On Trust and Transubstantiation: Mitigating the Excesses of Ownership

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INTRODUCTION

The legal institution of trust gives rise to two basic sets of question. The first set concerns the respective rights held by the trustee and the beneficiary with respect to the trust property—do these rights feature a structure characteristic of property, contract, or something in between. The second concerns the normative relationship between the trustee and the beneficiary themselves—what explains the existence and content of the obligations owed by the trustee to the beneficiary, especially the fiduciary duty of loyalty, according to which the trustee is expected to act in the sole, rather than merely the best, interest of the beneficiary. A successful account, moreover, must be able not only to address both sets of question, taken separately, but rather to explain the nature of the connection between them.

I devote these pages to the second basic question.¹ My argument develops two main clusters of claim. Negatively, I seek to show that accounts of the trustee’s fiduciary obligations grounded in and around the settlor’s intention; the virtue of loyalty; or contract fall short of capturing the idea of the trust (whatever it is). For instance, with respect to the argument from contract, I argue that the trustee/beneficiary characteristic relationship features a special notion of beneficiary passivity that, to an important extent, is deeply incompatible with the formal structure of the kind of contract relationship that is often attributed to the trust’s fiduciary relationship.

Affirmatively, I argue that the grounds and content of the trustee’s fiduciary obligations are, at least in part, the upshot of the special difficulty that the trust institution picks out, namely, what I shall call the excesses of ownership. On this argument, the institution of trust arises in connection with the difficulty of acquiring the standing of

¹ I take the former question (concerning the nature of the rights and the duties that arise under the trust form) elsewhere. See Avihay Dorfman, Trust: Property in Letter, DisProperty in Spirit (unpublished manuscript).

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ownership, which is a status authority over anyone else with respect to an external object. A Trustee makes possible—that is, creates the legal space for—a derivative status of ownership: That which allows patients (by choice or by chance) to enjoy access to the institution of ownership but, at the same time, to do without the agential powers characteristic of the standing that ownership involves. The duty of loyalty, I shall argue, arises against this backdrop, tracking the role of the trustee in possessing, and sometimes even constituting, the personhood of the beneficiary and thus acting as his alter ego, as it were, in relation to the trust property. In that, the duty of loyalty is consequential to the transubstantiation of the trustee into the bearer of what I shall call the ownership personality of the beneficiary.

I shall use the metaphor of ‘transubstantiation’ in order to distinguish the proposed account from accounts of trust that cast the trusting relationship in terms of ‘substitution.’ The notion of substitution implies a transfer of the legal capacity or personality from the beneficiary (or settlor) to the trustee so that the latter exercises legal powers that are, in fact, derived from the former. By invoking the metaphor of transubstantiation, by contrast, I seek to emphasize that the trust can, and should, go beyond mere substitution. That is, the distinctiveness of the trust arrangement has to do with the possibility that the trustee may possess her legal powers even when the beneficiary has never held such power to begin with (and even when no settlor is involved in bringing about the trust). As I shall argue in due course, it is the legal creation of the trust form that establishes a normative framework within which the trustee can assert the power to author acts and decisions with respect to the trust property in the name of the beneficiary. Such assertion of power need not turn on its being derived (in the right sense) from the beneficiary (or the settlor).

On the account that I shall develop, the distinctive feature of the trust form is that of placing a person, the trustee, with the standing to provide ownership, rather than merely management, services to another, the beneficiary, including in cases where the latter cannot or would not possess the capacity for ownership in the first place. This is true, I argue, both conceptually and normatively. Conceptually, there can be—and, in fact, there are—any number of legal institutions that can solve problems that the trust form is typically set to address, such as the regulation of intergenerational wealth. The trust form may be a particularly successful solution, but so do others. It is not surprising, therefore, to see that accounts of the trust form that emphasizes the management, rather than

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2 For a thorough exposition of the substitution-based account of trust and fiduciary law, more generally, see Paul B. Miller, Justifying Fiduciary Remedies, U. TORNOTO L.J. (forthcoming 2013) (hereinafter: Miller, Remedies); Paul B. Miller, Justifying Fiduciary Duties, MCGILL L.J. (forthcoming 2013) (hereinafter: Miller, Duties). See also Paul B. Miller, The Fiduciary Relationship [THIS VOLUME] [*** at 12]

ownership, aspects of the trust runs into the difficulty of over-inclusiveness—that is, much of what they have to say about the idea of trust becomes almost indistinguishable from what they could say about the ideas of neighboring legal forms, such as the corporation. What makes the trust form, and in principle other functionally equivalent arrangements, conceptually distinctive is that it can offer ownership services, including most importantly to those who either cannot or would not possess the capacity for possessing rights of private ownership.

