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ON TRUSTS, HYPOCRISY AND CONSCIENCE

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ABSTRACT. *In this paper, I suggest that taking seriously the way in which the trust is founded on a duty of conscience has far-reaching ramifications for the appropriate attitude towards new forms of trusts that are designed to allow people to enjoy the benefits of ownership without incurring the duties that come with it. The morally freighted concept of conscience that lies at the heart of trust law means that every claim against trustees invokes a demand that the trustee abide by the requirements of their conscience. The conditions on the right to blame others for a moral wrongdoing, and the relationship between blaming and suing in the context of trust law, lead to the conclusion that, in novel forms of trust that are geared towards the creation of a morally bankrupt "orphan property", beneficiaries do not have moral standing to sue the trustee for a breach of trust.*

KEYWORDS: *trust law*; *moral theory*; *conscience*; *offshore*; *right to blame*; *hypocrisy*

I. INTRODUCTION

In this paper, I suggest that, if we take seriously the way in which the trust is founded on a duty of conscience, this would have far-reaching ramifications for the way we treat new forms of trusts that are designed to allow people to enjoy the benefits of ownership without incurring the duties of justice that come with private control over a resource.

Trusts in modern societies are vehicles of major social goods: flexible finance, charities, pension funds, ongoing financial support for vulnerable people, investment funds, land pooling and more are all facilitated by this ingenious invention of the English courts of Chancery.[1] And yet, when we hear about the trust in the news or read about it in scholarly

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[1] See some examples in K.D. Schenkel, "Trust Law and the Title-Split: A Beneficial Perspective" (2009) 78 UMKC Law Review 181, 181–83, 196; J. Grannis, "Community-Driven Climate Solutions: How Public-Private Partnerships with Land Trusts Can Advance Climate Action" (2020) 44 William & Mary Environmental Law and Policy Review 701. We explain why trust is a necessary component in a liberal property regime in H. Dagan and I. Samet, "Express Trust: The Dark Horse of the Liberal Property Regime" in S. Degeling, J. Hudson and I. Samet (eds.), *Philosophical Foundations of the Law of Express Trusts* (Oxford 2023).

work or in various government and think tank reports, the slant is often negative: crafty professionals seem to have highjacked the trust to serve their clients' shady ambitions, and their shenanigans overshadow the significant contribution of trusts to efficient free markets, charitable work and the autonomy of owners.[2]

By exploiting structural elements of the traditional trust, adding new features and pushing governments to give up on essential checks and balances, these practitioners have managed to fashion a vaguely familiar but menacing creature: an arrangement whose sole, or main, purpose is to enable people to enjoy the benefits of ownership without taking on the duties that it entails, namely, using the property to pay their debts, support their dependants and contribute one's due share in maintaining the common good via tax.[3] Such "orphan property" is a moral outrage; any legal device that facilitates its creation must urgently come under scrutiny. In previous work, Hanoch Dagan and I explained why settlors' right to autonomy cannot justify the use of ownership rights to arrange their property in this way.[4] In this paper, I propose to look at the normative foundations of the trust in order to expose the contradiction between, on the one hand, settling property on trust in order to shield it from legitimate claims by third parties, and, on the other, the moral commitment of the trustee, in which the right to enforce the trust is grounded.

As we will see, several kinds of trust structure can be used to achieve this illicit goal and, to judge by experience, others will be conjured up by creative lawyers when need arises. It is therefore important to keep our eyes firmly on the target, namely the *purpose* which different trust formats are designed to achieve; the form they happen to take is less important for the present investigation. A note on scope: the dilemmas that typify any legal (and political) system that seeks to tackle the legitimacy crisis in which the trust is engulfed are here examined through the lens of English law. But the point of the paper is a principled one and, as such, it is relevant to all common law jurisdictions in which the trust features as a recognised form of property-holding. And

[2] Perhaps the most famous example is "The Paradise Papers" project – a special investigation by *The Guardian* and 95 media partners worldwide into a leak of 13.4 million files from two offshore service providers and 19 tax havens' company registries, which found that many of the tax avoidance schemes relied on the trust structure: "Paradise Papers: A Special Investigation", *The Guardian*, available at https://www.theguardian.com/news/series/paradise-papers (last accessed 21 January 2024). See also the BBC Panorama programme, "Millionaire Bankrupts Exposed", which 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: "Millionaire Bankrupts Exposed", available at https://www.bbc.co.uk/programmes/b09m5wdd (last accessed 21 January 2024); M. Bennett and A. Hofri-Winogradow, "The Use of Trusts to Subvert the Law: An Analysis and Critique" (2021) 41 O.J.L.S. 692.

[3] Following changes to the way trusts are being taxed, it is now nearly impossible to use an onshore trust structure to avoid taxes. The Income Tax Act 2007 stipulates that trustees must pay income tax at the highest rate for any income from the trust assets: see Part 9 (special rules about settlements and trustees).

[4] H. Dagan and I. Samet, "What's Wrong with Massively Discretionary Trusts" (2022) 138 L.Q.R. 624, 629.

one on jargon: since, as will be made clear, the main inspiration for those trust types that facilitate a morally vacuous type of ownership comes from offshore jurisdictions, I call them "offshore-inspired trusts" – OSITs (without implying that all offshore trusts, or those that use offshore characteristics, are thereby iniquitous).

Trust scholars are aware of the danger posed by OSITs to the credibility of the trust as a building block of a just property system, and some attempt to address it. *Conceptual* analyses of the problem ask whether the new permutations of the traditional trust model qualify as trusts, given the structural requirements of this legal relationship. They ask, for example, whether OSITs abide by the beneficiary principle, or fulfil the conditions for certainty of intention.[5] Other critics adopt an *external* perspective, and apply categories like distributive justice or economic efficiency which they then use to evaluate the (de)merits of novel trust structures.[6] But the depth and complexity of the problem mean that no single methodology can, on its own, offer a comprehensive understanding of the challenge and the way(s) to resolve it.

This paper proposes to approach the conundrum from a fresh "internal normative" perspective. The analysis is *internal* by virtue of its point of departure, namely the law of trust as developed by the courts over the centuries. More specifically, it looks to English case law to excavate the roots of the trustee's obligation to hold and apply the property in accordance with the trust terms. But rather than remaining within the confines of a conceptual discourse, I am looking for the moral implications of the trustee's obligations towards the beneficiary as it is set out in the case law. The trustee's obligation is explicitly cashed out in moral terms of conscience, and the stepping stone into moral discourse therefore stands out nice and clear (or so I will argue). My conclusion is that beneficiaries and other stakeholders in OSITs do not have *moral* standing to enforce the trust. And since a just legal system should aspire to align legal rights to make a claim with the moral standing to do so, this conclusion adds weight to the side of the scales that rejects OSITs as a legitimate way of arranging one's property affairs. The argument should therefore assist courts and advisory committees to reject pressures to recognise OSITs as a rightful member of the trust family.

The paper proceeds as follows: Section II explains the extent and depth of the threat to justice that is posed by trusts that are designed to create orphan property, and the (hesitant) measures that are in place to tackle it. In Section

[5] E.g. L. Smith, "Give the People What They Want? The Onshoring of the Offshore" (2018) 103 Iowa Law Review 2155; J.P. Webb, "An Ever-Reducing Core? Challenging the Legal Validity of Offshore Trusts" (2015) 21 Trusts & Trustees 476.

[6] E.g. D. Russell and T. Graham, "Trusts: Weapons of Mass Injustice or Instruments of Economic Progress?" (2017) 23 Trusts & Trustees 363; R.M.B. Antoine, "The Offshore Trust: A Catalyst for Development" (2007) 14 Journal of Financial Crime 264.

III(A), it is claimed that a morally freighted concept of conscience lies at the heart of modern trust law and that hence every claim against a trustee invokes a demand that the trustee abide by the requirements of conscience. In Section III(B), we will go on a detour through the conditions on the right to blame, and the relationship between blaming and suing in private law in general and trust law in particular. In Section III(C), I explain why, given the role played by conscience in doctrines of trust law, claimants who wish to challenge the trustee of an OSIT do not have moral standing to do so, and I conclude with the effects of this result.

II. Here, There and Everywhere

A. Offshore: The Race to the Bottom

It is clear to anyone who reads the findings of investigative journalism into the shady financial affairs of the ultra-rich and the corrupt that much of the trust's PR problem lies with offshore legislation and practices.[7] In these tiny jurisdictions, a large chunk of the economy is based on a financial services industry that caters to the needs and desires of individuals and companies who have reasons to divert their capital away from the country where their economic activity takes place. These reasons can be benign, but are many times of the wrong kind: tax evasion, money laundering and asset shielding are chief among them.[8] Barely disturbed by this normative deficit, "the offshore jurisdictions of the world have made a business of responding to what people want" without asking too many questions.[9]

The various ways in which legislation in offshore jurisdictions has revolutionised the modern trust are well documented.[10] The traditional role of each participant in the trust relationship, as well as the interaction between them, have been subjected to aggressive treatment with the aim of reshaping the trust to fit the goal(s) for which settlors choose the offshore jurisdiction as its locus (in spite of the high management fees that this choice entails). While some features, like extensive discretion or a depleted set of beneficiary's rights, are known to, and indeed started life in, onshore jurisdictions, the concentration and intensity of such

[7] In the US, the spillover has already taken place and some states have enacted asset protection trusts that can also be self-settled: see the review in A.J. Hirsch, "Fear Not the Asset Protection Trust" (2006) 27 Cardozo Law Review 2685, 2685–87.

