

POWER, PROPERTY AND THE LAW OF TRUSTS REVISITED
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Trusts Law and Structural Power: A Study in Conceptual Fossilization

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In his seminal article 'Power, Property and the Law of Trusts', Roger Cotterrell cautions us that to engage in proper sociological critique of the law we must swim the deep and murky waters of society and the human condition. We cannot hope to fully understand the workings of the law without interrogating the social context in which law is placed.

Cotterrell's critique of trusts was grounded in the idea of trusts law as a *distancing* framework which masked the true extent of beneficiaries' power, and seeks thereby to endow the trustee-beneficiary relationship with moral obligations of protection that are not, in fact, justified. Our paper uses Cotterrell's framework as a starting point, but offers a very different diagnosis. We argue that a proper appraisal of the strengths and limitations of trust law must start not with a narrow focus on *property*-based power, but with the broader issue of *structural* power. Structural power is concerned with mapping inherent inequities in society, the institutional structures that create those inequities, and their impact on the outcomes of social interaction. This dimension of power matters both because of its historical importance to trust law, and because equitable doctrines and remedies, unlike those of the common law, offer tools to directly address the consequences of structural power.

Structural power, and structural inequities, offer a strong normative justification for the imposition of trust-based obligations; yet it is a peculiarity of modern trusts law that they are rarely imposed in such situations. From this perspective, the problem with trusts law lies not in the fact that it creates many moral obligations in favour of powerful beneficiaries, but that it fails to confer the right types of power on the right types of beneficiaries. The problem is not with the conceptual structures and obligations that characterise trusts law, but with the fact that trusts law suffers from a conceptual fossilization which prevents its application in contexts where its ideological underpinnings would most usefully redress the types of structural inequities with which they have the potential to deal. We develop this argument through three case studies, focusing on three specific aspects of this conceptual fossilization: the types of relations where trust-based obligations are appropriate, the types of interests and beneficiaries that merit protection through the instrument of trusts, and the types of obligations that must be imposed to adequately address the underlying problems of structural power.

First, we argue that trusts doctrine, particularly in relation to implied trusts, fails to take adequate account of structural imbalances in interpersonal relations in modern society and, hence, leaves those areas to other domains of law such as contract or regulation which are less equipped to deal with them. We use as our example the control and use of information and personal data, focusing in particular on the issues created by the potential use by insurers of genetic information, and the use by internet services of control over information visibility to users, and information about the users themselves. In each case, we show that trust-based obligations offer strong ways of controlling the exercise of, and ameliorating the effects of, the structural power that characterises these relations.

Second, we explore the manner in which trusts law conceptualises beneficiaries and the types of interests of beneficiaries that it protects. Using the local authority cases as our example, we show that the law presently embeds a narrow conception of beneficiaries, and of the interests of beneficiaries, which entrenches structural inequalities in society. In particular, there is a strong focus on money, at the expense of other types of value and interests, which leads to focus on a narrow category of beneficiaries (typically, ratepayers). A proper conception of beneficiaries, grounded in a proper understanding of the role of trusts in dealing with structural power, would in contrast recognise the possibility of different classes of beneficiaries and of the possibility of different obligations in relation to these different classes. The same is true of interests, where cases such as *Harries v Church Commissioners* and *Martin v City of Edinburgh District Council*, in contexts closely intertwined with the political process, lead to trusts law prioritising a particular ideological stance. Here, the consequence is to preclude trustees from being able to mediate between different interests of differing importance to different classes of beneficiaries conflicts, because the central concern is financial.

