to satisfy the liberal state's obligation to provide the citizens the opportunity to structure their property holding and gifting in ways that suits their individual agendas. But there is also, as noted, a second function the trust serves – one that at times is also the path to its role as the home for well-established trust types: the express trust is the vehicle for creating an individual story for one's property within the strictures of English land registration regime.

### *B. The Missing Piece in Liberal Property Rights Jigsaw*

Recall the liberal case for a residual property type. While the *numerus clausus* rule is a necessary framework for property rights, liberal property calls for a more nuanced approach: an exception should be made for those whose life story cannot be told by using the typeset provided by the state. And while concerns of information costs should not be dismissed lightly, an autonomy-enhancing property law should strive to ensure that they do not frustrate people's ability to opt out of state-favoured forms. A registration reform in England along the lines noted above may well be the first best way of securing this goal. In the meantime, however, we explore whether the express trust can function as a (close?) second-best.

As a 'form of property of ever-increasing importance because of its adaptability and convenience in effecting complicated forms of settlements'<sup>53</sup>, the trust seems to be a good candidate for the task. There are, to be sure, other property types which are adjustable, but the trust is *qualitatively* more open-ended. Unlike all other property types, trusts' open-endedness is their defining signature. This does not mean, of course, that the trust is structure-less. Quite the contrary: trusts have certain fixed elements, notably fiduciary administration, ascertainable beneficiaries

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<sup>53</sup> Charles Mitchell, *Hayton and Mitchell : Text, Cases and Materials on the Law of Trusts and Equitable Remedies, Fourteenth edition. edn* (London: Sweet & Maxwell, 2015) 3-002 p.64.

or charitable purposes, and a *res* that is the subject matter of the trust. But this structure allows exactly the kind of flexibility in terms of uses and allocation of rights and powers that various complicated arrangements require.

Indeed, as the previous section demonstrated, under the broad category of the trust one can easily trace established 'trust types', each with its own local DNA. But can the broad category of trust also serve as a freestanding property type, open to autonomy-enhancing tailor-made engineering which is not similarly mediated by any preexisting DNA? Can, and indeed does, the traditional express trust go beyond these familiar types and serve as the residual category of property which is a necessary component in a truly liberal system? We start with highlighting the extent to which the trust satisfies the duty of the liberal state to allow people to create property rights that exceed the state-shaped categories. We then turn to consider the ways in which existing trust law seems to fall short of the ideal residual category.

### 1. Properly Open-Ended

The Law of Property Act (LPA) (1925) sets in section 1 a short list of the legal estates that one can create over land, with equitable interests mirroring the legal ones where formality requirements have not been duly complied with. And while English judges do not resort to the language of *numerus clausus*, they do follow the rule that unless a right can be categorised under one of the sub-sections, in accordance with the way they were interpreted by the courts, it cannot be proprietary.<sup>54</sup> Yet, when the settlor formulates the rights under a trust, she is bounded, almost exclusively, only by the limits of her creativity.

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<sup>54</sup> See, for example, how a right to be 'protected from the weather' was not recognised an easement in *Phipps v Pears* [1964] EWCA Civ 3, [1965] 1 QB 76 since '[t]here is no such easement known to the law' (at 83). See also *Berrisford v Mexfield*, where the Supreme Court used the Common Law in a highly dubious way in order to avoid a clear injustice that would have resulted from a straightforward application of the principle that a lease must

The LPA sets no limitation on the way the beneficiary can benefit from the property, on the way the benefit is allocated between various beneficiaries, or on the duration of their enjoyment.<sup>55</sup> This feature is not coincidental. It captures the legacy of the trust as a formalities-crunching device, which underlies its pathway throughout history. The medieval predecessor of the trust ('Use') was designed to enable property owners to tailor rights to their property in a way that would suit their needs when these were not catered for by the highly restrictive property law of that time. For example, until 1540 it was not possible to leave land upon death to anyone but the owner's legal heir; settlement on trust circumvented this harsh restriction of the owners' power to make decisions about his land.<sup>56</sup> Similarly, a father who wanted to provide some financial independence to his married daughter could not do so by giving her a gift, as the doctrine of coverture transferred the rights to her husband. The trust, through the family settlement, enabled parents to provide for their daughters before this notorious doctrine was abolished in the middle of the nineteenth century.<sup>57</sup>

The authorities were naturally deeply displeased. A cat and mouse battle between freedom-seeking owners and a centrist government raged for centuries, and ended in a (temporary) defeat for the former under the reign of Henry VIII: the 1535 Statute of Uses effectively abolished the use by providing that the *cestui que use* (equivalent to the beneficiary in a modern trust) is to be treated as the legal owner of land. The creativity of owners was condemned by the preamble as 'divers

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have a term. A much simpler solution would have been to arrange the relationship between the parties around a trust.

<sup>55</sup> Though there are rules to stop trusts in England & Wales from existing for an excessive time. See the Perpetuities and Accumulations Act 2009 (and the Perpetuities and Accumulations Act 1964 for instruments taking effect before 6 April 2010).

<sup>56</sup> On the way the Use increased the owner's freedom of alienation see J. L. Barton, "The Medieval Use" 81 *Law Quarterly Review* 562

<sup>57</sup> See Alecia Simmonds, "Courtship, Coverture and Marital Cruelty: Historicising Intimate Violence in the Civil Courts" 45 *Australian Feminist Law Journal* 131 3.3 (the author is critical of the way this form of protection was reserved for the well-to-do, a concern we share, see below xx.) For further examples of the advantages of settling property on trust in this period see Baker, *An Introduction to English Legal History*, 3rd edn (1990) chapter 14.

and sundry imaginations, subtle inventions and practices . . . craftily made to secret uses . . . sometimes by signs and tokens'. The highly unpopular statute, which gave rise to spectacular legal sophistry aimed to circumvent it and en-route gave rise to the law of modern trust, was finally abolished in 1925.<sup>58</sup>

The urgency felt by owners to find a structure of rights that would best suit the specific needs of their family or business pushed many of them to choose to settle their property on trust.<sup>59</sup> For the flexibility offered by trust is hard to compete with.<sup>60</sup> Under a trust one can, for example, create a testamentary fixed trust for her surviving spouse for life, with the remainder divided in shares of 20%/50%/30% for life among children A, B & C, with remainder to their children in equal part, subject to the power of her spouse to appoint capital in his absolute discretion if their medical condition requires extra expenses, with the discretion vesting in the trustees upon his death (subject to perpetuity period). Creating the same structure by using the ordinary bricks of property right would be either impossible or fiendishly complicated.<sup>61</sup> In the previous section we saw some examples of innovative and creative uses of trust that exemplify trust's claim as one of the best tools for working on DIY (to distinguish from off-the-shelf) property structures.

However, some central aspects of English trust law may cast doubt on the notion that the trust supplies an out-of-the-box property type that gets us close enough to the liberal ideal of autonomy-enhancement. When we examine this question in the subsections we focus on the beneficiary's dependence on the trustee as well as her exposure to trustee wrongdoing and third parties' claims and the

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<sup>58</sup> Frederic William Maitland, *Equity : A Course of Lectures*, 2nd edn (London: Cambridge University Press, 1936), at page 34.

<sup>59</sup> For the reasons that motivated the creation of trusts in the sixteenth and seventeenth century after the demise of feudalism see Baker, *An Introduction to English Legal History*, 3rd edn (1990), pp.330-331.

<sup>60</sup> See, e.g., Matthew Harding, 'An Argument for Limited Fission' in John CP Goldberg et al (eds), *Equity and Law: Fusion and Fission* (2020) 374, 382-83.

<sup>61</sup> At least following the abolition of interests like life estates, and estates in reversion in the post 1925 legislation. The significant culling of estate types in the new Act attest to the fact that common law did a poor job in facilitating the flexibility that the trust was (and is) so nimble in supplying.



limitations on her ability to protect her interest in the trusts of land. From this perspective, we ask whether these limitations on the property right it embodies preclude the trust from serving the liberal property regime in the way we envisage.