[8] See e.g. the extensive arguments that support Tony Molloy's observation that "[a]lmost 50 years of specialist trust practice has left me with no doubt … [that o]ffshore trusts are routinely involved in fraud and evasion on an industrial scale": T. Molloy, "High-Net-Worth Trusts in the Twenty-First Century: Confiscatory Taxes and Duties?" in R.C. Nolan, K.F.K. Low and T.H. Wu (eds.), *Trusts and Modern Wealth Management* (Cambridge 2018), 536, emphasis removed.

[9] Smith, "Give the People What They Want?", 2156.

[10] See e.g. R. Lee, "The Evolution of the Modern International Trust: Developments and Challenges" (2018) 103 Iowa Law Review 2069; L. Smith, "Massively Discretionary Trusts" (2019) 25 Trusts & Trustees 397. In the US context, see E. Marty-Nelson, "Offshore Asset Protection Trusts: Having Your Cake and Eating It Too" (1994) 47 Rutgers Law Review 11.

restructuring is mostly unique to offshore trusts.[11] Thus, much of the recent bout of legal creativity in offshore trust law features clever permutations of the familiar building blocks of the trust, in combination with targeted innovations that are designed to make it easier for owners to create a private authority over a resource, free of the burdens of ownership.[12]

When a settlor successfully uses structures of this kind to create orphan property, he can "live in debt and luxury at the same time" or provide this corrupt luxury to a beneficiary.[13] The creation of orphan property undermines a fundamental principle of the right to private property, namely that owners must pull all the economic levers available to them to address legitimate claims on their resources (with some limited public-policy exceptions, like bankruptcy laws). The grave injustice of allowing people to enjoy the economic and psychological advantages of assured financial support without the duty to pay debts from the source of such benefits is particularly conspicuous with regard to non-voluntary creditors.[14] In the notorious US case of *Scheffel v Krueger*,[15] for example, the horrendous sexual assault of a child went uncompensated even though the offender had a spectacular amount of money settled on him by his mother in a "spendthrift trust".[16]

The spendthrift trust is a good example of a trust format that explicitly facilitates the creation of orphan property. The settlor of a spendthrift trust prohibits a trust beneficiary from voluntarily transferring their interest in the trust to a third party (*voluntary alienation*), and prevents creditors of a beneficiary from reaching the beneficiary's interest through garnishment or attachment (*involuntary alienation*).[17] The trustee is typically allowed to make direct payments to third parties who have supplied the beneficiary's needs, while avoiding any direct payments that can be used to pay debts.[18] In a bid to compete with the offshore business model, many states in the US have now adopted some form of spendthrift trust, including its greasly offshoot, the self-settled spendthrift trust.[19] It is no wonder that

[11] E.g. *Re McPhail and Other Appellants v Doulton and Other Respondents* (sometimes referred to as *Re Baden's Trust*) [1971] A.C. 424 (H.L.); *Serious Fraud Office v Litigation Capital Ltd.* [2021] EWHC 1272 (Comm). See also A.S. Hofri-Winogradow, "The Stripping of the Trust: A Study in Legal Evolution" (2015) 65 University of Toronto Law Journal 1.

[12] D.R. McNair, "Cook Islands Asset Protection Trust Law" (2010) 3 The Journal of Business, Entrepreneurship and the Law 321, 322; S.G. Gilles, "The Judgment-Proof Society" (2006) 63 Washington and Lee Law Review 603. Offshore practitioners market such advantages to their clients in an explicit way: see e.g. "Best Offshore Trust Jurisdiction – a Comparison", available at https://www.offshorecorporation.com/trust/ (last accessed 21 January 2024).

[13] J. Chipman Gray, *Restraints on the Alienation of Property*, 2nd ed. (Boston 1895), 247.

[14] See examples in C. Spivack, "Democracy and Trusts" (2017) 42 ACTEC Law Journal 311, 311–12.

[15] 782 A.2d 410 (N.H. 2001).

[16] Ibid., at 413 (Duggan J.).

[17] Gilles, "Judgment-Proof Society", 637.

[18] R.C. Ausness, "The Offshore Asset Protection Trust: A Prudent Financial Planning Device or the Last Refuge of a Scoundrel?" (2007) 45 Duquesne Law Review 147, 150.

[19] S.E. Sterk, "Asset Protection Trusts: Trust Law's Race to the Bottom?" (2000) 85 Cornell Law Review 1035, 1043; K.J. Nienhuser, "Developing Trust in the Self-Settled Spendthrift Trust" (2015) 15 Wyoming

"most . . . academics [who] consider the subject find [the laws that facilitate such trusts morally] offensive".[20] The case of spendthrift trusts, and the pressures that allowed them to mutate from an offshore curiosity to a widely-recognised instrument for shielding assets in the US, has much to teach us about the danger posed by a drive to attract trust-related business regardless of the price in the moral legitimacy of trusts.

One trust structure that brings the threat closer to home for English lawyers goes by the menacing name "black hole" or "massively discretionary" trust (MDT). In an MDT, trustees have the power to appoint property to members of a very large group of people/entities, which can be subject to a further power of variation. The only beneficiary named at the outset is typically a charity, which is not informed of this fact;[21] there is no point in doing so, for the chance that it will ever benefit from the trust is nil.[22] The trustee's extensive power is also on paper only. The reality behind the trust is that the settlor, who has a clear idea about who should in effect benefit from the trust, reveals this intention to the trustee by recourse to instruments such as "letter of wishes".[23] The absence of a beneficiary with the ability *and interest* to enforce the trust is compensated for by installing a trust "protector" who is granted the power "to direct the trustees, or refuse consent to the trustees, in the latter's exercise of one or more of their administrative powers (or discretions)".[24] The trustee, whose business is dependent on her "reputation for probity, efficiency and discretion in executing such trusts in accordance with the confidential wishes of clients", is very likely to follow the settlor's wishes as long as it is legal to do so.[25] The economic reality behind the arrangement is that the settled property is used to benefit a class of "ghost beneficiaries", namely people who enjoy the comfort of being cared for by a trust fund, while their creditors have no recourse to it.[26]

There are, of course, variations on the theme and other formats that have been (or will be) developed to achieve the same morally reprehensible aim.

Law Review 551. In England, section 33 of the Trustee Act 1925 allows the trust document to contain provisions to stop a beneficiary from prejudicing his right to the income of the trust, including becoming bankrupt. But in contrast with the situation in the US, the protective trust was never a popular tool for "asset protection" of the settlor's own property. English laws and international conventions on transactions at under value and fraudulent preferences provide good protection against potential abuse of creditors: W. Cotton, "The Self-Protective Trust" (2013) 19 Trusts & Trustees 259, 259.

[20] R.J. Mann, "A Fresh Look at State Asset Protection Trust Statutes" (2014) 67 Vanderbilt Law Review 1741, 1743, fn. 3.

[21] As in the infamous case of Northern Rock trusts: see I. Cobain and I. Griffiths, "A Twisty Trail: From Northern Rock to Jersey to a Tiny Charity", *The Guardian*, available at https://www.theguardian.com/business/2007/nov/28/northernrock.subprimecrisis (last accessed 21 January 2024).

[22] Smith, "Massively Discretionary Trusts", 26–28.

[23] T.T.Z. Wei, "The Irreducible Core Content of Modern Trust Law" (2009) 15 Trusts & Trustees 477, 489.

[24] D.W.M. Waters, "The Protector: New Wine in Old Bottles?" in A.J. Oakley (ed.), *Trends in Contemporary Trust Law* (Oxford 1996), 63.

[25] *Re T R Technology Investment Trust plc* [1988] B.C.L.C. 256, 264 (Ch.D.) (Hoffmann J.).

[26] P. Matthews, "The Black Hole Trust – Uses, Abuses and Possible Reforms: Part 1" (2002) 1 Private Client Business 42, 47. See also *Re T R Technology Investment Trust* [1988] B.C.L.C. 256, at [623]–[624] (Hoffmann J.); *Prest v Petrodel Resources Ltd.* [2013] UKSC 34, [2013] 2 A.C. 415, 491 (Lord Sumption).