Normatively, the ability of the trust form to mitigate some ineliminable excesses of the institution of private ownership is morally superior to the other problems that this form may help to solve. To see that consider three alternative societies. In the first society, people who are the immediate bearers of the excesses of private ownership (say, an infant or an absentee, both of whom may lack the capacity for private ownership) have absolutely no access to the private ownership institution—that is, there exists no trust form. The second society recognizes a trust institution whose operation is strictly limited to mitigate such excesses. No one other than the likes of the infant or the absentee can invoke the trust institution—by implication, the bourgeoisie are not allowed to turn themselves into beneficiaries by hiring a trustee in order to manage their money. The third world provides the opposite picture: The bourgeoisie and other capable (and wealthy) adults can invoke the trust form, while the likes of the infant and the absentee cannot. My claim that the normatively distinctive feature of the trust form is the provision of ownership services to mitigate the excesses of the institution of private ownership is that, all else is being equal, the private law of the second society is morally superior to the law of the other two societies.

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4 Two familiar accounts that exemplify this suspicion are the economic analysis of trust law, which applies the corporation law’s agency costs model to the domain of trust, and the autonomy-based account of fiduciary law. See Robert H. Sitkoff, *The Economic Structure of Fiduciary Law* ___; Hanoch Dagan & Sharon Hannes, *Managing Our Money: The Law of Financial Fiduciaries as a Private Law Institution*, ____. The most typical response of those who fail adequately to explain the qualitative difference between the trust and other forms of managing wealth is to mention the flexibility of the former over the latter. I criticize this trend in Part III below.

5 Civilian arrangements (such as the French *Fiducie*) provide functional equivalents to the trust. However, I suspect that none of them deals with the problem of ownership excesses as comprehensively as the trust form. That is, the trust provides a general, and so systematic, solution to the problem of excesses that I identify in these pages, whereas civilian arrangements provide “local” (i.e., context-specific) solutions that may not amount, separately and jointly, to the trust’s comprehensiveness. See, on this point, Michele Graziadei, *Virtue and Utility—Fiduciary Law in Civil Law and Common Law Jurisdictions: Then and Now*, [CHAPTER, THIS VOLUME]. Another way to put this point is to say that the trust is juridically, but not functionally, unique. I owe this way of putting the point to Paul Miller.

6 I further develop this claim in the Conclusion.
I. SETTING THE SCENE: THE METHODOLOGY OF EXPLAINING THE TRUSTEE’S DUTY OF LOYALTY

I begin with a very brief discussion of the theoretical challenge faced by accounts of the fiduciary duty of loyalty in trust law. The discussion is crucial in order to emphasize this challenge in the light of the analytical gap that exists between (at least) two ways of attending to the interest of the beneficiary. First, that of promoting the beneficiary’s interest to the exclusion of the trustee’s self- or other-regarding interest. And second, that of promoting her best interest along with the trustee’s self- or other-regarding, non-conflicting interest. Thus, an account of the fiduciary’s duty of loyalty must explain not only the demand to act in the best interest of her beneficiary, but also to exclude all considerations that do not concern the sole interest of the latter even when attending to such considerations is best overall, including from the perspective of the beneficiary’s interest itself. (A structurally similar challenge is familiar from other private law contexts, such as the otherwise puzzling notions of vindicating contractual expectations without lost reliance (including lost opportunities) and a noninterfering trespass to property. In due course, I shall re-describe the challenge in terms of explaining the combination of three features that are characteristic of the duty of loyalty: its restorative, rather than deterrence-base, logic; its giving rise to in rem, rather than in personam, remedies; and the strict liability that it sets out. But before I get there, I shall seek to explain why it is methodologically appropriate to begin with the trust, rather than the generic fiduciary, relation.