## 2. The Challenge of Dependence

As we have just seen, depending on the settlor's and beneficiary appetite for investing time and resources in managing the property, a trust can be designed to reflect a measure of reliance on the trustee that suits their needs.<sup>62</sup>

Alas, from the perspective of the beneficiary, property rights under trust seem to lack an important element of the self-determination that is enjoyed as a matter of course by owners of ordinary property rights; for the beneficiary cannot sue directly third parties who damaged the property, stole it, or trespassed onto it. The way in which the beneficiary rights are recognized only in equity, whereas the property-protecting torts operate in law, means that these tortfeasors cannot be sued by the beneficiary; only the trustee has a claim against him, for only he is recognized in law as the owner of the trust property.<sup>63</sup> This dependency on the trustee for preserving the beneficiary's rights in the pursuit of legal remedies against tortfeasors and trespassers is therefore not an accidental feature of English trust law; it is inherent in the formal structure of the beneficiary's right. The

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<sup>62</sup> Despite of Lord Sales' statement to the fact that 'trusts can be created (and often are created) by the unilateral act of the settlor without any involvement on the part of the beneficiaries' (*Pleshakov v Sky Stream Corp* [2021] UKPC 15 [47]), as Mitchell and Hudson show, in trust creation the settlor is dependent on at least one beneficiary and one trustee who do not decline to take the post, as well as on compliance with the common law rules on transferring ownership in the particular *res* (unless it's a self-declaratory trust). This is, of course, another way in which the settlor is dependent on others to fulfill her wishes, but we think this limitation is clearly justified and we therefore continue to examine the effect of the rules that apply post-creation on the settlor's autonomy (Hudson and Mitchell, "Justificanda" (2022)).

<sup>63</sup> *Mcc Proceeds Inc. V Lehman Brothers International (Europe)* [1997] EWCA Civ 3068; *Leigh and Sillavan Ltd v Aliakmon Shipping Company Ltd (Aliakmon)* [1986] AC 785, at 812. If the beneficiary is in possession, she can sue for conversion, but then she will be claiming on the basis of her own possessory right (*Healy v. Healy* 1 KB 938).

beneficiary can of course sue the trustee for a breach of trust if he declines to pursue charges against a tortfeasor, as his refusal would (presumably) go against the interests of the beneficiary.<sup>64</sup> But a direct action against those who harm or trespass on the property is beyond her reach.

This pitfall, if left unaddressed, not only jeopardizes the beneficiary's material benefit; it also implies that the trust form fails to deliver the right to civil recourse, which is a fundamental feature of property in a liberal polity.<sup>65</sup> Luckily, the courts devised a roundabout way to mitigate the real-life consequences of this ingrained feature of the trust structure: if a trustee refuses to use the power to sue, the beneficiary can resort to the so-called 'Vandepitte procedure', which allows her to sue a trespasser or tortfeasor as long as she joins the trustee as a party to the proceedings.<sup>66</sup>

The Vandepitte procedure is often portrayed in caselaw and commentaries as a pragmatic solution to what would otherwise be a cumbersome process in which the beneficiary first has to sue the trustee in order to force her to sue the trespasser/tortfeasor (or ask for her replacement if she remains intransigent). But if the trust is to fill its role in the system of a liberal property regime, the availability of civil recourse against third parties who undermine the integrity of ownership is much more than a procedural shortcut. Far from being a mere pragmatic solution, it is a brilliant device that retains the important distinction between legal and equitable rights – without which no trust can exist, while addressing the need to empower the beneficiary to protect his right vis-à-vis third parties – without which

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<sup>64</sup> *Barbados Trust Co Ltd v Bank of Zambia* (2) Bank of America NA [2007] EWCA Civ 148. On the trustee's duty to safeguard trust assets see Glister, Lee and Hanbury, *Hanbury and Martin Modern Equity, Twenty-first edition. edn* (2018) 19-002-003.

<sup>65</sup> See generally John C.P. Goldberg & Benjamin C. Zipursky, *Recognizing Wrongs* (HUP 2020) 25-178.

<sup>66</sup> *Roberts v Gill & Co & Anor* [2011] 1 AC 240, [62]; *Vandepitte V Preferred Accident Insurance Corp. Of New York* [1933] AC 70; *The Albazero* [1977] AC 774; see generally Glister, Lee and Hanbury, *Hanbury and Martin Modern Equity, Twenty-first edition. edn* (2018), 19-003 and sources cited there. For a critical review of the beneficiary's recourse to sue the third party see Andrew Tettenborn, "Trust Property and Conversion: An Equitable Confusion" 55 *The Cambridge Law Journal* 36

the trust cannot function as an out-of-the-box property type. The Vandepitte procedure is therefore a necessary part – indeed a core feature – of the package of rights which beneficiaries under a trust should enjoy.<sup>67</sup> Its basis in trust law is much more robust than the way it is usually portrayed. Dependence on the kindness of strangers, or even their willingness to perform their legal duties, for realising one's property rights lends severe blow to these rights. The courts of equity (once again) saved the day.

Less can be done, however, for people who potentially stand to benefit from discretionary trusts. They may legitimately feel that by relying on the trustee's discretion on whether and how much to appoint to them, the trust relationship reduces them to supplicants and undermines their autonomy. In that particular trust arrangement, the autonomy of settlors to structure the gift in a way that suits the story they want to write for the property, may indeed come at the expense of the beneficiary's sense of autonomy. But, at the end of the day, the beneficiary can choose to walk away from the arrangement and the gift, and build his life independently of it. In difference from discriminatory conditions for gifts which we discuss below, in ordinary discretionary trusts the settlor is using the power that is given to any owner to decide who should benefit from the property. The trust adds some strings to this particular bow by allowing the settlor to replace her discretion with that of a (hopefully) knowledgeable third party, and indeed stretch it into the future (over the perpetuity period). But the beneficiary, like everyone else (in English law), has no right to receive a gift in or after the settlor's life. In as much as they feel that waiting and relying on the trustee's discretion is degrading to their sense of autonomy, they can leave it behind. That said, the way in which the discretionary trust may encourage a life of dependency, especially where the settlor

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<sup>67</sup> Proponents of the Right against Right analysis of the beneficiary's rights believe that the beneficiary's inability to directly sue the trustee attests to the non-proprietary nature of their rights (Ben McFarlane and Rob Stevens, "The Nature of Equitable Property" 4 *Journal of Equity* 1; Lionel Smith, "Trusts and Patrimony" in Remus Valsan (ed), *Trusts and Patrimonies* (Edinburgh: Edinburgh University Press, 2015)). However, if they are happy to go along with viewing the trust as a non-property solution to the liberal requirement to supply out-of-the-box category, they can endorse the Vandepitte procedure as a welcome solution that expresses this role for the trust, while still retaining the conceptual difference owners who have rights in the property and beneficiaries who only have rights against their trustees.

herself cultivated the expectation and/or need as part of their relationship with the beneficiary, is indeed problematic from the point of view of autonomy. Examining the precise way in which dependency undermines autonomy – and considering possibilities of reconstruction or reform that would remedy this defect – is, beyond the boundaries of this chapter. (Below, just before our concluding remarks, we nonetheless offer some rudimentary thoughts.)

In the next section we come across a particularly stubborn dent in the trust as a form of property, one that is likewise rooted in the split between the management of assets and ownership, but in which the conflict with the interests of third parties could not be resolved as elegantly. Before we get there, however, we should briefly address the mirror image of the deficiency in the beneficiary's independence, namely, the settlor's standing to enforce the trust. The settlor's lack of power to enforce the arrangement she envisaged for her property (unless she is also a beneficiary) is subject of a lively debate in trust theory.<sup>68</sup> It is another aspect of the law to which our theory makes a difference. For the way in which settlors do not have an automatic right to enforce the trust – which corresponds with the way the fiduciary duties of the trustee are owed to the beneficiary and not the settlor – reduces the efficacy with which the trust device can serve as a tool for implementing idiosyncratic agenda for one's property.<sup>69</sup>

In principle, placing the trustee under fiduciary duties and the duty to account for any deviation from the settlor's plan as it is stated in the trust terms should resolve this agency problem. However, this barrier to abuse of the trustee's position is likely to underperform in reality for a few reasons. First, the beneficiaries' interest may not align with the settlor's agenda, and in such cases, they can authorize conflicts of interest, endorse breaches or fail to sue for them. Moreover, there is a good chance that the beneficiaries are less than the rational and educated principals

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<sup>68</sup> See *Re Astor's ST* [1952] Ch 534 at 542. Once the trust is settled, the settlor drops out of the picture and cannot enforce it.