But these two examples already make abundantly clear that it is wrong to claim that OSITs are merely a natural development of a legal instrument that has since time immemorial been used to dodge legal rules and avoid taxes. Indeed, soon after people realised that they could rely on the Chancellor's willingness to enforce obligations of conscience on legal owners, they started to settle property in order to circumvent the severe limitations on the power of ownership that were typical in medieval property law.[27] However, with OSITs, the rule-circumventing use of the trust has moved to a different and much more dangerous phase. OSITs constitute an attack on the very foundations of property as private control over assets that comes with duties of relational justice.[28] As such, OSITs cannot be conceptualised as expanding the boundaries of the autonomous use of ownership, but should rather be understood as breaching the boundaries of legitimate control over resources. This is in stark contrast to trusts that facilitated transfers of property where the limitations on doing so were too restrictive of owners' autonomy or were downright unjust, like the notorious coverture rule.[29]

B. Onshore: At the Crossroads

1. In court

In this section, I explain briefly how the normative analysis offered here can make a difference to the way in which the challenge of OSITs affects lawmaking in England. To do that, I look at two ways in which OSITs engage the legal system: in the courts, and in the Law Commission. My aim here is not to offer a close reading or a novel analysis of the case law or the Law Commission's work. Rather, I wish to point out the general direction in which the courts are going, and the questions that the Law Commission asks, in order to understand how the normative analysis of Section III can assist them in tackling the OSITs challenge in a successful way.

In recent years, OSITs (like other innovative trust forms) have lost the somewhat mysterious image they enjoyed in the past, as one judge remarked: "sophisticated offshore structures are very familiar nowadays to the judiciary who have to try them. They neither impress, intimidate, nor fool anyone."[30] The trailblazers are, as the quotation above demonstrates, the family courts. In the trust context, family courts adopt a pragmatic approach and look beyond formal structures: reserved powers are taken as a strong indication that assets settled on a trust are

[27] J.H. Baker, *An Introduction to English Legal History*, 3rd ed. (London 1990), 284.
[28] On the relational justice duties of owners, see H. Dagan, *A Liberal Theory of Property* (Cambridge 2021), ch. 5; in the context of trust, see Dagan and Samet, "What's Wrong", 641.
[29] Trusts were used in a morally commendable manner to provide for a married daughter: Dagan and Samet, "Express Trust", 155.
[30] *J v V* [2003] EWHC 3110 (Fam), [2004] 1 F.L.R. 1042, at [130] (Coleridge J.).

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still the property of the settlor.[31] Individuals who are not named as beneficiaries on the trust instrument, but who de facto benefit from the trust, may well be asked to account for that fact when their dues on divorce are calculated.[32] When these first-line measures fail, family courts resort to "judicious encouragement" – that is, they put pressure on the *trustees* to provide the beneficiary - spouse with the means to comply with the court's view of the justice of the case.[33] It is important to keep the example of the family courts in mind since it demonstrates what a determined court can do in the face of ruthless owners who seek to use the trust to shield their property from legitimate claims over it.

The Chancery courts take a more cautious approach. When faced with a mismatch between those who de facto benefit and/or control a trust and its formal structure, Chancery judges are not willing to implement radical veil-lifting measures of the kind introduced by family courts. This caution may be justified in light of the heightened need for clarity and stability in the areas that are overseen by Chancery. But the normative analysis I offer here should, I hope, embolden them to push through forceful measure to tackle the injustice of OSITs.

An important early step in confronting illicit trust structures is Robert Walker J.'s bold decision in *International Credit and Investment Co. (Overseas) Ltd. v Adham*, in which he highlighted the risk of "shadowy" structures "formed in jurisdictions where secrecy is highly prized and official regulation is at a low level".[34] But what is the best way to confront the risk? The stringent conditions attached to the sham doctrine severely limit its usefulness as a tool for fighting off the dangers posed by such shadowy structures.[35] Over the years, judges have come to believe that "they will have the support of the public if they are prepared to ask more difficult questions, … be more prepared to draw adverse inferences from silence, and generally … be more interventionist than ever before".[36] The result is a growing appetite for using the doctrinal tools they have, or developing new measures, in order to tackle trust formats that facilitate injustice. Thus, the concept of an "illusory trust" –

[31] *Charman v Charman* [2007] EWCA Civ 503, [2007] All E.R. (D) 425 (the husband had, qua settlor of the offshore trust, the power to replace the trustees and a letter of wishes stated that he should have maximum access to the trust's capital and income).

[32] The courts take into account "the likelihood that trustees will exercise their discretion in favour of a particular beneficiary in deciding what provision to make for a former spouse on divorce": *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2015] EWCA Civ 139, [2016] 1 W.L.R. 160, at [13] (Lewison L.J.) (referring to *Whaley v Whaley* [2011] EWCA Civ 617, [2012] 1 F.L.R. 735).

[33] *Thomas v Thomas* [1995] 2 F.L.R. 668, 670–71 (C.A.) (Waite L.J.).

[34] [1988] B.C.C. 134 (Ch.D.). See also T. Akkouh and C. Lloyd, "'Trust-Busting' After *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev & ors* [2017] EWHC 2426 (Ch)" (2018) 24 Trusts & Trustees 151, 155; *Tasarruf Mevduati Sigorta Fonu v Merrill Lynch Bank and Trust Co. (Cayman) Ltd.* [2011] UKPC 17, [2012] 1 W.L.R. 1721.

[35] S. Gadhia, K. Rodgers and J. Ho, "Sham Trusts" (2016) 22 Trusts & Trustees 464, 469.

[36] R. Snowden, "Keynote Address: The Use and Abuse of Trusts and Other Wealth Management Devices" (2017) 31 Trust Law International 99, 105.

whether you think it is old wine in a new bottle or a bold new move – specifically targets legal relationships that feature a trust-like structure, but tweaks it to such an extent that it is difficult to say whether the property was indeed settled on a trustee.[37]

The answer to the question whether the original owner has indeed divested herself of enough power vis-à-vis the property to have ceased to be its owner is far from clear-cut. A conceptual analysis will not be enough on its own to determine the approach to such cases since there are several (more or less bold) interpretations of the point at which a trust becomes "illusory", or fails the test of certainty of intention (to transfer one's legal title to the property to a trustee). An internal normative analysis of the kind suggested here can help: if there is no moral standing to enforce trusts that aim to create orphan property, the courts ought to choose a more interventionist approach; a course of action that offers a more robust answer to the normative deficit of OSITs is justified even for the price of sacrificing some trusts that could have been saved under a more conservative approach.

The case of *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev*, which has already "caused considerable consternation among practitioners", illustrates this point well.[38] One of the claims made by the claimants was that certain trusts settled by the defendant were "illusory", since the de facto settlor was the protector of each of the trusts, with protector's powers that were unusually extensive (although not uniquely so) and included powers to veto the distribution of income or capital, investment of the trust funds, the appointment and removal of trustees and more.[39] Birss J. accepted the essential claim, while rejecting the usefulness of the term "illusory trust": "[i]n substance the deeds allow Mr Pugachev to retain his beneficial ownership of the assets."[40] The subject matter of the "trust" was to be added to the pool from which Pugachev's creditors could satisfy their claims.[41] If the argument of this paper is sound, it can lend moral support to the push towards a brave and decisive response to the challenges posed by OSITs of the kind we find in *Pugachev*.

[37] S. Agnew, "The Reservation of Powers by Settlors: Intention and Illusion" [2021] C.L.J. 18, 20–21; M. Bennett, "The Illusory Trust Doctrine: Formal or Substantive?" (2020) 51 Victoria University of Wellington Law Review 193, 194; P.W. Lee, "Form, Substance and Recharacterisation" in A. Robertson and J. Goudkamp (eds.), *Form and Substance in the Law of Obligations* (Oxford 2019), 90.

[38] J. Brightwell and L. Richardson, "*Mezhprom v Pugachev*: Bold New Approach or Illusory Development?" (2018) 24 Trusts & Trustees 398, 400; *JSC Mezhdunarodniy Promyshlenniy Bank v Pugachev* [2017] EWHC 2426 (Ch), 20 I.T.E.L.R. 905. When a similar point came up in a different context, the court refused to stretch the principle established there any further: see *The Law Society v Dua and Another* [2020] EWHC 3528 (Ch), [2021] W.T.L.R. 1469.

[39] *JSC Bank v Pugachev* [2017] EWHC 2426 (Ch), at [113]–[140] (Birss J.).

[40] Ibid., at [278].

[41] Commentators disagree about the legal basis of the decision: see e.g. Bennett, "Illusory Trust Doctrine", 142.