Third, we consider the extent to which beneficiaries have the sort of power that Cotterrell suggests. Using the example of the pension trust-arguably a vehicle for social justice where the beneficiary *should* be strong and powerful-we show that the reality belies the claim. The state exercises power over both the trustees and the beneficiaries; the trustees have power over the beneficiaries; and the beneficiaries lack any practical power-not even having the ordinary rights given to the beneficiaries of small family trusts because of the impossibility of *Saunders v Vautier* collective action with such large numbers of beneficiaries. Pension trusts are accordingly susceptible to the whims of the political process and to the ideologies and thought-styles of those with the greatest amount of social power. In the case of pension trusts itself, the result has been a distancing effect from the beneficiaries, with the law prioritising the resilience of the trust fund over beneficiaries. This leaves beneficiaries in a state of abject dependence and powerlessness, with little or no ability to control those who ultimately determine their legal position. Here, the problem is not that the law justifies owing moral obligations to powerful beneficiaries, but that it justifies the *absence* of moral obligations to powerless beneficiaries.

Our analysis thus illustrates dramatic inadequacies in the law of trusts as it is currently constituted, which are deeply embedded in the way trusts law has developed. The result is that whilst trusts law can be used to challenge and remedy imbalanced power relations, its distancing from structural imbalance is so deeply ingrained that it does not do so, and cannot change direction without significant intervention. We argue that there is a strong case for a greater focus on the role of structural power as a normative justification for trust-based obligations, and for studying the manner in which the current conceptual fossilization of trust law might be overcome, enabling it to move in the necessary direction.

Textbook Treatments of Family Home Case Law *Rosemary Auchmuty, University of Reading*

The topic of Implied Trusts of the Family Home is now dealt with in both Equity/Trusts and Land Law textbooks. Which book is adopted will affect the way that students on a particular course view the development of case law in this area. One group of writers sees the 'Mrs Bolands of this world' as nuisances, standing in

the way of the smooth operation of the clear and certain Land law rules. Another group presents the case law as demonstrating the inadequacies of implied trusts, and the hypocrisy of relying on 'common intention' when normal cohabitants (they contend) never have one, being too much in love. They call for family-law-type legislation. A third, more critical, approach decries the outmoded values of some judges ('These sorts of gendered attitudes must be exposed and criticised') and calls instead for expanded definitions of contribution in the constructive trust cases. Despite their differences, all these treatments share common features. One is a representation of the present day (not the law, but society) as an era of gender equality, in contrast to the bad old past when women were clearly exploited. Another is the absence of any discussion of who has benefited from the certainty of the common law and/or reliance on resulting trust principles: *men*. Indeed, textbook writers go to remarkable lengths to avoid mentioning men (the problem being, rather, women's claims): for example, 'In its earliest incarnations, the role of trusts law was conceived of as being a means of protecting women from the social mores of the time.' These two features mean that continuing gendered inequalities and injustices go unnoticed by students, and unprepared for.

The Fabrication of Trusts Law in Colonial Bombay

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The capacity for trusts law to constitute and preserve power took on global dimensions in the 19th century, with the advent of formal British colonial rule in India. From the mid-19th century until Independence, the development of trusts law in India picked up pace as the colonial government found it increasingly necessary to regulate a species of property that had important consequences for the development of markets in land and financial capital, along with revenue collection. The development of trusts during British colonial rule reveals a long period of negotiation between legal systems, the epistemic violence of 'translation' of Hindu and Muslim law into the language of English equity, the transmission of indigenous concepts of charity into an English legal framework, and most significantly, the fabrication of a distinction between private and public realms.

Trusts Law and the Problem of Moral Distance

Michael Bryan, Melbourne Law School

In his paper 'Trusting in Law: Legal and Moral Concepts of Trust' 46 (1993) *Current Legal Problems* 75 Roger Cotterrell identified a growing 'moral distance' between the trustees and beneficiaries of so-called 'big trusts', such as large charities and pension trusts. The 'moral distance' was principally caused by the size and complexity of these trusts. This paper examines some 'small' commercial trusts, such as securitisation trusts, and identifies similar problems of 'moral distance' between trustee and beneficiary. While the complexity of these trusts, or of the arrangements which incorporate them, is a significant issue, it is not the sole cause of problems attributable to moral distancing. The paper concludes by examining some legal and extra-legal solutions to the problems.