<sup>69</sup> Only an express provision in the trust instrument that allows the settlor to remove trustees, revoke the trust etc. can grant the settlor the power to intervene to enforce it. *Re Flavell*, *Murray v Flavell* (1883) 25 Ch D 89 at 102–103; *Standing v Bowring* (1885) 31 Ch D 282.

the settlor can rely on to endorse her plans for benefiting them, otherwise she would have just transferred the property to them in the first place. And even beyond the question of motivation, beneficiaries who lack financial acumen and sophistication are unable to monitor the trustees' action in a satisfactory manner.<sup>70</sup>

Writers on the settlor's right of standing (or lack thereof) and the practical solutions that have been developed to cope with the problematics of this state of affairs take different approaches to the question.<sup>71</sup> The argument we make here about the normative underpinnings of the trust, while it cannot on its own resolve the intricate question of the settlor's standing, adds weight to the 'empower the settlor' side of the scales. A law that grants the settlor the standing to enforce the terms of trust which embody her vision for the property is conducive for facilitating the potential of the trust to serve as an autonomy-enhancing property type. Once the normative DNA of the trust is thought of as a discharge of duty to diversify the categories of property, arguments against granting standing to the settlor must be heavy if they are to hold water, heavier than they would need to be to win against arguments from concept, doctrine or efficiency alone.

### 3. The Challenge of Exposure

People's ability to count on the stability of their rights stands, as we've seen, at the core of property's service to their functioning as planning agents who can set up long-term projects and life goals. In a dynamic civil society, this stability cannot – and indeed must not – be boundless; owners' Rawlsian duty to support just institutions justifies, as shown elsewhere, *some* susceptibility to the power of state

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<sup>70</sup> See discussion in Sitkoff, "An Agency Costs Theory of Trust Law" (2004) 89 Cornell L Rev 621 at 643–646.

<sup>71</sup> E.G. from law and economic perspective in Sitkoff, "An Agency Costs Theory of Trust Law", at 668, John T Gaubatz, "Grantor Enforcement of Trusts: Standing in One Private Law Setting" (1984) North Carolina L Rev 905), and Sterk, "Trust Protectors, Agency Costs, and Fiduciary Duty" (2006) 27 Cardozo L Rev 2761 at 2771. For a doctrinal perspective, see *Estate of Wall v Commissioner: An Answer to the Problem of Settlor Standing in Trust Law* Northwestern University Law Review 2005 vol:99 p.1723, David J. Hayton, *Developing the Obligation Characteristic of the Trust*, 117 L.Q. Rev. 96, 106 (2001).

authorities to revise the content of their property rights.<sup>72</sup> Our focus here is different: we zoom on the exposure of the beneficiary's right to derogations either due to its vulnerability to the transgressions of a rogue trustee (or his creditors) or to claims of third parties who may acquire title to the property against her will. This vulnerability entails, of course, instability of the settlor's agenda for his property. If plans for property that do not fall within state-sponsored categories can only be realised by converting it to an unsteady right, the state does not fulfil its duty to supply a route for unconventional property forms. We will argue that in spite of the exposure that is integral to the transfer of legal title to the trustee, the protection awarded to the beneficiary's right and the settlor's plans provides them with the level of stability that a liberal property regime requires in the circumstances.

### 3.1 Rogue Trustees

The courts of equity are acutely aware of the inbuilt vulnerabilities of hands-off beneficiaries and settlors. The opportunities to embezzle the trust fund, they realize, imply that the trust can only be viable if the trust property is duly protected. Indeed, the safeguards they developed drove Maitland to call the beneficiary a 'lucky being, the spoilt child of English jurisprudence'.<sup>73</sup> For these, as the next paragraph shows, go beyond anything an ordinary owner can dream of getting in common law.

For starters, equity is generous with the personal claims against trustees, including gain-based remedies and (in some jurisdictions) exemplary damages.<sup>74</sup> Furthermore, in contrast with the ordinary tort of conversion, where the owner can only claim damages from whoever converted her property to his own use, equity offers the beneficiary an enhanced remedy of specific performance if they can

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<sup>72</sup> See Dagan (n 12) Ch 8.

<sup>73</sup> Frederic Maitland, "Trust and Corporation" 32 *Grünhut's Zeitschrift für das Privat- und Öffentliche Recht* 1, p.21

<sup>74</sup> On remedies against trustee in breach see Glister, Lee and Hanbury, *Hanbury and Martin Modern Equity, Twenty-first edition. edn* (2018), 24-001-24-028; Samuel L. Bray, "Punitive Damages against Trustees?" in D. Gordon Smith and Andrew S. Gold (eds), *Research Handbook on Fiduciary Law* (Cheltenham, UK: Edward Elgar Publishing Limited,, 2018).

identify the trust property among the trustee's assets.<sup>75</sup> If the beneficiary can follow the very asset that formed part of the trust subject matter or trace its value into a new asset, she will get it in specie regardless of the trustee's solvency. Moreover, if the trustee mixed her own assets with those of the trust, any uncertainty as to the contribution each made to the mixture is determined against the trustee.<sup>76</sup> And when tracing into substitution is possible, the beneficiary is free to pick and choose between different rules that address evidential uncertainty in order to reach the best result for herself.<sup>77</sup> Insofar as these rules focus on the rights of the beneficiary vis-à-vis the rogue trustee, which is our focus here, they are commendable.<sup>78</sup>

However, even these extraordinary measures are not full proof, as once the trust asset (or its traced value) is destroyed or dissipated, the beneficiary is left with a (likely worthless) personal claim against the trustee. A wary settlor may consider appointing herself either as a sole trustee or as a co-trustee, and thus eliminate this risk or at least greatly reduce it; or she might place the trustee under strict duties to consult with, and provide information to, the settlor and/or the beneficiaries. But at the end of the day, the risks at hand – not only of betrayal, but also of incompetence – are, at least to an extent, a function of the resources a settlor is willing and able to put into the trust. Hiring a professional, skilful, and reputable trustee comes, however, with a price tag that may well place it outside the reach of the less-well-off. This unfortunately means that when the only out-of-the-box form of property is trust, it is easier for the well-to-do to realise their autonomy through property rights they have.

### 3.2 Third Parties

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<sup>75</sup> *Foskett v McKeown* [2001] 1 AC 102, at 127-8.

<sup>76</sup> *Infabrics Ltd. V. Jaytex Ltd* [1985] F.S.R. 75

<sup>77</sup> See Charles Mitchell and David J. Hayton, *Hayton and Mitchell : Commentary and Cases on the Law of Trusts and Equitable Remedies*, 13th edn (London: Sweet & Maxwell, 2010)13-17.

<sup>78</sup> The language of the text is intentionally careful. The justifiability of some of these rules is much less obvious insofar as their parties are concerned. See Hanoch Dagan, 'Restitution in Bankruptcy: Why All Involuntary Creditors Be Preferred' (2004) 78 Am Bankr LJ 247.

The risk of losing property rights as a result of interaction with third parties – innocent or blameworthy – is common to all forms of property rights. What is unique, and on its face disturbing, for the trust context is that the right of the beneficiary is inherently weaker than a fully-fledged ownership: being based in equity, the rights of beneficiaries cannot win the upper hand against good faith purchasers of the trust property.

According to the ‘equity darling’ rule, if a bona fides purchaser gives value to the trustee in return for his legal title to the trust property, she gets a clean title to the property even where the transfer was made in breach of trust.<sup>79</sup> The beneficiary can of course sue the trustee for breach of trust and require that he accounts for whatever consideration was paid for the trust property; but the property itself and the right to sue the transferee for conversion is lost to her. For in common law, the trustee passed good title to the third party, and equity will not intervene to change the parties’ rights unless unconscionability is involved.<sup>80</sup> Below (subsection 3.3) we explain how, in England, the beneficiary’s situation is even worse if the subject matter of the trust is registered land. Does this inferiority of the trust in relation to the conventional types of property render it unsuitable to serve as the ‘out of the box’ category that a liberal system must supply? We think that it probably does not, both because of the way this disadvantage is ‘set-off’ elsewhere, and – even more fundamentally – because equity’s darling rule nicely follows the tenets of liberal property.