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2. In Parliament

In offshore jurisdictions, financial services providers are so powerful that they can often manoeuvre lawmakers to reshape the law so as to fit with their clients' wishes.[42] In response, speakers for local onshore practice often tout the ever-so-useful redeeming consideration "if you can't beat 'em, join 'em". Backed by pressure groups, expert witnesses, and some academics, onshore practitioners argue that the changes introduced in offshore jurisdictions are in fact valuable "modernising" reforms; and anyway, if we fail to implement similar changes to domestic law, clients will simply go off to where they get what they want – they will achieve their goals, but invest and pay professional fees abroad.[43]

That we must ensure that the law of trusts answers the needs of modern commercial life is beyond controversy. The English Law Commission's project on "Modernising Trust Law for a Global Britain", which sets its eyes on "[r]eforming outdated trust laws to enhance Britain's competitiveness", is therefore a welcome opportunity to take the law of trusts forward. The Law Commission recognises that "trusts are a significant source of business for the UK and many international corporations and individuals use English law and courts to govern their arrangements". It is sensibly suggested that we need to look into "various technical problems and limitations with our current trust law".[44] However, the foil against which the investigation is to be conducted rings an alarm bell: the Commission proposes to examine the moves to "modernise" trust law in Singapore and New Zealand in which "new trust and trust-like structures [have been introduced] to meet demand". This is quite worrying since, especially in Singapore, "modernisation" has included the admittance of trust structures that utilise dubious offshore practices – for example, it provides that a trust will not be invalid merely because the settlor reserved *all* the powers of investment and asset management.[45] The authors of reform proposals for Australia likewise warn that, unless the country wishes to be "handicapped from attracting wealthy settlors from civil law jurisdictions in the APAC region", it needs to introduce relaxations of traditional principles of trust law similar to those that we see in Hong Kong and Singapore.[46] The motivation behind the Law Commission's task, namely "ensur[ing] Britain's trust services are

[42] In the US, see e.g. Spivack, "Democracy and Trusts", 331.

[43] See e.g. D.A. Chaikin and E. Brown, "An Alternative Australian Trusts Act: Enhancing Australia's Capacity to Grow and Export Financial Services", available at https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.pc.gov.au%2F__data%2Fassets%2Fword_doc%2F0008%2F193427%2Fsubdr050-services-export.docx&wdOrigin=BROWSELINK (last accessed 21 January 2024); Smith, "Give the People What They Want?", 2172–74.

[44] "Modernising Trust Law for a Global Britain", available at https://www.lawcom.gov.uk/project/modernising-trust-law-for-a-global-britain/ (last accessed 21 January 2024).

[45] Trustees Act 1967 (Singapore), s. 90(5); Trustee Ordinance (Hong Kong) 2014, s. 41X(1); L. Ho, "'Breaking Bad': Settlors' Reserved Powers" in Nolan, Low and Wu (eds.), *Trusts and Modern Wealth Management*, 38.

[46] Chaikin and Brown, "Alternative Australian Trusts Act", 7.

competitive in the global market", can therefore be interpreted by interest groups as welcoming what Lionel Smith dubs "the onshoring of the offshore".[47]

The argument of this paper can assist in revealing why such FOMO is not a good enough reason to endorse offshore practices and the ethically bankrupt forms of property-holding they generate. Just as we are willing to reject potentially lucrative investments when they involve money laundering, the evasion of international sanctions, or indeed the proceeds of crime, we ought to shun income that will only flow here if we adopt rules that would lead to a morally degenerate trust law. The Law Commission ought to be clear about rejecting changes that allow and encourage OSITs, even if that means that income from professional fees is lost to competitors. As recent actions to tackle global tax evasion demonstrate, the way forward is a determined international cooperation to stem unpalatable offshore activity, not mud wrestling (in which you get covered in mud, and the pig enjoys itself).[48]

In the following sections, we will see how the trust is based on a duty of conscience and what effect that has on the moral standing of claimants to sue the trustees of OSITs. We can then circle back to the issue we raised in this section about the legitimacy of OSITs, and how lawmakers and the courts should respond to this legal phenomenon.

III. The Conscience of Trust Law

A. Bedrock

In important ways, the trust – widely considered the golden child of equity – no longer behaves like a typical equitable doctrine.[49] Many norms of trust law do not feature the characteristics we tend to associate with the law of equity, namely, flexibility, particularity and open-endedness.[50] Instead, we find an abundance of clear-cut, general and (often) technical rules that are very different from the morality-infused principles of, say, proprietary estoppel or undue influence.[51] I have explained elsewhere why in other more fundamental respects trust law is still faithful to its heritage as the brainchild of the courts of Chancery.[52] One of the most important ways

[47] Smith, "Give the People What They Want?", 2159. In Australia, see proposals in Chaikin and Brown, "Alternative Australian Trusts Act", 1.

[48] On the global tax agreement, see D. Bunn and S. Bray, "The Latest on the Global Tax Agreement", available at https://taxfoundation.org/blog/global-tax-agreement/ (last accessed 21 January 2024).

[49] F.W. Maitland famously regarded the development of the trust as "the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence": F.W. Maitland, *Equity: A Course of Lectures*, 2nd ed., rev. by J. Brunyate (Cambridge 1936), 29.

[50] L. Katz, "Conscience with a Filter: Comments on *Equity: Conscience Goes to Market*" (2020) 21 Jerusalem Review of Legal Studies 22, 22–24, footnote 6; P.B. Miller, "Conscience and Justice in Equity: Comments on *Equity: Conscience Goes to Market*" (2020) 21 Jerusalem Review of Legal Studies 37, 40–42.

[51] See e.g. *Guest v Guest* [2022] UKSC 27, [2022] 3 W.L.R. 911, at [4] (Lord Briggs).

[52] I. Samet, "On Trusts, Angels, Morality and Fusion: Reply to My Critics" (2020) 21 Jerusalem Review of Legal Studies 50, 50–53.

in which the trust is still very much a part of the equity family is the way in which it is founded on duties of conscience. Indeed, in the routine life of the trust, and in the greater part of trust litigation – which naturally revolves around the intricate rules that regulate the day-to-day business of managing trusts – the concept of conscience is not explicitly invoked. But conscience does come to the fore in decisive junctions in the *development* of the law of trust; on those rare, but critical, occasions when the role of the court goes beyond applying rules to facts, and judges must venture into the terrain of creative lawmaking, conscience emerges from behind the scenes to occupy centre stage. As is (and should be) the case with established doctrines, these moments are uncommon, but momentous.[53] Let us look briefly at three such junctions.

In *Burgess v Wheate* (1759),[54] which took 20 years to roll through the courts of Chancery, the judges had to decide whether the beneficial interest under a trust of land was to go to the Crown (through escheat) when the beneficiary died intestate and (as it was decided) heirless. The very unusual facts propelled the law of trusts to emerge "from the grip of the medieval land law system, [and] make its own way forward".[55] The old rules of medieval tenures, the court concluded, do not apply to the right of the beneficiaries, and the Crown therefore could not take by escheat. Being in possession, and there being no one to whom he owed an obligation of conscience, the trustee therefore had the strongest claim in equity and law to the land. The fundamental reason given for this surprising result was that "the trust is an institution based on the conscience of the trustee being affected" and, in the circumstances, it was not so engaged.[56]

In modern times, the case of *Westdeutsche Landesbank Girozentrale v Islington LBC*[57] is another turning point for the law of trusts: a novel question (whether compound interest – an equitable remedy – is due in the aftermath of a void transaction) which resulted from a retrospective decision that an action of the defendant was ultra vires. Lord Browne-Wilkinson justified his decision that no such interest is due by explaining that "(ii) Since the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected, he cannot be a trustee of the property if and so long as he is ignorant of the facts alleged to affect his conscience".[58] His Lordship's observation that the legal owner does not come under *any* obligation in equity – either proprietary or personal – unless her conscience is affected has been justifiably criticised.[59]

[53] B.N. Cardozo, *The Nature of the Judicial Process* (first published 1921, New York 2005), 16, 61–62.
[54] (1759) 1 Eden 177, 28 E.R. 652.
[55] P. Matthews, "*Burgess v Wheate* (1759)" in C. Mitchell and P. Mitchell (eds.), *Landmark Cases in Equity* (Oxford 2012), 115.
[56] Ibid., at 144.
[57] [1996] A.C. 669 (H.L.).
[58] Ibid., at 705 (Lord Browne-Wilkinson).
[59] E.g. R. Chambers, *Resulting Trusts* (Oxford 1997), 204–6.