So why it is that acting in the best, though not necessarily in the sole, interest of the beneficiary must count, in the eyes of the law, as a breach of a duty owed to the beneficiary? The following methodological discussion seeks to suggest that a successful answer should begin with two considerations: First, the specific legal form against which a particular fiduciary relationship arises—for instance, it may be crucial to focus the inquiry on the fiduciary relation that arises against the backdrop of the trust form as opposed to the complete gamut of fiduciary relations in law; and second, the point of this form, trust or otherwise, in particular. To substantiate this claim, I shall take up two methodological approaches to the trustee’s duty of loyalty—a pluralist and a unitarist approach—only to show that each violates both of these considerations. Nothing in my argument proves the impossibility of developing other pluralist or unitarist accounts of

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7 John H. Langbein, Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?, 114 YALE L.J. 929 (2005).
9 See, e.g., Bocardo SA v Star Energy Onshore Ltd and another [2011] AC 1at 26 (per Lord Hope) (distinguishing between protecting a person against “interference with the use of the land” and protecting her “ownership”).
the duty. My ambition is merely to emphasize, by way of illustration, the methodological shortcomings of some, though not necessarily every, pluralist or unitarist accounts of the duty of loyalty.

**Pluralism.** The basic thought that drives the pluralist's analysis is the various different economic and social contexts within which a fiduciary acts at the expense of the formal legal structure that is constitutive or otherwise facilitative of her interaction with the beneficiaries. For instance, consider the typically antithetical contexts picked out by financial markets and the property relations within circles of familial intimacy. On the pluralist view, the appropriate legal treatment of the trust relationship in every case must be influenced at every turn by the context in which it arises. Accordingly, the analysis of the financial and the family trustees will likely defy the fact that both cases may feature similar forms of right and duty in relation to the trust property. This is not to deny that context does not matter, but rather that it supervenes on the formal structure that is built into the legal practice of trust. Moreover, insofar as core legal doctrines, such as the property/contract distinction and the duty of loyalty, apply to the participants in a trust relationship by virtue of invoking the trust form, which is to say across contexts, it is both necessary and desirable to understand this form before considering the introduction of adjustments to reflect the particular context within which a trust interaction arises.

**Unitarism.** Whereas the preceding methodological suspicion concerns the undue emphasis placed on contextual analysis of trust relationships at the expense of the formal characteristics shared by all such interactions, the second will focus on approaches that seek to generate an account of fiduciary obligations by lumping together different legal forms. Indeed, by moving from the most abstract generalization of the fiduciary relationship directly to the concrete doctrine (such as the content of the trustee’s duty of loyalty), the unitarist approach necessarily obscures the distinction that may exist between fiduciary relationships that arise in and around various different legal forms. For instance, the formal difference between the trust and the corporation, which is expressed by the difference between the status of the fiduciary as an owner and as a mere manager, respectively, vanishes into thin air at the hand of the unitarist account of the fiduciary

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10 The property/contract distinction has various important doctrinal implications for the law of trust. Two such implications are worth noting at this point: the *numerus clausus* principle (on which more below) and the doctrine of pure economic loss. For the latter doctrine, see Avihay Dorfman, *The Society of Property*, 62 U. TORONTO L.J. 563, 597-99 (2012).


12 Note that I do not deny the more modest unitarist view, according to which all fiduciary relationships share some basic qualities. The argument in the main text, however, is that such similarities may not render sufficiently precise the connection between the generic fiduciary duty of loyalty and the content of the particular fiduciary duty on the part of the *trustee*.
obligation. It is not clear why the content of the fiduciary obligation in these two cases must be identical, despite the qualitative difference between the trustee and the corporate’s officer. It may well be the case that the fiduciary obligations owed, separately, by a trustee and by a corporate officer converge. However, the source of the (arguable) convergence has nothing directly to do with the formal distinction between trust and corporation and everything with the coincidental overlap of extrinsic considerations and circumstances under which the fiduciary in question—be that a trustee or a corporate officer—acts. My worry is that the structural characteristics distinctive of the trust relationship (or, for that matter, the corporate form) are no mere empty formalism.