To start with, equity’s protection of the beneficiary from the risk posed by third parties who are not deemed as ‘darling’ greatly exceeds what is on offer by applicable rules to owners of ordinary property. On balance, it is hard to say that ‘beneficiaries are significantly less well-protected from the risk lest third parties take good title over their property’ since, in important aspects, equity does a *better* job at protecting the beneficiary’s right than does the common law with respect to

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<sup>79</sup> See further A. Nair and I.Samet, “What Can ‘Equity’s Darling’ Tell Us About Equity?” in D. Klimchuk, I.Samet and H.E. Smith (eds), *Philosophical Foundations of the Law of Equity* (Oxford: OUP, 2019)

<sup>80</sup> Nair and I.Samet, “What Can ‘Equity’s Darling’ Tell Us About Equity?” (2019), part 3, sec.2.



ordinary property rights. A prime example is the way in which a beneficiary who is able to identify the original trust asset or its value in the hands of third parties (who did not pay consideration, or had, or should have had, notice of the trust), can follow or trace it into their hands and claim that they hold it for her on constructive trust.<sup>81</sup> Unlike legal owners, beneficiaries enjoy the equitable remedy of specific performance which not only allows them to put their hands on the property itself, but also grants them a status of 'secured creditor' if the third party goes bankrupt. Thus, while the rules of tracing and following that apply to innocent third parties are not as generous as those that apply to wrongdoers, equity still affords the beneficial owner a defence that is clearly superior to the personal claim which is available in common law to legal owners whose property was stolen.<sup>82</sup>

The elevated protection awarded by equity is historically rooted in the *in personam* nature of its remedies, and not necessarily in a wish to reinstate the autonomy-enhancing status of the trust by adding more weight to the 'protection for beneficiaries' rights' side of the scale. But for our purposes the result is what matters: in a significant number of cases, equity assists the settlors and beneficiaries to realise their plans for the property in a way ordinary owners can only dream of. At the bottom line, the trust creates a title which, like all other titles, is sensitive to other people's claim in some cases, and resistant to them in others.

Furthermore – we now turn to our more principled answer – it would be wrong to deem the trust second best to the liberal property ideal due to the bona-fides-purchaser rule, because this rule is fully justified not only from the viewpoint of equity, but also from the perspective of liberal property itself. To see why, recall that for liberal property, commitment to relational justice is not an exogenous imposition. Quite the contrary, relational justice is part and parcel of liberal

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<sup>81</sup> E.g. *Williams v Central Bank of Nigeria* [2014] UKSC 10; [2014] A.C. 1189, at [31]. The advantages of the proprietary remedy are noted by Lewison L.J. in *FHR European Ventures L.L.P. v Mankarious* [2013] EWCA Civ 17; [2014] Ch. 1, at [14], including tracing as in *Foskett v McKeown* [2001] 1 A.C. 102 (HL).

<sup>82</sup> There is a discretionary remedy similar to specific performance in common law (Torts (Interference with Goods) Act 1977, s 3), but 'that remedy will rarely be available' unless the claimant can show that the good at hand is unique. Nick Curwen, "The Remedy in Conversion: Confusing Property and Obligation" (Oxford, UK) 26 Legal Studies 570, p.573.

property's *raison d'être*. A liberal account of property, as noted, grounds owners' claim of legitimate private authority on people's interpersonal obligation of *reciprocal* respect for self-determination. This necessarily means that owners are also subject to this maxim in applying their authority vis-à-vis others, which is why relational justice is liberal property's third pillar.<sup>83</sup> And because respect for others' self-determination is hollow without *some* attention to their predicament, relational justice is not limited to a negative duty of non-interference that is the correlative of others' right to independence.

Implementing relational justice in property law is a complex task, which requires carefully to follow H. L. A. Hart's advice that we distinguish 'between the gravity of the different restrictions on different specific liberties and their importance for the conduct of a meaningful life'.<sup>84</sup> One important entailment of this guideline is that liberal property's relational justice need not, and indeed does not, overwhelm the ability of owners to self-determine (this would have been self-defeating). Accordingly, the affirmative duties and burdens it imposes on owners and other property rights-holders are quite modest.

One such category involves rules that require owners to take some responsibility for guiding non-owners in the fulfillment of their duty to respect the owners' property rights. The obligation to accommodate non-owners' self-determination justifies along these lines doctrines of consent, mistake, and proprietary estoppel, as well as burdens arising from registration or recordation law. All these doctrines and rules prescribe modest responsibilities to give notice to non-owners in order to mitigate their possible mistakes while interacting – by way of physical entrance or through legal transactions – with owners' property rights.<sup>85</sup> The equity darling rule squarely falls within this category of doctrines. If beneficiaries do not make known to third parties of their private arrangement with

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<sup>83</sup> Dagan (n 12) Ch 5, on which the next three paragraphs draws. On relational justice more generally, see Hanoch Dagan & Avihay Dorfman, 'Just Relationships' (2016) 116 Colum L Rev 1395.

<sup>84</sup> Hart (n 19) 834-35.

<sup>85</sup> Equity is particularly keen on this point. See Irit Samet, "Proprietary Estoppel and Responsibility for Omissions" 78 Modern Law Review 85

the legal owner (their trustee), they cannot externalize the costs of this arrangement on such third parties.<sup>86</sup> Since they do not incur the burden of publicization, they justifiably bear both the risk and the potential cost of the possible 'conflict between innocents' that may come about.

### 3.3 Registered Land

But is this answer fully satisfying? After all, even if a settlor is willing, indeed happy, to incur the costs of publicization in order to secure full protection against the risk of third parties gaining good title to the trust property, she cannot do so if the subject matter of the trust is land. When it comes to ownership of land, English law severely limits the ability of the settlor and beneficiary to protect their vision for, and right to, the settled property by means of registration. The registration system, which was introduced to English law in 1925, includes as one of its three foundation principles the 'curtain principle' according to which 'references to trusts should be kept off the register'. Consequently, the register records the ownership of the legal estate, but not the beneficial interests that encumber them, and the registrar is not affected with notice of a trust.<sup>87</sup>

Moreover, purchasers of interest in registered land are allowed to assume, regardless of their actual state of knowledge, that the registered owners, i.e. the trustees, have unlimited power to dispose of the estate, free from any limitation contained in the terms of trust on the validity of such disposition. And so, generally, as long as two legal owners convey the interest to the purchaser, she gets good title and need not worry about satisfying the conditions of the 'equity's darling' principle.<sup>88</sup> The only protection the beneficial interest can enjoy is in the form of

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<sup>86</sup> For an analysis of trust in terms of cost externalisation and 'common pool' problem, see Kent, "Trust Law and the Title-Split: A Beneficial Perspective" 78 UMKC Law Review 181, parts IV & V.

<sup>87</sup> Section 78 of the *Land Registration Act* 2002.

<sup>88</sup> The standard 'Form A restriction' on transaction in trust subject to trust provides that capital money must be paid to two trustees or a trust corporation, for which the trustees who register the land or the beneficiaries can apply.

'restriction' on transactions that are contrary to the terms of the trust – but the interest does not gain priority over an interest bought in defiance of the restriction; all that is needed in order to satisfy the registrar that the terms of the trust were complied with is a statement by the trustee that this is indeed the case.<sup>89</sup> Thus, bad intentions or negligence of the trustee are enough to frustrate the beneficiary's interest in the property and the settlor's plans for it, regardless of the buyer's state of mind. This means that rights under trust form an important part of this infamous class of 'property rights that can neither be registered nor recorded... [and whose] validity is [therefore] not guaranteed, and they cannot have their priority protected by being recorded'.<sup>90</sup>

The injury to the beneficiary's property right is somewhat mitigated in that it is transformed to a different proprietary right: in what Martin Dixon calls the 'statutory magic' of overreaching, the beneficiary's right which was 'swept off' of the land is transferred to the purchase money.<sup>91</sup> For once the purchase money is paid, the money becomes subject to the trust in lieu of the land, which has now moved out of the trust and into the hands of the purchaser (or became subject to a charge). To be sure, the requirement that two trustees should be part to the conveyance if overreaching is to happen helps to prevent 'a feckless, reckless or malevolent sole trustee from compromising the transient proprietary interests of

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<sup>89</sup> See Form B, Schedule 4 of the Land Registration Rules 2003; A 'Form N restriction' which requires the consent of the *beneficiaries* will not normally be allowed (see more details in HM Land Registry 'Practice guide 19: notices, restrictions and the protection of third-party interests in the register', available at <https://www.gov.uk/government/publications/notices-restrictions-and-the-protection-of-third-party-interests-in-the-register/practice-guide-19-notices-restrictions-and-the-protection-of-third-party-interests-in-the-register>. Beneficiaries can also apply for a restriction in Form II which ensures that they be notified of the disposition, thereby giving them the opportunity of pursuing the proceeds of sale. But the mechanism of notice (which gives *priority* to the interest subject to the notice) cannot be used with respect of interest under trust (LRA 2002 sec. 32, 33).