But the criticism does not affect his claim that the *personal* duty of legal owners to hold their property for the benefit of someone else is dependent on unconscionability, namely on knowledge (constructive or actual) of the facts that establish such a duty. As Sinéad Agnew shows, the ultimate duty of express trustees – to account for the property – is rooted in conscience, today as in the early days of the trust.[60] The move away from a privity-based commitment towards a mixed proprietary/personal obligation did not change this essential connection between conscience and the trustee's duty.[61]

The more recent Supreme Court decision in *Akers and Others v Samba Financial Group*[62] further demonstrates this point. In this case, doubts about two important aspects of the trust – the effect of the trust property's *locus situs*, and the interface between the rules on bona fide purchasers of trust property and section 127 of the Insolvency Act 1986 – were resolved with direct reference to conscience. On the first point, the opinion of Lord Selborne L.C. in *Ewing v Orr Ewing*[63] was cited with approval:[64] "the courts of equity in England are, and have always been, courts of conscience … accustomed to compel the performance of [these obligations]" regardless of the owners' domicile.[65] On the Insolvency Act issue, the point of departure was the rule that, "[w]hen the asset is transferred to a third party, the question becomes whether the conscience of the transferee is affected".[66] Conscience plays out differently in response to the facts in each of these contexts. But the point of principle remains intact: when arguments on technical/formal legal norms do not yield a clear answer, the normative core of the trust is exposed; if a claim is based on the defendant's alleged duties as a trustee, the claimant necessarily relies on and invokes the defendant's duty of conscience.[67]

But what exactly do we mean when we say that the obligations of trustees are rooted in conscience? What in the concept of conscience makes it of such "immediate appeal to an equity lawyer"?[68] As I show elsewhere, the concept of conscience is not intended to introduce an element of subjectivity into courts' discretion; nor is it a mere nod to the history of Chancery as a court ran by clerics.[69] The element of "conscience" invites the court to engage in

[60] S. Agnew, "The Meaning and Significance of Conscience in Private Law" [2018] C.L.J. 479, 487.
[61] On this changing nature of the trust (and its predecessor, the "use"), see D. Foster, "Historical Conceptions of the Express Trust, c 1600–1900" in Degeling, Hudson and Samet (eds.), *Philosophical Foundations*.
[62] [2017] UKSC 6, [2017] A.C. 424.
[63] (1883) 9 App. Cas. 34 (H.L.).
[64] *Akers v Samba Financial Group* [2017] UKSC 6, at [24] (Lord Mance).
[65] *Ewing v Orr Ewing* (1883) 9 App. Cas. 34, 40 (H.L.) (Lord Selborne L.C.).
[66] *Akers v Samba Financial Group* [2017] UKSC 6, at [89] (Lord Sumption).
[67] See also *Byers and others v Saudi National Bank* [2023] UKSC 51, [2024] 2 W.L.R. 237, at [36], [40] (Lord Briggs).
[68] *Royal Brunei Airlines v Tan* [1995] 2 A.C. 378, 392 (P.C.) (Lord Nicholls).
[69] I. Samet, *Equity: Conscience Goes to Market* (Oxford 2018), ch. 1.3. For the opposite view, see e.g. P. Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 University of Western Australia Law Review 1, 18. The complaint about Equity's alleged subjective nature has a long and famous history going all the way back to Thomas Audley, who wrote in 1526 of "a law called 'conscience', which is always uncertain, and depends on the greater part on the 'arbytrement'

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moral judgment. But the modern category of conscionability shares with its medieval ancestor a commitment to an *objective* moral judgment that is accessible to the conscience of every reasonable person. According to this view, the legal category of conscience is not just borrowing a terminology from moral theory. Rather, in referring to conscience, equity incorporates an important element of moral discourse in order to communicate its message to the law's addressees and justify its authority.[70] Then, as today, "equity is the creature and the enforcer of good conscience, of which the unconscionable businessman should, like anyone else, tread in fear, in particular when entrusted with someone else's property or affairs as a fiduciary".[71]

But in contrast with other familiar appeals to moral concepts in the law – like respect, freedom, promise or duress – when "conscience" is invoked, it does not serve as a proxy for a set of moral principles or duties. As Agnew explains, the language of conscience "cannot help us to identify the principles or values which underpin an equitable obligation … [nor] give detailed content to the relevant obligation".[72] In that sense, it is empty of substantive content. But that does not mean that it is bereft of explanatory power. On the contrary, our conscience helps us to come to *know* the morally right course of action, and to be *motivated* to act accordingly. The concept of conscience is therefore a versatile tool that can help us to understand what justifies equity's intervention in the parties' common law rights, and when it should do so.

The moral duties that inform the norms of equity are of the kind to which a clear answer is most likely to be available and accessible.[73] Unlike the case of contested issues in ethics, such as assisted dying and restrictions on freedom of speech, people are likely to converge on the solution to the moral quandaries that equity invites us to engage with even in multicultural societies: should I keep an informal promise or representation? Would Φing amount to an exploitation of weakness? Should a dependable defendant have been offered independent advice?[74] The law of equity employs the concept of conscience in order to signal to people who contemplate a legal transaction that involves this kind of

of the judge": J.A. Guy (ed.), *Christopher St. German on Chancery and Statute* (London 1985), 79–80; see also D.R. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Surrey 2010), 69.

[70] Samet, *Equity*, 62–64.

[71] M. Briggs, "Equity in Business" (Lincoln's Inn 2018), [54], available at https://www.supremecourt.uk/docs/speech-181108.pdf (last accessed 21 January 2024); *Guest v Guest* [2022] UKSC 27, at [4] (Lord Briggs).

[72] Agnew, "Meaning and Significance of Conscience", 488.

[73] Samet, *Equity*, 207–10.

[74] These are the questions that typically arise in, respectively: proprietary estoppel (*Thorner v Major* [2009] UKHL 18, [2009] 1 W.L.R. 776); unconscionable bargain (*Alec Lobb (Garages) Ltd. v Total Oil (GB) Ltd.* [1985] 1 W.L.R. 173 (C.A.); *Commercial Bank of Australia Ltd. v Amadio* [1983] HCA 14, (1983) 151 C.L.R. 447); and undue influence (*Royal Bank of Scotland Plc v Etridge* (No. 2) [2001] UKHL 44, [2002] 2 A.C. 773; *Johnson v Buttress* [1936] HCA 41, (1936) 56 C.L.R. 113).

question that they must consult their conscience before making a move; even in market transactions, a cold cost-benefit calculation is not enough. In that way, as Lord Sales explains extrajudicially, equity "serves to narrow the gap between law and morality and thus to legitimise the law and secure loyalty to it".[75]

Given the kind of ethical questions which are of interest to equity, the moral duty should have been clear to the defendant, and the law can legitimately expect that she acts on it.[76] The concept of conscience thus has a dual role to play: in the transaction stage, it communicates to players in the market that the law expects them to follow the *morally* right course of action; in the post-claim stage, it establishes the *authority* of the courts of equity over defendants who are responsible for their actions when (and only when) they possessed all the knowledge and skills that are necessary for recognising that the actions they took are morally wrong.

Such understanding of the element of conscience in trusts jurisprudence can help us to tackle the threat posed by OSITs despite the fact that these duties of conscience are owed only to the beneficiary. In summary, a trust that is designed to exclude legitimate creditors from property which de facto belongs to the debtor is an instrument of glaring injustice. Stakeholders who nevertheless hope to benefit from the orphan property it creates, and have any reservations about the way in which the trust fund is managed (or just want information about it), can take the trustee to court. In the next section, I argue that the unconscionability that lies at the heart of OSITs can undermine their *moral* right to sue the trustee, and should therefore have adverse effects on our willingness to grant them legal standing to do so. But in order to see that, we need to shift our attention from the *trustee's* duties of conscience towards the *beneficiary*: and, more specifically, to the moral standing of beneficiaries (and other stakeholders) to enforce these duties.

B. Compasses, Beams and Standing to Blame

In this section, I wish to argue that claimants do not have the moral authority to make a claim on the basis of trust obligations if the arrangement which created the trust is itself afflicted with unconscionability. To support this argument, I start with a detour into the morality of blaming which will take us to moral standing to sue in law and in equity.

[75] P. Sales, "Proprietary Estoppel: Great Expectations and Detrimental Reliance" (Lincoln's Inn 2022), [35], available at https://www.supremecourt.uk/docs/Proprietary%20Estoppel%20-%20Oxford%20Property%20Conference%20-%20Lord%20Sales.pdf (last accessed 21 January 2024).

[76] Where the answer is not crystal clear, the law can, and does, expect us to err on the side of caution. But if the situation is genuinely perplexing, equity should not find against the defendant as their actions can be the result of a sincere mistake. *Bank of Credit and Commerce International (Overseas) Ltd. v Akindele* [2001] Ch. 437 (C.A.) is an example of a perhaps overcautious application of this policy.

Max Scheler was a prominent German philosopher in the early twentieth century, a founding member of the school of phenomenology and a public intellectual. As a convert to the Catholic religion, this highly charismatic orator and teacher did the church a great service as he brought many of his followers under the wings of the faith. But to his great dismay, the local bishop found out that Scheler intends (yet again) to divorce his wife. When he came to call, the bishop rebuked him for the hiatus between the values he preached and the life he led. Scheler's quick response was remarkable: "I am the compass not the north." For him, assertions about the right course of action draw their legitimacy from the truth value of their content – like instructions from a reliable GPS which you ought to heed regardless of whose voice happens to read them out. The moral virtue of the speaker is, or at least should be, irrelevant for determining the value and authority of directions on how to arrive at your destination – on the road or in life more generally. Sure enough, if the audience disregards the speaker due to a perceived lack of virtue, the assertion will not produce the intended result. But assertions can be rejected for many irrelevant reasons, like the speaker's pitch or accent; a dismissal on the basis of the speaker's virtue does not reflect a problem with the moral authority of *the assertion*, but rather a misconception on the part of the audience. This all makes sense, especially in the moral realist framework I adopt here (in which the truth value of moral assertions is independent of circumstances).