The Central Bank as Trustee

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In this paper I draw on Roger Cotterrell's 'Power, Property and the Law of Trusts' to explore Walter Bagehot's famous defence of central banking. In *Lombard Street* Bagehot argues that in a crisis the Bank of England (BoE) should use its reserve of banknotes to act as a Lender of Last Resort (LOLR): in other words, it should lend freely at a high rate of interest to solvent but temporarily illiquid banks. Bagehot justifies such a use of the BoE's reserve by claiming that the BoE held that reserve on trust for the benefit of "the public" (which he describes elsewhere as "the money market"/"Lombard Street"/"our credit system"). In Bagehot's own words, "The directors of the [BoE] are, therefore, in fact, if not in name, trustees for the public, to keep a banking reserve on their behalf (36-37) ... At present the Board of Directors are a sort of *semi*-trustees for the nation. I would have them real trustees, and with a good trust deed" (75).

My first task in this paper is to offer an explanation of why Bagehot drew on the concept of the trust to justify the BoE's role as a LOLR. Providing this explanation takes us to the Bank Charter Act of 1844. According to many contemporaries, that legislation "rendered [the BoE] an ordinary bank of deposit and discount" (Torrens), which was now barred from, as the PM behind the Act, Robert Peel, put it "affording assistance to the mercantile world". Instead of relying on the BoE's reserve of banknotes, the banks of Lombard Street would have to embrace the values of self-reliance and self-discipline and put in place reserves of their own.

Bagehot considered such an arrangement impractical, and to bolster his argument he drew on the concept of the trust. He did so because underpinning that concept were, as Cotterrell puts it, "ideas which are part of the everyday climate of thought of citizens" and which - however vaguely - stood in contrast to the norms of self-reliance and self-discipline: the BoE held a reserve of banknotes not for its own benefit, but for the benefit of others, in particular those left vulnerable by financial crisis.

If this reading of Bagehot is right, it takes us to this paper's second task. In 'Power, Property and the Law of Trusts', Cotterrell argues that "The idea of fiduciary obligation of the trustee ... induces us to see the trust beneficiary not as the possessor of property-power but as a person meriting protection". I will suggest that Bagehot's use of the trust does exactly that: it induces us to see the country's banks, these holders and distributors of "the many Millions in Lombard Street" (Bagehot at 17), not as "possessors of property-power" but as vulnerable members of the public "meriting protection". What these "possessors of property-power" offer in return for this protection is not an issue Bagehot explores. But perhaps Bagehot's omission is our opportunity: what do banks owe in return for the support they receive?

The Power of the Settlor

Jonathan Garton, Warwick Law School

In his 1987 article, 'Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship', Roger Cotterrell identified how the trust mechanism can facilitate and obscure property-power. His focus was on how the law's conception of the trustee as the controller of trust assets, managing them on behalf of passive beneficiaries who are not permitted—absent judicial intervention—to interfere in

their administration, disguises the fact that the true power lies with the beneficiaries, who enjoy the real value of the assets and can use the ‘fluidity’ of beneficial entitlements to stay hidden from sight. This paper argues that in fact the real property-power lies with yet a third actor: the settlor. This is often overlooked as a result of the settlor’s characterisation as someone who drops out of the picture once the trust is constituted, yet any power enjoyed by the beneficiaries can only ever be at the behest of the settlor as the originator of that power. The paper will explore the extent to which (a) settlors really do drop out of the picture, (b) the settlors of family trusts can use the fluidity of the trust mechanism to exert power over the lives of their beneficiaries, (c) charity donors can use their wealth to affect the landscape of social welfare, and (d) the appropriateness, in light of all this, of equity’s supposedly blindness to the motives behind the creation of a trust.