<sup>90</sup> Law Commission Consultation Paper No 227 Updating the Land Registration Act 2002 A Consultation Paper. Sec. 2.32.

<sup>91</sup> M. Dixon, *Modern Land Law* (Taylor & Francis, 2018), 2.9.

the equitable co-owners'.<sup>92</sup> Alas, as the case law readily reveals, it offers only a partial protection to the beneficiaries.<sup>93</sup> For, as Dixon observes, '[e]ven if capital money has been paid, the beneficiaries are in practice... very likely to receive nothing because the trustees will have spent the ... [purchase] money'.<sup>94</sup> The bottom line is that when it comes to registered land, the trust as a type of property right is clearly inferior to other estates which can enjoy the strong protection of the public register, an inferiority that places the trust firmly as a '*second best*' alternative to an open-ended 'Spanish' category in this context.

If the way in which the state discharges its duty to make available a miscellaneous property type is by making available the mechanism of the trust, there must be powerful justification(s) behind such serious limitation on the way settlors and beneficiaries can ensure that third parties do not knowingly interfere with their plans for the property. Are the reasons that have been offered in support of the much inferior protection that interests under trust of land enjoy indeed strong enough? In *London Building Society v Flegg* – in which beneficiaries' right was overreached in spite of the fact that they actually lived in the house – the House of Lords explained: '[o]ne of the main objects of the legislation of 1925 was to effect a compromise between on the one hand the interests of the public in securing that land held in trust is freely marketable and, on the other hand, the interests of the beneficiaries in preserving their rights under the trust'.<sup>95</sup> The concern that allowing

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<sup>92</sup> Martin Dixon, "Reaching up for the Box in the Attic" Conv 165 p.166.

<sup>93</sup> See for example *Birmingham Midshires Mortgage Services Limited v Sabherwal* [2000] 80 P&CR 256; *London Building Society v Flegg* [1988] 1 AC 54.

<sup>94</sup> Dixon, "Reaching up for the Box in the Attic" Conv 165 p.166. In *State Bank of India v Sood* [1997] 2 W.L.R. 421 it was decided that if the payment to the legal owner (i.e. the trustee) was in the form of a valid mortgage executed to secure future lending so that no capital money was transferred at the time when the property was charged, the beneficiary's interest will be overreach *even if only one trustee was party to the transaction*. This looks like a further serious blow to the meagre protection of the two-trustees requirement. However, as Dixon explains, in reality, since in these cases at least the trustee cannot take the money and disappear (or lose it to creditors in bankruptcy), the beneficiary's situation is improved, so that Sood does not place the beneficiaries in any worse position in practice than Flegg.

<sup>95</sup> [1988] 1 AC 54, 73-74, per lord Templeman.

the registration of interests under trust would clutter the register and undermine the goal of enhancing the marketability of land is repeated by leading textbooks and commentators with a few, or no, critical comments on its viability.<sup>96</sup> In its report from 2018, the law commission opined that ‘the existing mechanisms are sufficient to protect beneficial interests under trusts’, and moreover that ‘because of the curtain principle, further protection would be inappropriate’; and anyway, they thought, examining the viability of the curtain principle was beyond the commission’s remit.<sup>97</sup>

The commission was not blind to the difficulties that are raised by the current form of the curtain principle, and the consultation paper recognises the way in which ‘[t]he treatment of beneficial interests under the Act... reflects an ongoing debate about the correct balance to strike between the rights of purchasers and mortgagees on the one hand, and beneficiaries on the other’.<sup>98</sup> The commission rightly sensed that the ‘debate raises broad questions of social policy that ultimately touch on the appropriate balance the law strikes between property as a “home” and as a financial investment for homeowners to realise’, and that as a result ‘[t]he treatment of beneficial interests in the LRA 2002 sits within a much wider matrix of considerations of how the law balances the desire of home owners to secure their interest in the home, with the interests of purchasers and of those (such as mortgage lenders) with a financial interest in the property’. But the members nevertheless decided that it would be inappropriate ‘to interfere with long-established assumptions’ of the LRA 2002.<sup>99</sup>

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<sup>96</sup> See for instance E. Lees, *The Principles of Land Law* (Oxford University Press, 2020), p.89; E. Cooke, *The New Law of Land Registration* (Bloomsbury Publishing, 2003), p.32.

<sup>97</sup> *Updating the Land Registration Act 2002: Report* (2018), 10.89; see *Updating the Land Registration Act 2002: Consultation Paper* (2016) sec. 1.20: ‘[o]verreaching is a general principle, which applies to personal property as well as land and to unregistered as well as registered land. It is governed primarily by provisions in the Law of Property Act 1925. We therefore concluded that its operation did not fall within our current review’.

<sup>98</sup> *Updating the Land Registration Act 2002: Consultation Paper* (2016) 1.21.

<sup>99</sup> *Updating the Land Registration Act 2002: Consultation Paper* (2016) *ibid*. The law commission, did however go some way to further secure interests under the trusts when it recommended that a holder of a derivative interest under a trust (i.e. sub beneficiary)

These are indeed complicated issues, which we cannot hope to resolve here, but a few observations may be in place. We agree that the Registrar should not be required to examine whether a dealing constitutes a breach of trust. However, it is unclear to us whether it is indeed impossible to afford more protection to beneficiaries who are willing to undertake the burden of publicization<sup>100</sup> without deteriorating registration into recordation.<sup>101</sup> We believe that this chapter's argument about the normative foundations of the trust adds an important factor that ought to be considered when the issue of protecting beneficiaries' interests and settlors' plans in registered land finally does get the attention it deserves: the current law weighs upon the ability of the trust to function as the miscellaneous category, and hence (at least unless an alternative is introduced) it hinders the aspiration of English property law to be worthy of the label 'liberal'.

#### IV. THE PATH TO REHABILITATION

We opened this chapter with sympathy for the concerns which animate the sharp critique of trust as a vehicle for absconding from one's duties – towards creditors, estranged spouses, third parties who trade on the basis of a façade of wealth created by the trust, and the community at large. We concluded, however, that, rather than throwing the baby with the bathtub, a liberal property regime should seek to preserve the express trust and further its functioning as an autonomy-enhancing property type. But lest this chapter would end up as exercise of apology and legitimation, we must emphasize that in fine-tuning the doctrine in line with the

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would also be entitled to lodge a caution against first registration if the beneficiaries have failed to do so, see sec 4.84-5.

<sup>100</sup> As an aside, we note that there is an important public interest in increasing transparency of landownership as it can help crack down on tax fraud and money laundering, and it would be interesting in this respect to follow British Columbia's Land Owner Transparency Act of 2019, which passed the first reading. *See* Bill 19, Land Owner Transparency Act, 2019, 4th Session, 41st Parliament, 2019. *See also* Ministry of Finance, Land Owner Transparency Act White Paper: Draft Legislation with Annotations (2018).

<sup>101</sup> It is not surprising that in the US, where most states offer only recordation, some states permit – and a few require – the recording of trust declarations. *See* . *See* George G. Bogert & Amy Morris Hess, *The Law of Trusts and Trustees* (rev 2nd edn, 1977) § 149.

liberal *telos* we ascribe to the trust, law should be particularly vigilant to ensure that trust doctrine is not amenable to uses that offend the very justification which underwrites its legitimacy. While we cannot fully explore the implications of this prescription in this chapter, it is imperative that we point out to the two main directions of its reform, which is – we should reemphasize – critical to its liberal credentials.