And yet, many of us feel unease when we read Scheler's response. Indeed, you need not be a triangle to teach geometry, but many of us would feel that the viability of instructions in matters of morality is somehow dependent on the *speaker*, not only on the truth value of the assertion. The question "who can say what to whom?" has now become a fairly popular topic in moral philosophy.[77] After millennia-long discussions of the question "who can be *blamed*?", philosophers started to ask the complementary question, namely: "[i]f the recipient of blame must meet certain criteria to be blameworthy, does not the blamer have to meet certain criteria to be blamer-worthy?"[78] The act of blaming may have serious consequences for the accused that require careful thought about who should be allowed to engage in it.[79] It therefore makes sense

[77] Surely also thanks to the attention called to it by G.A. Cohen, "Casting the First Stone: Who Can, and Who Can't, Condemn the Terrorists?" (2006) 58 Royal Institute of Philosophy Supplement 113: see, in particular, his complaint in footnote 9.

[78] M. Friedman, "How to Blame People Responsibly" (2013) 47 Journal of Value Inquiry 271, 272.

[79] As Nicola Lacey and Hanna Pickard explain, "[blaming] can include, for instance, hatred, anger, resentment, indignation, disgust, disapproval, contempt and scorn, and can be manifest in any number of ways, including seeking retaliation, retribution, and vengeance": N. Lacey and H. Pickard, "From the Consulting Room to the Court Room? Taking the Clinical Model of Responsibility Without Blame into the Legal Realm" (2013) 33 O.J.L.S. 1, 3. John Gardner qualifies their insight by pointing out that "[t]he problem … is not so much that we live in a 'blame culture' but that we live in a 'call-out culture' where accusation, reproach, censure, and punishment run wildly out of control

that not just anyone who notices a wrong can make accusation against the wrongdoer, or at least not with equal credibility. Beyond the obvious epistemic conditions, namely that the accuser has her facts right, there are conditions that are attached to the psychological or moral makeup of the accuser.

One such condition underlies the proverb, "the pot should not call the kettle black", which has parallels in many cultures.[80] Thus, as G.A. Cohen explains, an employee who has been reproached for minor pilfering by a well-heeled boss who routinely evades paying his taxes can legitimately be left unimpressed.[81] The employee does not dispute the truth value of the judgment made by her superior, "[s]he challenges, instead, her critic's right to *sit* in judgment, and to *pass* judgment".[82] It is now widely agreed by philosophers who write on the subject that the right to blame is subject to a "non-hypocrisy" condition.[83] But the precise contours of the condition are hard to draw, and the reasoning behind it is not readily explicable.

Starting from the contours of the non-hypocrisy condition, it is clear that Jesus's recommendation "[l]et he who is without sin cast the first stone" sets the bar too high.[84] If any trifling immorality would stand in its way, the right to blame would be de facto unexercisable. Just how serious the breach of moral norms must be if it is to disqualify an act of blaming is hard to determine *ex ante*. But for my purposes here, it is enough if the reader concedes that a fairly serious transgression would do the job. More difficult is the question of the relation between the moral lapse, which is the subject of the blame, and the stain on the conscience of the accuser. If the reproach in Matthew 7:4, "how wilt thou say to thy brother, let me cast out the mote out of thine eye; and lo, the beam is in thine own eye?", is interpreted as requiring that the accuser's transgression must be more serious than that of the accused, the condition would be too narrow. A different kind of relationship between the actions of accused and accuser is suggested by Gerald Dworkin: it is "crucial ... that the fault one is criticizing is the very same fault one has".[85] This constraint on the non-hypocrisy condition, as Cohen points out, is very difficult to implement, since it very much depends on the level of generality at

and can no longer be managed back into proportion by mediating institutions such as the criminal courts". He therefore calls for greater care about individuals' acts of finger-pointing: J. Gardner, "Why Blame?" in I. Solanke (ed.), *On Crime, Society, and Responsibility in the Work of Nicola Lacey* (Oxford 2021), 92.

[80] Like the ancient Persian proverb about the bramble saying to the pomegranate tree, "Wherefore the multitude of thy thorns to him that toucheth thy fruit?", or the Latin American proverb, "The donkey talking about ears".

[81] G.A. Cohen, "Incentives, Inequality, and Community" in G.B. Peterson (ed.), *The Tanner Lectures on Human Values*, vol. 13 (Salt Lake City 1992), 273, 275.

[82] Cohen, "Casting the First Stone", 119, emphases in original.

[83] P. Todd, "A Unified Account of the Moral Standing to Blame" (2019) 53 Noûs 347, 347.

[84] G.A. Cohen, *Finding Oneself in the Other*, ed. by M. Otsuka (Princeton 2013), ch. 7, section 1.

[85] G. Dworkin, "Morally Speaking" in E. Ullmann-Margalit (ed.), *Reasoning Practically* (Oxford 2000), 185.

which the respective transgressions are described:[86] Would sexual harassment and raiding the petty cash box be in the same category if taking place in the office? Are littering and picking roses in the park in the same category of (minor) offences against the aesthetics of public spaces? I say more on the similarity constraint below.

Moving on to the question of justification, we need to explain why blaming acts which expose the accuser as mean, stingy, petty or arrogant do not thereby lose their authority qua accusations, whereas hypocrisy is enough to undermine the accuser's right of standing.[87] Clearly, it is not merely the lack of virtue that stands in the way of the blaming act. It is also not only a matter of reliability. The reliability of the accuser is of course essential to the legitimacy of blaming. We allow, even encourage, acts of blaming, in spite of the pain they cause, in order to secure the positive results we expect them to have; but these will not follow if the blame is misguided. It is therefore important to ensure that only those who are able to reliably detect blameworthy transgressions will engage in finger-pointing. Can a person who is guilty of a vice or a transgression be relied upon to detect it in others? Not necessarily: one way in which conscience-silencing mechanisms work is by obscuring the immoral nature of one's chosen course of action.[88] And since a mechanism of this type tends to take over the psyche of wrongdoers, their ability to detect the immoral nature of their behaviour may be greatly reduced. In other cases, however, we may be highly sensitive precisely to the faults that we ourselves are guilty of.[89] Powerful psychological mechanisms of projection, in which unwanted emotions or traits are unconsciously attributed to other people, can explain this common phenomenon. As a result, it is impossible to predict what epistemic effect being guilty of a similar sin would have on the agent. Lack of reliability in the matter, therefore, cannot be the basis for the unique power of hypocrisy to undo the right to blame.

As of late, writers on the subject seem to converge on an account that explains the non-hypocrisy condition with reference to reciprocity in moral communities. R. Jay Wallace offers an attractive version of this argument. A person who is guilty of a transgression or a vice, he says, is still entitled to *feel* resentment or indignation towards other people when he recognises similar violations of the moral good. He can, of course, also be angry with himself for not managing to rise to his own standards. But what he cannot legitimately do is apply forms of *blame* discriminately to some agents and not others – including to others and not to himself. Blame, Wallace explains, "tacitly generates a commitment; the moral objection to hypocritical blame

[86] Cohen, *Finding Oneself*, section 2.
[87] M. Bell, "The Standing to Blame: A Critique" in D.J. Coates and N.A. Tognazzini (eds.), *Blame: Its Nature and Norms* (New York 2012), 275.
[88] See e.g. M.K. Green, "Kant and Moral Self-Deception" (1992) 83 Kant-Studien 149.
[89] Dworkin, "Morally Speaking", 186.

can accordingly be understood to be that hypocrites have failed to live up to the commitment that they have undertaken through the attitudes that constitute their blame".[90]

Moral standing must be distributed across the community on an equal basis as it is an expression of our shared humanity. One cannot therefore be willing to grant oneself a moral standing about *X* and, at the same time, deny it to other members of the community, as this would undermine a condition which is "fundamental to moral thought".[91] This insight can also be put in terms of self-contradiction: the hypocrite, as Kyle G. Fritz and Daniel J. Miller explain, "(implicitly) rejects the impartiality of morality and, consequently, the equality of persons with respect to blaming for violations of *N*, which is what grounds the right to blame for violations of *N* in the first place".[92] As a member of a moral community of equals, the hypocrite cannot "culpably fail[] to observe, criticize, and scrutinize his own moral faults *while demanding that others do*".[93]

This insight also sheds light on one question we left open, namely the degree of similarity between the transgressions beyond which the would-be blamer is barred from acting on his indignation. We can now see that too much emphasis on "having done similar things" is misplaced, since what matters to the legitimacy of blaming is what the hypocrisy *points* to, namely non-commitment to relevant shared values.[94] We can combine this argument with the individuation problem we noted and say the following: the lower the level of generality we need to employ in order to describe the offences of blamer and blamed as similar, the greater the non-commitment to shared values that a hypocritical blaming displays. Thus, when the offences are relatively alike, even if not identical, we see the hypocrite's readiness to blame as a more serious rejection of the equality between herself and the (other) transgressor. If so, we have a sliding scale of "authority to blame": the closer the offences, the deeper the rejection of reciprocity value it expresses, and the right of standing to accuse diminishes in tandem.