The Secret Life of the Trust: Boredom, Love, Money

Adam Gearey, Birkbeck Law School

Taking its prompting from Simmel, Marx and Weber, this paper argues that the trust is bound up with logics of abstraction and commodification. The reification that characterises the form of the trust can be understood through an analysis of the boredom that characterises the study of the law of trusts; the sense of entering a ‘they world’ where everything is exchangeable, and nothing has value. But boredom is also the experience that- correctly understood- allows critical purchase to be gained on the trust and its hidden history.

From Property to Power: Using Economic Theology to Conceptualise the Trust

Hayley Gibson, Kent Law School

Every so often, common lawyers raise the issue as to whether Trusts law is more adequately viewed through the lens of property on one hand, or of obligation on the other. While the proprietary approach to the Trust finds several adherents, it poses, in philosophical terms, an ontological problem: Trusts comprise overlapping forms of ownership that are said to be non-contradictory, and yet which resonate as something of an ontological ‘clash’ whereby multiple actors occupy the place of the owner of Trust property. The issue is saved, perhaps, by discriminating between *forms* of ownership – between the legal and the beneficial, or between use and enjoyment – but, short of falling back into the viewpoint of obligations, it is difficult to discern how this discrimination can take place without doing damage to the very concept of property ownership (as is the case, or so James Penner explains, in civil jurisdictions). In one deft manoeuvre, Cotterrell’s “Power, Property and the Law of Trusts” circumvents the issue of obligation and extends the scope of the proprietary approach by introducing to the study of Trusts the connection between property and *power*. This is an achievement of the 1987 article not just because it has opened Trusts scholarship to Critique, but also because it invites, I think, an analysis from more recent developments in the critical examination of ontological problems. In raising the question of *power*, it is possible to examine the Trust apparatus in conjunction with Giorgio Agamben’s recent work in economic theology, in which he describes a fragmented sovereign: a King ‘who reigns but does not govern’ on one hand, and an administration of (in the words of one commentator) “Trustees” who administer the Kingly power that lends itself not simply analogously, but also philosophically – even fruitfully – to the law of Trusts.

Trust Proliferation: A View from the Field

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The last few decades have seen a global wave of trust law reforms and a global proliferation of trust service providers. Commentators hypothesise that this rapid process is harmful, eroding tax bases as well as protections accorded to trusts users' creditors. To test this hypothesis, I conducted a global survey of 409 trust service providers and in-depth interviews with 28 additional providers in five jurisdictions. I found that offshore legal systems are chosen to govern trusts based, first, on their usefulness for tax minimization, and second, on their incorporation of advanced trust features, many of which block creditor access to the trust assets. Forum choice clauses are sometimes used to avoid norms applicable to trust users, such as tax demands and creditors' rights. Trust instrument clauses curtailing beneficiaries' rights to information appear in about a quarter of donative trusts, while clauses negating beneficiaries' enforcement powers appear in about 15 per cent. While some such clauses are included in an attempt to protect the integrity of the trust fund, its smooth administration or beneficiaries' own interests, others reflect the fact that persons designated as beneficiaries on the face of the instrument are not in fact intended to receive any benefit. A significant number of trust instruments appear, on purpose, to create beneficial entitlements other than those their creators in fact intend. Wealthy clients use the trust regimes of jurisdictions other than their jurisdictions of residence, including offshore jurisdictions, more often than other clients.

Property and the Interests of Things: The Case of the Family Trust

Johanna Jacques, Durham Law School

According to the liberal theory of private property, a thing is either owned outright or in the commons. This poses problems for the family trust within property theory. After all, the transfer of property to a beneficiary under a trust involves neither absolute ownership nor leaves the property free for appropriation by others. This article pits the substance of the trust against its liberal understanding as a species of gift. But rather than discarding the 'thing-ownership conception' of classical liberal thought, it consciously adopts it in order to disprove the gift analysis of the trust. Using doctrinal analysis and by reference to Heidegger's analysis of the person-thing relationship, it argues that the family trust subverts the liberal idea of private property in order to enable things to be neither owned nor not owned, a status which in turn allows them an independent existence and interests of their own.