### *A. Delineating Trusts' Private Authority*

In response to harsh criticism of the way trust law is manipulated to undermine distributive and relational justice, the state can, and at times did, intervene and modify aspects of trust law as well as of other neighboring areas in order to mitigate the potential for harm.<sup>102</sup> It is not our intention here to review these measures or offer new ones.<sup>103</sup> Our account can contribute to these efforts by showing that their *justification* need not rely only on concerns of public policy external to trust law. This internal point of view is premised on the very foundations of liberal property, which is justified, as we repeatedly emphasise, by reference to – and to the extent of – its support of people's self-determination.

We have already invoked this premise, which implies that liberal property types must comply with their autonomy-enhancing *telos*, when we accounted for the effect of equity's darling rule on the trust. A similar analysis underpins familiar limitations on the settlor's freedom to determine the content or the form of the beneficiaries' entitlement, such as the perpetuity and *Saunders* rules, which are justified by reference to the autonomy of other parties, either existing or down the line;<sup>104</sup> it is also the background for most powerful critique of certain abusive uses

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<sup>102</sup> See examples in HMRC, *The Taxation of Trusts: A Review*, Consultation Document (2018); and the HMRC report HMRC, *No Safe Havens* (2019) This effort by the British government is surely (also) a response to the Guardian's special investigation dubbed the 'Paradise Papers' (<https://www.theguardian.com/news/2017/nov/05/what-are-the-paradise-papers-and-what-do-they-tell-us>).

<sup>103</sup> See FN 5.

<sup>104</sup> See a few examples in Liew, "Justifying Anglo-American Trusts Law" 12 William & Mary Business Law Review 685, sec. 3:1.



of trust law, which we cannot address here, dealing with improperly shielding resources from people's creditors.<sup>105</sup> For our purposes of explaining why liberal property offers internal critique of the disturbing tax abuse practices that are currently on the policymaking agenda, it is enough to add a few words on liberal property's first pillar as well as on the background precondition to property's legitimacy.

Liberal property's first pillar, as noted, is that the private authority which any given property type establishes should be carefully adjusted to its potential contribution to owners' self-determination. This maxim is particularly pertinent to commercial property types: as discussed elsewhere, where ownership is justified by its *indirect* contribution to people's self-determination (as it is regarding commercial property), the private authority property instantiates should be strictly circumscribed in line with its instrumental role.<sup>106</sup> But this conclusion is even more straightforwardly relevant here, since the use of the trust for tax abuse purposes cannot plausibly be justified by reference to owners' self-determination.

Property's background condition of legitimacy is likewise crucial for our purposes. As noted, the legitimacy of the property rights of the well-off relies on and indeed depends upon their contribution to a viable background regime that guarantees everyone the material, social, and intellectual preconditions of self-authorship. This again points to a property-related reason for condemning the way trusts perversely turned into a tax-abuse instrument, a means that rather than serving people's autonomy, subverts their compliance with their duties as owners.

These practices undermine in these ways the very autonomy-enhancing ideal on which the trust's legitimacy relies. Therefore, friends of the trust who celebrate

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<sup>105</sup> A prominent example comes from the spendthrift trust, which American trust law – unlike English law and the law of the British Commonwealth – facilitates. As John Chipman Gray maintained in his well-known (and justified) critique of spendthrift trusts (which are quite common in the U.S.), the law should not allow people to “have an estate to live on, but not an estate to pay his debts with”; owners, in other words, should not “have the benefits of wealth without the responsibilities.” J. C. Gray, *Restraints on the Alienation of Property* (2d ed. Kessinger 1895) 242-43. See also Carla Spivack, “Democracy and Trust” 42 ACTEC Law Journal 339

<sup>106</sup> Dagan (n 12) Ch 3.

its contribution to people's self-determination cannot but object to these practices and work to eradicate or transform them. Accordingly, legal reforms for abolishing or curtailing these abuses should not be understood as impositions on or limits of trust law. Instead, these are means for pushing the trust to live up to its own *raison d'être* as a liberal property type; measures of *perfecting* the trust's laudable autonomy-enhancing *telos*.

Thus, in a separate article,<sup>107</sup> we critique along these lines the way in which law and legal scholarship tackle one of the most important (fairly) recent developments in this area of law: the 'massively discretionary trust' (MDT), also known as 'black hole trusts'.<sup>108</sup> In an MDT, trustees' discretion is stretched to the limit (or beyond) as they are given absolute discretion to appoint property to almost anyone in the world, while the people who are really intended to benefit from the trust (e.g., the settlor's children) are not named as beneficiaries in the trust instrument.<sup>109</sup> Along with the practice of forming MDTs, we find a flourishing industry of drafting instruments that are designed to (at least) pressurise the trustee to submit the absolute discretion she is given on paper to the wishes of the settlor, who thereby retains much, if not all, the power over the settled property. A 'Letter of wishes', for example, is a popular device with settlors of MDTs, as it allows the settlor 'to indicate in a confidential manner matters which he would like a trustee to take into account'.<sup>110</sup>

Why would a settlor choose to create an MDT rather than an ordinary discretionary trust? One reason, as private client lawyers like to put it, is harnessing "tax efficiencies".<sup>111</sup> A more significant advantage of structuring one's trust as an

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<sup>107</sup> Dagan and Samet, "What's Wrong with Massively Discretionary Trusts" *Law Quarterly Review* (n 66).

<sup>108</sup> Term coined in Lionel Smith, "Massively Discretionary Trusts" 25 *Trusts & Trustees* 397

<sup>109</sup> A good description of the structure is provided by Hoffmann J. in *Re TR Technology Investment Trust plc* [1988] BCLC 256 at 623-4.

<sup>110</sup> Terence Tan Zhong Wei, "The Irreducible Core Content of Modern Trust Law" 15 *Trusts & Trustees* 477, p.489

<sup>111</sup> Sunil Gadhia, Konrad Rodgers and Joe-han Ho, "Sham Trusts" 22 *Trusts & Trustees* 464, p.1. Where the assets or the trust itself are in the UK, tax benefits for discretionary trusts have largely evaporated when the Income Tax Act 2007 stipulated that trustees must pay

MDT may come from the way it enables the 'ghost beneficiaries' to enjoy the many advantages of property that is available to satisfy one's wishes, without the duty to submit this property to pay one's debts.

As we show there, although the three familiar responses to the destabilising effect of MDTs – the 'conceptual', the 'doctrinal' and the 'public policy' critique, as we call them – do important work in tackling the challenges that MDTs pose for friends of the trust, their power is limited. The consensus among judges and many impartial academic commentators that these are abusive devices is, however, supported by (what we call) an 'internal-normative' reason. The MDT is rightly condemned because it blatantly disregards liberal property's first, and most fundamental, pillar as well as, by extension, its third pillar of relational justice. Settling property on an MDT is not a legitimate move within the open category of property, because it accedes the powers which this property type – like any other type within a genuinely liberal property regime – lends legitimacy to. If we indeed manage to show that, our analysis of the role of trust as fulfilling the state duty to provide an out-of-the-box property type is an essential buttress for a robust response to this particular abuse of the trust institution.

Indeed, reinterpreting the trust as an important building block of a liberal property law can shed light on hazy corners of trust law, excavate the foundations of the debates that surround them, and thereby help resolving the disputes to which they give rise. In the next section, we explore a very different area of trust law in which, unlike the MDTs, the water has been choppy for over a century. Yet, again, legitimizing the trust as part of our commitment to a liberal *telos* strongly tilts the scales in favour of one solution – a solution that was favoured by many judges who lacked the theoretical foundation that underlie it, and hence did not feel confident enough to adopt it.

### *B. Relational Justice and Discriminatory Trusts*

Sir Adolph Tuck gained some fame among trust law students by creating a trust the benefit of which can only be enjoyed by a descendent 'of the Jewish faith'. To

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income tax at the highest rate for any income from the trust assets (See Part 9 Special rules about settlements and trustees).

qualify, the descendent can only take an 'approved wife', defined in the settlement as a woman 'of Jewish blood by one or both of her parents and who has been brought up in and has never departed from and at the date of her marriage continues to worship according to the Jewish faith'.<sup>112</sup> In attaching this condition to the settlement, Tuck joined a long line of donors who set the terms for allocating the largess they settled on a trust in a discriminatory fashion. In this section we explore the way in which our analytical framework sheds light on the way forward with respect to the thorny issue of discriminatory patterns for appointing trust property.