C. From Blaming to Suing Trustees

This paper is about the right to make a claim in a court of law, which is, of course, different from blaming another person for violating a moral norm.

[90] R.J. Wallace, "Hypocrisy, Moral Address, and the Equal Standing of Persons" (2010) 38 Philosophy & Public Affairs 307, 326–27.
[91] Ibid., at 328. R.A. Duff, "Blame, Moral Standing and the Legitimacy of the Criminal Trial" (2010) 23 Ratio 123, 128.
[92] K.G. Fritz and D.J. Miller, "The Unique Badness of Hypocritical Blame" (2019) 6 Ergo: An Open Access Journal of Philosophy 545, 547.
[93] C. Roadevin, "Hypocritical Blame, Fairness, and Standing" (2018) 49 Metaphilosophy 137, 148, emphasis in original.
[94] Todd, "Unified Account", 362.

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But the practices are closely related, and the right to accuse or make a claim in court is intertwined with the right to blame in interesting ways. An overlap between moral and legal rights seems most intuitive in criminal law. As Anthony Duff explains, a criminal trial "can be seen as a formal, legal analogue of the informal, moral process of calling another to answer for an alleged wrong, and blaming her for it if she cannot offer a suitably exculpatory answer".[95] The state engages in the ultimate act of blaming when it accuses the defendant of committing a criminal offence.[96] The moral standing of the state to sue criminals is therefore subject to the general conditions on the right to blame, including the non-hypocrisy condition.[97]

However, given the nature of the state, its standing to blame can hardly ever be undermined by its involvement in similar-looking wrongdoing.[98] Thus, if a citizen stands trial for financial sleaze, highlighting the way in which the Minister of Health threw Covid contracts at his friends from the pub will not be a very good defence. This is because the right response to these grave accusations is to see the Minister as acting ultra vires and thus to detach his actions from the state. Similarly misguided is a hypocrisy-based complaint about the content of legal rules, such as that they allow the consumption of alcohol and therefore cannot authorise actions against sellers of marijuana (a much less harmful substance). At least in a democracy, even strongly held moral reservations about legal rules ought to be pursued through political means like elections and civil protest; they cannot normally affect legal processes in which the state functions as the guardian of public peace.

These arguments against the activation of the hypocrisy bar will only succeed where the state (acting as a public entity) stands to blame. When we get to private law, the parties' actions can indeed be assessed against each other in a hypocrisy metric. But when moving from prosecuting for a criminal offence to filing suits in private law, we lose the clarity about the nature of the action as "blaming". For, whereas if the state accuses *X* of committing a criminal offence, it is widely believed that a moral blame game is taking place, it is highly controversial whether claims in private law imply moral transgression on the part of the defendant.

[95] Duff, "Blame, Moral Standing", 129.

[96] Gardner, "Why Blame?". But see the work of Nicola Lacey and Hanna Pickard, who reject the picture of criminal law as essentially blaming and punishing in favour of viewing it as an institution whose "point is forward-looking: to hold responsible and to account, as a way of regulating behaviour, reducing harm, and upholding approved legal standards protecting the public against harm". As such, the criminal law "cannot lose its standing to blame – *for its function is not to blame to begin with*": N. Lacey and H. Pickard, "Why Standing to Blame May Be Lost but Authority to Hold Accountable Retained: Criminal Law as a Regulative Public Institution" (2021) 104 The Monist 265, 271, 273.

[97] V. Tadros, "Poverty and Criminal Responsibility" (2009) 43 Journal of Value Inquiry 391; G. Watson, "Standing in Judgment" in D.J. Coates and N.A. Tognazzini (eds.), *Blame: Its Nature and Norms* (New York 2012).

[98] Duff, "Blame, Moral Standing", 133.

Some excellent scholarly work aims to show that claims in tort and for breach of contract are indeed based on an alleged wrongdoing.[99] But the question whether this is indeed so remains contentious.[100] It is a fundamental tenet of legal economics, for example, that the state is justified in intervening in a contractual relationship if, and only if, this is necessary to correct efficiency-reducing market failures. Wrongdoing (like breaking one's promise) may play an incidental role in explaining and justifying the various claims one can make in courts of law about contractual relationships, but it is far from a necessary element of any legal rules in this area: the law is geared to ensure the efficiency of contractual relationships, not to address wrongdoing.[101] This controversy is deep and interesting, but it goes way beyond the boundaries of this paper. I explain below why, in my view, it has much more limited effect (if any) on the move suggested here in the context of trusts.

In the previous section, I argued that claims based in trust law, even those which invoke the more technical aspects of it, take root from the duty of conscience to hold the trust property in accordance with the terms of the trust. And this reference to conscience invokes the moral norms that bind trustees. When beneficiaries (or anyone with legal standing) invoke the trust relationship to make a claim against trustees, they thereby rely on their duty to abide by their conscience and perform their duties. As we saw earlier, while the courts of equity do not concern themselves anymore with the afterlife of trustees, the state still draws its moral authority to enforce the obligations of trusteeship from the commitment they freely took upon themselves to abide by the terms of trust and hold the property for the benefit of other people.[102] Even conscience sceptics – who doubt the wisdom of allowing it to become a conduit for extralegal reasoning in equity doctrines – can still be on board with the idea that claims against trustees point to a *moral wrong* of disregarding the call of conscience (to hold a property one legally owns for the

[99] In tort, see e.g. J.C.P. Goldberg and B.C. Zipursky, "Torts as Wrongs" (2010) 88 Texas Law Review 917; J. Gardner, *Torts and Other Wrongs* (Oxford 2019); A. Ripstein, *Private Wrongs* (Cambridge, MA 2016). In contract, see C. Fried, *Contract as Promise: A Theory of Contractual Obligation*, 2nd ed. (Oxford 2015). Though it is not necessarily the case that civil remedies are aimed at correcting such wrongs, see S.A. Smith, *Rights, Wrongs, and Injustices: The Structure of Remedial Law*, 1st ed. (Oxford 2019).

[100] Rebecca Stone suggests, for example, that justification for claims in private law is not rooted in the defendant's wrongdoing, but rather in the plaintiff's moral permission to enforce her rights under conditions of epistemic uncertainty about justice: R. Stone, "Private Liability Without Wrongdoing" (2023) 73 University of Toronto Law Journal 53.

[101] See e.g. R.E. Scott, "A Joint Maximization Theory of Contract and Regulation" in H. Dagan and B.C. Zipursky (eds.), *Research Handbook on Private Law Theory* (Cheltenham 2020). In tort, see discussion and sources in Y. Kaplan, "Economic Theory of Tort Law" in Dagan and Zipursky (eds.), *Research Handbook*.

[102] See e.g. T. Etherton, "Equity and Conscience" (2017), available at https://www.judiciary.uk/wp-content/uploads/2017/10/sir-terence-etherton-mr-eldon-lecture-20171030.pdf (last accessed 21 January 2024); G. Virgo, "Whose Conscience? Unconscionability in the Common Law of Obligations" in A. Robertson and M. Tilbury (eds.), *Divergences in Private Law* (Oxford 2016); D.R. Klinck, "The Unexamined 'Conscience' of Contemporary Canadian Equity" (2001) 46 McGill Law Journal 571.

benefit of another). As we saw, the notion of conscience helps us to locate the root of moral responsibility in the trustee's free choice to either ignore the verdict of his conscience on a course of action he contemplates, or to wilfully naturalise the voice of conscience in the context of his trusteeship.

It is important to note, however, that claims against trustees do *not* necessarily include an argument that they engaged in wrongdoing. As Charles Mitchell shows, in claims that are based on the duty to account, the beneficiary invokes the primary duty of trustees to manage the trust property according to the trust terms and account for their actions to the beneficiary. As such, the claimant need not argue for any wrongdoing on the part of the trustee.[103] In that respect, claims which are based on the duty to account are materially different from claims for breach of trust in which the *secondary* duty to pay compensation for breach is relied upon. On its face, the most basic claim against trustees therefore does not involve any act of blaming. But even in claims for a breach of trust, the claimant need not necessarily argue that any wrongdoing took place. This is because the trustee's responsibility to follow the trust obligation is strict. If the trustee's state of mind when committing the breach does not matter, that arguably cuts off any necessary connection between *legal* accountability for a breach of trust and *moral* responsibility for it. Making a claim against trustees need not, and indeed many times does not, involve blaming them for wrongdoing. Nevertheless, I wish to argue that the non-hypocrisy condition for blaming applies to claims against trustees.