The 'Even More Interesting' Ideological Function of Charity

Henry Jones, Durham Law School

In the penultimate paragraph of 'Power, Property, and the Law of Trusts', Roger Cotterrell raises charitable purpose trusts as a perhaps unique example of the construction of the public, of society as a whole, as a single subject, as a property owner. In this paper I will tease out some of the implications of this powerful and understated observation. On the ideological side, charity opens up the whole question: the structures of ideology, church, school, military, are all charitable. Even relief of poverty is ideological. This is law not as an instrument of ideology itself, or

not just this, but as a facilitator of all other ideology. It is the ideological apparatus *par excellence*.

The other half of the insight is even more productive, that this constructs society as a property owner. By this Cotterrell cannot have meant any notion of public ownership - this is not common property he is talking about. Instead society is restructured in the form of the individual, absolute, property owner. Written at the height of "no such thing as society", Thatcherite neoliberalism, this claim clearly had an urgent political dimension. 30 years on, 30 years of neoliberalism beginning to fracture in the long wake of the global financial crisis, what does it now mean to construct society as an individual property owner?

In this paper I will revisit the law of charities, key judicial decisions, and the work of the Charity Commission. Fundamentally, the question of public benefit demands that the law constructs a public, and its interests. I will first look at how these decisions reveal the ideology of private property at work. Secondly I will address the bigger question of the implications of constructing society in this way. In addition to Cotterrell's article I will also address the history of charities law through two other lenses, Althusser's writing on ideology first, but also Deleuze's concept of control.

Neutralizing Trusts' Risks: Secrecy and 'Ownerless' Assets

Andres Knobel, Tax Justice Network

Trusts' secrecy features (lack of registration in a public register and complex control structures) likely explain the use of trusts in grand corruption and tax evasion cases. There are no arguments to exclude them from new transparency measures, especially when compared to similar legal vehicles, such as private foundations that do have to register. Trusts, especially asset protection trusts, may result in an "ownerless limbo", allowing trust users to circumvent debts to legitimate creditors, evade and avoid taxes. Corrective measures are necessary.

State Power, Property and the Law of Trusts

Nick Piška, Kent Law School

In his classic article 'Power, Property and the Law of Trusts' Roger Cotterrell argued that the trust extends the ideological function of property by further separating persons and things and intensifying at the same time as hiding the property-power of beneficiaries. This critique of the trust form had the advantage of demonstrating the ideological grounding of some aspects of trust law doctrine, in particular the beneficiary principle, and how the trust form produces and obscures wealth inequality. However, Cotterrell's analysis has been questioned. First, Cotterrell puts too much emphasis on the property-power of beneficiaries and not enough on trustees and the power of trust industry, which lobbies for reform of state laws to protect settlors, trustees and trust property from state laws and regulations. Secondly, Cotterrell does not analyse the role of the state in trust law and practice. This paper analyses the role of the state in relation to the law of trusts and the production and legitimation of wealth inequality. Drawing on the work of Brooke Harrington and Saskia Sassen it considers how changes in our understanding of the state interrelates with changing functions and regulation of trusts.

The Gendered Trust

Lisa Sarmas, Melbourne Law School

In his article on 'Power, Property and the Law of Trusts', Roger Cotterrell argued that the trust creates a distancing effect that reinforces and conceals the property-power of the beneficiary, thereby obscuring 'private power' and perpetuating the 'legal ideology that human beings appear as equal subjects before the law'. In this paper I draw on and problematize Cotterrell's thesis by analysing the trust as a *gendered* 'private power' device that works to effect a dialectic of *both* distance *and* intimacy as it variously takes on the gendered characteristics of male and female form respectively. Through this process the trust form reproduces the gender binary and contributes to gender-power. This raises the question of whether it is possible to imagine a non-binary trust that contributes to the ultimate dissolution of gender-power.