Discrimination against potential beneficiaries on the basis of religion, race, or ethnicity – including trusts that were created many years ago, but are now coming to fruition – is, unfortunately, far from rare.<sup>113</sup> Common law jurisdictions have struggled to offer solutions that would adequately account for the different values that are at play in such scenarios.<sup>114</sup> Take the English case: public disapproval of discriminatory practices is crystal clear; the Equality Act 2010 is described by the British government as aiming to protect people 'in the workplace and in wider society' from discrimination on the background of age, gender reassignment, being married or in a civil partnership, being pregnant or on maternity leave, disability, race including colour, nationality, ethnic or national origin, religion or belief, sex or sexual orientation' ('protected groups').<sup>115</sup> The law explicitly applies in a wide range

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<sup>112</sup> *Re Tuck's Settlement Trusts* [1976] 1 All ER 545.

<sup>113</sup> See Rex J. Ahdar, *Religious Freedom in the Liberal State* (Oxford Oxford University Press, 2013) who concludes from the large number of reported decision that 'this was a matter who preoccupied many Victorians when they contemplated their own mortality' (p.129). For more modern cases see for example, *Re Donn's Will Trusts* [1943] 2 All ER 564, *Re Selby's Will Trust* [1966] 1 WLR 43; *Re Abrahams' Will Trusts* [1969] 1 Ch 463 (Ch).

<sup>114</sup> Many Canadian cases are discussed in Jonas-Sebastien Beaudry and Aruna Nair, "Property and the Freedom to Discriminate: Markets, Gifts, and the Scope of Anti-Discrimination Norms" in *Modern Studies in Property Law vol 11* (Oxford: Hart, 2021) Australian cases can be found in Matthew Harding, "Some Arguments against Discriminatory Gifts and Trusts" 31 *Oxford Journal of Legal Studies* 303 pp 307-10.

<sup>115</sup> Government guidance on the Equality Act 2010. Can be accessed at <https://www.gov.uk/guidance/equality-act-2010-guidance>.

of social contexts: at work, in education, when using public services, when buying or renting property or engaging in consumer transactions, as well as insofar as members or guests of a private club or association are concerned. The act allows charitable trusts to discriminate *in favour* of members of protected groups, but explicitly disallows discrimination against them.<sup>116</sup>

We are interested, however, in private trusts, i.e. trusts where the potential pool of beneficiaries is limited to individuals who are usually identified by their close relationship with the testator. And when it comes to such private trusts, the strong message of the Equality Act seems to be facing a wall: the owner's freedom to leave their property to whomever they choose, so the argument goes, includes the right to settle property in a discriminatory manner, and a trust can therefore be used as a vehicle to fulfil the testator's wishes in this, as in (almost) every other regard. The tension between these propositions and our strongly held anti-discrimination commitments resulted in a caselaw that is marred with uncertainty and lack of transparency as judges endeavoured to utilise technicalities to achieve a resolution that alluded their best efforts.

When discriminatory conditions in trusts showed up in their docket, courts have apparently felt too uncomfortable to enforce them, but not confident enough to strike them down outright; hence, such conditions have suspiciously often failed on the basis of uncertainty of objects. Thus, rather than voiding discriminatory conditions by declaring them contrary to public policy – as the courts were willing to do with regards to conditions that encouraged divorce or estrangement between parents and children – they resorted to unworkable distinctions and roundabout definitions that enabled them to tackle the problem without being explicit on what they do.<sup>117</sup> But when the House of Lords debated the certainty of a clause that

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<sup>116</sup> Sec. 193. Charitable trusts have always fared better in that respect. For courts routinely allowed trustees for charities who were disinclined to appoint property on a discriminatory basis to side-step the problematic clause by using the *Cy Pres* doctrine which saves charitable trusts from lapsing when the purpose they were meant to serve becomes unworkable in time (Harding, "Some Arguments against Discriminatory Gifts and Trusts" 31 Oxford Journal of Legal Studies 303, pp. 305-7).

<sup>117</sup> The courts used a fine distinction between 'condition precedent' – that rules out an interest from the start, and a 'condition subsequent' – which amounts to a forfeiture of an

excluded a potential donee who is or becomes Roman Catholic, Lord Wilberforce came clean about the court's attitude to discriminatory clauses:

It may well be that conditions such as this are, or at least are becoming, inconsistent with standards now widely accepted. But acceptance of this does not persuade me that we are justified, particularly in relation to a will which came into effect as long ago as 1936... in introducing for the first time a rule of law which would go far beyond the mere avoidance of discrimination on religious grounds. To do so would bring about a substantial reduction in another freedom, firmly rooted in our law, namely that of testamentary disposition. Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision nor by implication has private selection yet become a matter of public policy.<sup>118</sup>

We argue that neither Lord Wilberforce, nor the judges who sought to introduce a 'public policy' voidance mechanism by the backdoor, got it quite right. Testamentary freedom does not entail a freedom to create a legal mechanism for distributing benefits on a discriminatory basis, and there is no need for an external criterion like 'public policy' to achieve this result.<sup>119</sup> While no attempt has been

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interest which (at least partly) already materialised. The latter was deemed to require a particularly high standard of certainty, and many discriminatory clauses were interpreted as falling into this forfeiture-like group even when they could just as easily be interpreted as falling under the 'condition precedent' category. See for example the string of cases which involved a condition of belonging to 'the Jewish Faith' discussed in Davina Cooper and Didi Herman, "Jews and Other Uncertainties: Race, Faith and English Law" 19 *Legal Studies* 339 pp. 346-50; the authors conclude: 'for the most part... [r]ather than asking whether the conditions are in the public interest, the courts have asked instead, the narrower more formal question: are the exclusions sufficiently precise to constitute legally acceptable conditions?' (p.343); see also Harding, "Some Arguments against Discriminatory Gifts and Trusts" 31 *Oxford Journal of Legal Studies* 303, p.308. For a sharp criticism of the distinction see Whitford J., and Lord Denning (in the High Court and Court of Appeal judgements respectively) in *Tuck* ([1976] 1 All ER 545 at 551-2 and [1978] 1 All ER 1047 at 1054.

<sup>118</sup> *Blathwayt v Baron Cawley* [1976] AC 397, at 426.

<sup>119</sup> By the same token, our analysis is not dependent on the question of whether the 'limited horizontal effects' of the Human Rights Act 1998 can be interpreted to apply to such dispositions. Cf., Harding, "Some Arguments against Discriminatory Gifts and Trusts" 31 *Oxford Journal of Legal Studies* 303, pp. 311-3.

made to use the sections of the Equality Act which prohibits discrimination in the 'disposal' of property to strike down private trusts or gifts,<sup>120</sup> we claim that the same *property*-justification for the prohibition of discriminatory uses of the power to sell or lease, also renders discriminatory dispositions *ultra vires* the powers of owners in a liberal system of property.<sup>121</sup>

To see why, consider first the implicit reliance of Lord Wilberforce's speech on the dominion conception of property. Lord Wilberforce *presupposes* that owners' right to sell, lease, or donate their property is unqualified, which explains why he views the application of antidiscrimination law as a 'substantial reduction' of their entitlement. This presupposition seems obviously correct if property is indeed properly understood as structured around a robust core of 'sole and despotic dominion'. But that conception must be inadmissible for liberal law. As we repeatedly emphasise, to be justified, property must rely on the maxim of *reciprocal* respect for self-determination. Taking the constitutive role of this maxim in the legitimacy of property seriously implies that the normative powers law confers upon owners need not only be circumscribed as per their service to owners' self-determination. Rather, they must also be compatible with liberal property's third pillar of relational justice. A genuinely liberal law cannot legitimately authorise owners, as the dominion conception does, to apply their normative powers in a way that clearly *disrespects* others' right to self-determination.

At times, relational justice requires *active* accommodation, as in many workplace instances (that are far afield from our topic) or in the modest affirmative obligations which explain equity's darling rule, discussed earlier. In other cases, such as those dealing with non-discrimination, relational justice implies *not* considering certain characteristics when making decisions. Thus, since deciding on one's residence is a major act of self-authorship, relational justice prescribes that in applying their powers in the context of real estate transactions, private owners

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<sup>120</sup> Beaudry and Nair, "Property and the Freedom to Discriminate: Markets, Gifts, and the Scope of Anti-Discrimination Norms" (2021), p.4, FN25.