As noted earlier, every claim that is based on a trustee's duty in effect says to him, "you must abide by your duty of conscience to provide information/ restore the trust account to its pre-unauthorised-investment state/appoint property to me now" etc. Even if the claim does not directly accuse the trustee of past wrongdoing, it insinuates that a trustee who does not comply with the request is wrong in doing so *now* as he repudiates a moral obligation to which he is subject. An act of blame, or at least an attempt to show the trustee the morally right way to act (e.g. put the trust's account in order), therefore underlies *every lawsuit* against trustees, regardless of the question whether wrongdoing needs to be proven. If so, people who expect to benefit from an OSIT do not have the moral standing to blame the trustees for behaving in an unconscionable manner; since they seek to benefit from a patently unjust form of property-holding that is created by these trusts, they lose the moral standing to make conscience-based claims for mismanaging property.

In that respect, claims in trust law are different from claims in contract or tort. With regard to the latter, we saw that there is a serious challenge to the argument that they subsist on moral wrongdoing. Advocates of a strong link

[103] C. Mitchell, "Equitable Rights and Wrongs" (2006) 59 Current Legal Problems 267, 380–82.

between legal and moral responsibility in contract and tort need to show that the connection between the relevant moral wrongdoing and the legal cause of action runs deeper than a superficial resemblance. Trust lawyers have a much easier job in that respect since the obligation of trustees is widely acknowledged to be founded upon a requirement of conscionability that lies at the heart of trust law. It is therefore much more difficult to deny that trustees' legal obligations are rooted in their moral duties. Indeed, analyses of the trust from a law and economics perspective – whether they see it as a type of contract with many default rules or highlight its proprietary nature – tend to ignore the role of conscience in trust law.[104] Perhaps due to this inability to account for a central feature of the trust, the law and economics perspective on trusts – in sharp contrast with other areas of private law – remains fairly marginal.

It is therefore safe to say that, in suing a trustee, the claimant states her expectation that the trustee fulfils his duty of conscience to abide by the trust terms (as his conscience called, or should have called, on him to do). Indeed, trustees are not typically under any moral duty to abide by the terms of an arrangement like the OSIT that is intended to create injustice (even if the trustee took on the commitment to do so freely, in the full knowledge that this was the case).[105] That does not mean, of course, that the trustee has the right to enjoy the property, manage or appoint from it to others as she sees fit. But the point I am making here is about the claimant's *standing* to make a conscience-based claim against the trustee of an OSIT.

Who should be affected by this loss of moral standing? The legal standing to sue a trustee for failing to abide by the requirements of the law or the terms of the trust is closely linked to the beneficiary principle (namely, anyone who stands to benefit from a trust can ask to enforce it).[106] However, as the Supreme Court makes abundantly clear: "[t]he right to seek the court's intervention does not depend on entitlement to a fixed and transmissible beneficial interest. The object of a discretion (including a mere power) may also be entitled to protection from a court of equity."[107] Following a careful analysis of recent case law, Richard Nolan concludes that objects of a fiduciary dispositive

[104] Thus, neither John H. Langbein nor Henry Hansmann and Ugo Mattei even mention the concept of conscience in their discussions: see J.H. Langbein, "The Contractarian Basis of the Law of Trusts" (1995) 105 Yale Law Journal 625; H. Hansmann and U. Mattei, "The Functions of Trust Law: A Comparative Legal and Economic Analysis" (1998) 73 New York University Law Review 434. The same applies for the book-length defence of the proprietary position in M.W. Lau, *The Economic Structure of Trusts: Towards a Property-Based Approach* (Oxford 2011). Robert H. Sitkoff, who suggests that we reconceptualise trust law as part of "organisational law", does not devote any attention to conscience categories either: R.H. Sitkoff, "An Agency Costs Theory of Trust Law" (2004) 89 Cornell Law Review 621.

[105] J. Raz, "Promises and Obligations" in P.M.S. Hacker and J. Raz (eds.), *Law, Morality, and Society: Essays in Honour of H.L.A. Hart* (Oxford 1977), 212; see also S.V. Shiffrin, "Immoral, Conflicting, and Redundant Promises" in R.J. Wallace, R. Kumar and S. Freeman (eds.), *Reasons and Recognition: Essays on the Philosophy of T.M. Scanlon* (Oxford 2011).

[106] *Morice v Bishop of Durham* (1804) 9 Ves. Jr. 399, 404–5 (32 E.R. 656).

[107] *Schmidt v Rosewood Trust Ltd.* [2003] UKPC 26, [2003] 2 A.C. 709, at [51] (Lord Walker).

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power have standing to invoke the jurisdiction of the court to remedy a breach of trust.[108] Thus, everyone who can potentially benefit from an arrangement that is designed to create orphan property – be they "ghost" or proper beneficiaries – has a legal standing to bring claims against a trustee when they believe that he has not fulfilled his duties properly. The question whether they have a *moral* standing to do so, and the negative answer that question attracts, is therefore relevant to all of them.

It is important to emphasise that the unconscionability in which these potential claimants are embroiled is their wish to gain an advantage from a manifestly unjust private control over property. The fact that they did not instigate the arrangement does not matter for the sake of the moral standing to enforce it. Their position is akin to that of heirs who seek to inherit a fortune that was made by iniquitous means; no one has a *moral* standing to ask for an unjust private control over resources to persist, regardless of the question whether they are responsible for the way in which it was attained to start with. The fact that the law routinely allows such inheritance does not matter at all for this normative fact. It may well be the case that seeking to create orphan property is but one purpose of a bigger complex arrangement. In such a case, a careful work of fact-finding is required in order to separate the OSIT element – for which there is no moral standing to sue – from other elements that do give rise to a right (moral and legal) to pursue the due administration of the trust.

IV. Concluding Remarks

I conclude that, since claims against trustees imply a statement about their moral duties, the non-hypocrisy condition applies so as to bar the *moral* standing of claimants to sue trustees of OSITs (for information, account, compensation, etc.). Claimants on the basis of such trusts cannot say to the trustee: "I am showing you where your conscience should lead when making decisions about property management, but please don't expect me to follow *my* conscience with regard to handling my property rights." Since both accused and accuser are guilty of sufficiently similar wrongdoings, namely violations of moral norms that apply to property, the non-hypocrisy condition undermines the claimant's moral standing to blame the trustee for his inequities.

If the courts take this argument seriously, they should feel emboldened to develop legal means for tackling OSITs. For example, they should be confident to rule out trusts for being illusory, apply the beneficiary principle with rigour, and not hesitate to decide that owners did not

[108] R. Nolan, "Invoking the Administrative Jurisdiction: The Enforcement of Modern Trust Structures" in P.S. Davies and J. Penner (eds.), *Equity, Trusts and Commerce* (Oxford 2017), 160–66. However, this does not stretch to protectors or objects of purely personal power.

divest themselves fully of the property even in borderline cases. They should feel that this is the right thing to do even if the price is the occasional invalidation of a trust that could have survived under a more forgiving view of the conceptually necessary components of trusts. Knowing that allowing OSITs to pass the scrutiny of the court will open a fissure between the legal right to make a claim and the moral standing to do so should make it easier for the courts to clamp down on such instruments for injustice, even when they can be interpreted as fulfilling the formal requirements of a trust.

If the courts do so consistently, settlors and their advisers will pay attention. They will think twice about whether to settle property on a trust that is so structured as to make the property unavailable to the creditors of those who benefit from it. Indeed, it may be the case that a trustee or a settlor who were themselves implicated in the wrongful attempt to constitute an OSIT will profit from the court's refusal to enforce the arrangement. As is the case with the illegality/clean hands bar to claims in private law, the court will need to take this possible injustice into account when deciding how to address individual cases.[109]

Once the it is firmly associated with shady dealings, tax avoidance, and the evasion of responsibility, friends of the trust will find it harder and harder to defend its moral credibility. Perhaps we have not missed the train yet. Urgent action to preserve what is left of the trust's reputation as a socially beneficial legal device is called for. OSITs that enable settlors to settle property in a way that allows people to benefit from it while denying their creditors the right to avail themselves of it should be high on the agenda. For the injustice it can lead to is clear to all. In this paper, I offer a normative analysis of the relationship between the players in such trusts, with the aim of showing that potential claimants do not have a moral right of standing to sue the trustee.

This move is made possible by the unique way in which equity places the category of conscience at the heart of the trustee's obligations. That an appeal to conscience is effectively made whenever trustees are sued means that the condition of non-hypocrisy applies to the moral standing to make a claim against them. And since using an OSIT to create an orphan property is morally wrong, the non-hypocrisy condition denies those who benefit from it the moral standing to make claims against the trustee. Courts who consider whether and how to develop doctrines and rules that are designed to tackle the legitimacy challenge of OSITs should take heart from this conclusion. For a system in which legal and moral rights to sue converge is better for that. Legislators who are pressurised to introduce practices and rules from offshore jurisdictions which would facilitate the settling of OSITs should therefore resist this

[109] *Patel v Mirza* [2016] UKSC 42, [2017] A.C. 467, at [108], [118] (Lord Toulson); Samet, *Equity*, 158–63.

pressure. The potential economic advantages to some sections of the economy from importing offshore innovations onshore would be significant. But legislators, and the bodies that advise them, need to know what we would sacrifice as a society if we gave in to the temptation to a "modernisation" project that includes permission to settle property on OSITs.