Trusts and Democracy

Carla Spivack, Oklahoma City University School of Law

Spendthrift trusts which shield the beneficiary's assets from creditors have been an ongoing problem for the law since their advent in the nineteenth century. Other, very recent, forms of trust are an even bigger problem: they take the notion of asset protection much farther, allowing settlors to protect not only the beneficiary's assets, but their own, from creditors; these are called "self-settled asset protection trusts. Moreover, more and more states allow so-called "dynasty trusts" which allow settlors and beneficiaries to maintain assets in trust tax free for generations, overturning long-settled principles of the common law such as the Rule Against Perpetuities. All of these trusts represent bad public policy: they disrupt contracts by allowing debtors to avoid their debts, they disrupt the tort system by denying victims compensation and removing deterrents to high risk behavior, and they withhold vast tax revenues from the public fisc. Most efforts to reform trust law to alleviate the problems of these trusts have been statutory - and unsuccessful. No one has looked to principles in the law itself for a brake on their proliferation. This is a serious oversight because property law itself does offer a solution in the obscure but important doctrine of *numerus clausus*. Students in common law jurisdictions do not study this doctrine, and few academics pay attention to it, but it is nonetheless a foundational principle of the law and one which unequivocally bars the types of trusts discussed above.

Escaping Law's 'Intellectual Ghetto': A 'Law and History' Analysis of the Impact of Commercial Applications for Trusts Law

Sarah Wilson, York Law School

Thirty years ago Roger Cotterrell's classic work 'Power, Property and the Law of Trusts: A Partial Agenda for Critical Legal Scholarship' set out a highly ambitious agenda for legal scholarship. This identified an imperative for searching for intellectual strength which is capable of enduring and able to build progressively a 'more adequate understanding of law' while, at the same time, 'radically challenging existing forms of legal study'. This paper draws much inspiration from Cotterrell's insistence that Law must escape the 'intellectual ghetto' of the law school which has served largely to isolate it from 'wider currents of systemic knowledge associated with other disciplines', on account that understanding of law requires that legal knowledge be 'continually confronted with, challenged by and eventually integrated

with forms of knowledge developed in 'non-legal disciplines'. The paper reflects on the continuing importance of such an agenda, situating Cotterrell's views alongside current encouragement being given to Law to engage with the discipline of History. It does this through exploring what a 'Law and History' approach might have to offer for legal scholarship that is distinctive and enabling in pursuit of Cotterrell's vision for understanding law.

The paper celebrates Cotterrell's use of the trust for exploring the dynamics between legal doctrine and wider currents of ideology, suggesting that the law of trusts illustrates saliently the enriching qualities a 'Law and History' approach has for legal scholarship more generally. This is notwithstanding that Trusts and Equity *can* be found extensively historicized in legal scholarship: this is evident within classic Legal History in the doctrinal tradition; and it has even been suggested that Critical Legal History analyses of equity have 'probably devoted more pages to historical description ... than to anything else' (Gordon, 1984).

The paper will set out some key parameters for a 'Law and History' approach, and how this might serve Cotterrell's ambitions for deep understandings and radical approaches; drawing on legal scholarship from across doctrinal and critical traditions, and also on reflections from historians on how their discipline can contribute to understandings of society and social change. The paper will also look to bring these ideas to life through reference to current applications of trusts and equitable doctrines to commercial dealings and relationships.

For the latter, the paper draws on burgeoning 'commercial equity' jurisprudence and scholarship to illuminate where these applications are apparent, and to ask what implications might arise. Here Cotterrell's seminal reflections on interplay between law and society, and property and power, together with views dating from the 1850s that commercial environments were not considered an obvious context for the application of trusts, are key reference points for intellectual interest in whether 'commercial applications' are actually influencing the nature of trusts law in the twenty-first century, and if so, how.