<sup>121</sup> Cf François du Toit, Matthew Harding, and Andreas Humm, *King Nno v De Jager: Three Perspectives*, \* Stellenbosch LJ (forthcoming).

must set aside certain considerations, such as racist preferences, which fail to respect the self-determination of others, namely: potential buyers or lessees.

This prescription is not grounded only in the Rawlsian duty to support the state's effort to fulfil its duty toward would-be victims of discrimination. Rather, it stands on its own, distinctive ground. Even a public commitment to fully secure – say, through public housing – everyone's equality of opportunity could not redeem a property law that authorizes private owners to discriminate against others in applying their normative powers of selling or leasing out their property. This *internal-to-property* foundation of the antidiscrimination rule in real estate transactions applies even where the owner's refusal to engage relies on sincere objections grounded in his or her own conception of the good. The reason for this is that relational justice necessarily constrains the class of choices and conceptions of the good that can legitimately require interpersonal respect only to those that recognize others' equal status. The animating ambitions of the murderer, the racist, and the bigot may be authentic; but since they repudiate their victims' equal standing, they have no valid claim to accommodation.<sup>122</sup>

But is this account of discriminatory sales practices relevant to discriminatory testamentary dispositions? Potential donees, one may still argue, may have *expectations* to such dispositions; but these are – at least according to conventional understanding of English inheritance law – merely expectations. If so, why wouldn't the donors be free to subvert them by applying the power of disposition in a discriminatory fashion? After all, disinheritance can be triggered by benign reasons as well, which means that disrespect to a potential donee's self-determination is incidental to the power to bequest. Moreover, the analogy from sale to bequest is further weakened once we appreciate that while the identity of the buyer may at times be important to sellers, choosing a donee is what the power of bequest is all about.

These are real differences between the normative powers to sell and to bequest, but neither of them challenges our claim. For unless one presupposes the dominion model of ownership, the claim that ownership authorizes discriminatory applications of the power to bequest is a non-starter. The discretionary nature of

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<sup>122</sup> For more, see Dagan (n 12) 122-39.



owners' right to bequest is indeed not different from their right to sell; nonowners, in both cases, have no valid legal complaint against an owner who simply refuses to exercise this right. But taking relational justice seriously as a constitutive pillar of property nonetheless implies that a regime of liberal property must ensure that *both normative powers that law confers on owners* – the power to sell and the power to bequest – are circumscribed so that they are consistent with the self-determination of other people (prospective buyers/lessees and prospective donees, respectively).

Property's normative powers presuppose that both non-owners and owners respect each other's right to self-determination. Therefore, the application of these powers is legitimate only insofar as it does not deny the equal standing of others due to who they are or how they self-define. A benign motivation on part of the particular donor (such as her religious convictions or concern for the continuity of minority culture) is simply irrelevant to this prescription, which precedes the decision of any specific owner. Therefore, such benign motivation cannot cure the relational injustice of dominating the beneficiary's constitutive decisions in *either* of these cases.<sup>123</sup> Relational justice does not (and indeed should not) purport to police owners' inner psyche; rather, it is about ensuring that the scope of the private authority, which a liberal system sets up and enforces, remains within its legitimate boundaries. Whatever owners' motivations may be, property law must neither authorize nor facilitate violations of the maxim of reciprocal respect for self-determination that secures its legitimacy.<sup>124</sup>

There is yet another reason for invalidating many – although admittedly not all – discriminatory testamentary dispositions, one that does not affect discriminatory sales practices. Discriminatory testamentary dispositions, like that of the Tuck trust

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<sup>123</sup> *Contra* Beaudry and Nair, "Property and the Freedom to Discriminate: Markets, Gifts, and the Scope of Anti-Discrimination Norms" (2021), after FN 133.

<sup>124</sup> We think that the same reasoning should invalidate a discriminatory condition in a conditional gift. The case of discriminatory gifts which are given without conditions is more complicated because there the violation is not *explicitly* recognised, and without further information, law must be careful not to attribute too quickly a disqualifying feature to an otherwise legitimate transaction. (This means that a different conclusion may be in place if a testator, for example, explicitly provides a discriminatory rationale to the exclusion of a child who married the "wrong" person.)

mentioned above, typically imply exactly the kind of interpersonal domination that relational justice proscribes, as they dictate core life choices to their donees. They are, in other words, just as offensive to the donee's self-determination as a forfeiture condition that penalizes marriage (e.g., 'to A for life, but if A marries, then to B'), which English courts are happy to invalidate.<sup>125</sup>

This means that the fact that beneficiaries of a Tuck-like trust are better-off with the conditional donation than without it, cannot rehabilitate the donor's attempted imposition on their autonomy, just as it cannot validate the forfeiture condition that penalizes marriage. In both cases – as in the more general case of coercive claims, where one person *illegitimately* exploits another person's predicament and dependence<sup>126</sup> – donees are asked to 'choose' the lesser of two evils; and in both, sanctioning the request threatens to undermine the donee's autonomy and is therefore unacceptable in a genuinely liberal property law.<sup>127</sup>

The astute reader will notice the way this argument from interpersonal domination may justify the resistance of English law to perpetual trusts and may furthermore suggest that even within the regime of the rule against perpetuities there must be limits to the acceptable control of both the settlor and the trustee over the beneficiary. These potential additional implications of our theory seem significant, but their consideration must await another day.<sup>128</sup>

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<sup>125</sup> E.g. *Lloyd v. Lloyd* (1852) 2 Sim (N.S. 255); for details on the way English law voids conditions that are designed to restrain marriage,, induce separation or divorce or interfere with discharge of parental duties, see Glister, Lee and Hanbury, *Hanbury and Martin Modern Equity, Twenty-first edition. edn* (2018), 14-007 – 008.

<sup>126</sup> cf Mitchell N. Berman, 'The Normative Functions of Coercion Claims' (2002) 8 Legal Theory 45, 53-54 (coercion also implies choosing the lesser of two evils, which means that the baseline for coercion claims is necessarily normative).

<sup>127</sup> As with other cases of coercive claims, this analysis requires to make *qualitative* distinctions between conditions that overly encumber the addressee's self-determination and those that are acceptable. This feature should not be surprising, as it typifies any autonomy-based legal accounts. See *supra* text accompanying note 84.

<sup>128</sup> Another, more specific example can come from a critical reading of a case like *Re Streed's WTs* [1960] EWCA Civ 2 (26 January 1960), which suggests that where the pertinent trust res is constitutive, rather than fungible, for the beneficiary's life story (that includes, of course, her relationships with others), she should have a voice in the trustee's

## CONCLUDING REMARKS

Legal institutions, especially those with a rich legacy such as the express trust, do not always evolve with a particular normative commitment in mind. Often their evolution is path-dependent and their rules not only reflect a mix of normative voices, but also testify to the impact of lawyers' internal (doctrinal) language as well as to the effect of interests and power-struggles, which are all necessary parts of the legal drama.

Yet, like other social institutions – and indeed of people, both individuals and groups – the life of the law also includes moments of soul-searching, in which legal institutions are pushed to refine their *telos* and adjust their rules accordingly. The causes and dynamics of these moments, which may culminate in a salient case or a defining new legislation, are often complicated. But the threat of a crisis – the possible collapse of a legal institution due to its exploitation in indefensible ways – seems an obvious reason, indeed an opportunity, for rethinking the foundations.

We believe that the current predicament of the express trust offers such an opportunity. Trust sceptics are correct to revolt against the increasing abuses of the trust. But they are wrong to deem it beyond redemption. A charitable interpretation of trust doctrine and of the legacy of the trust offers a happy *raison d'être* around which it can, and should, be reconstructed. The trust plays a distinctive important role in a system of liberal property.<sup>129</sup> Pushing it to live up to this (implicit) promise offers an exciting reformist agenda in which many of its weeds are properly clear.

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decisionmaking process, and where her view is unreasonably ignored (eg, if the financial stakes are not sufficiently high to override it), a court may reverse the trustee's decision.

<sup>129</sup> We hope to have clarified the precise power of our thesis. We acknowledge that there is more than one way to address the function we attribute to the express trust; in fact, as we've claimed it is in some senses a second-best. Moreover, the autonomy-enhancing service of the trust (or any other such residual category), while distinctive, is less fundamental to autonomy than the availability of a proper menu of property types.