Unitarists may respond by insisting that fiduciary relationships give rise to the same fiduciary duty of loyalty, irrespective of the form in which they happen to occur. That said, it is not clear how this assertion can be adequately defended. One basic challenge, recall, is to explain why pursuing the best, rather than the sole, interest of the beneficiary must count as a wrong to the beneficiary. I shall take stock of some of the non-instrumental and the instrumental attempts to come with a unitary, affirmative answer to this question.

The Non-Instrumental Strategy. A non-instrumental unitarist account of fiduciary obligations may invoke the moral imperative against treating the beneficiary as mere means for the fiduciary’s self- or other-regarding ends. However, this invocation fails to explain the exceptionally stringent duty to act in the complete absence of possible conflict of interests. Surely, the Categorical Imperative from which this imperative arises is consistent with less stringent obligations—does a risk-creator discharging her tort duty to exercise reasonable, rather than utmost, care necessarily violate the moral duty against treating risk-takers as mere means?

Another non-instrumental argument resorts to a rather loose analogy to property. The duty of loyalty is a constraint on the fiduciary’s power to act in the interest of the beneficiary. The analogy to property seems to imply that the power in question belongs, at bottom, to the beneficiary. For this reason, any profit made by the fiduciary qua

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14 Boardman v. Phipps [1967] 2 A.C. 46, 107, 115 (H.L.); Weinrib, Restitutionary Damages, supra, at 33-34; Ripstein, supra, at 18-19. On Paul Miller’s account, the “fiduciary power [should be] understood as means belonging to [sic.] exclusively to the beneficiary,” which is to say it is “one of her means.” In violating the duty of loyalty, “the fiduciary has treated fiduciary power as a means at his disposal and in doing so has violated the beneficiary’s exclusive claim upon the disposition of her means.” Miller,
fiduciary is essentially the beneficiary’s. However, the analogy to property is conclusory. To begin with, in many trust cases, the beneficiary has no such power to begin with (as when she is an infant or a member of a future, unborn generation). But even if the transfer of power to the fiduciary is meant only suggestively or notionally (whatever these may mean), there exists no relationship of entailment between the existence of this power and the duty to act in the sole interest of the beneficiary. All that the property analogy can establish is that fiduciaries cannot disregard the interest of their beneficiaries. But the question of what counts as “disregarding” depends on the different question of what respect to the interest of the beneficiaries consist of. At best, the analogy to property merely shifts the challenge of divining the precise content of the duty of loyalty from one legal domain—fiduciary law—to another—property law. At worse, an argument from property merely serves as a loose analogy. This is especially the case when the object of the fiduciary relation in question is not property, but rather something else (such as legal counsel in the case of a lawyer/client interaction).

The Instrumental Strategy. The instrumental unitarist account of fiduciary obligations resorts to the appropriate considerations of the costs and the benefits of implementing a clear and simple rule of conduct such as the one associated with the duty to act in the sole interest of the beneficiary.\(^{15}\) Certainly, such a rule can bring about desirable effects to beneficiaries and to society, more generally. However, whether these effects warrant the rule in question, and if so, need such a rule span the entire range of fiduciary relations, is necessarily contingent on the costs of foregoing more accommodating demands, such as the duty to promote the best interest of the beneficiary.\(^{16}\)

Another instrumentalist strategy may draw on various psychological observations, according to which fiduciaries are naturally susceptible to biased forms of deliberation when acting in the face of potentially conflicting interests. The suspicion is that fiduciaries are humans, too. And as such they will systematically misjudge the relevant reasons that apply to them when considering how to proceed with their tasks as fiduciaries. For instance, a fiduciary may discount the threat posed by her act to the beneficiary’s interest. Or, being aware of this failing, the fiduciary may throw the baby with the water by over-compensating for her uneasy position of acting in the furtherance of possibly conflicting interests (that of her beneficiary and that of her own, for

\(^{15}\) For an instrumental argument in support of the sole interest rule, see Dagan & Hannes, supra note 4, at ***.

\(^{16}\) Dagan & Hannes, who seek to defend the sole interest rule, are self-consciously aware of the contingency in question. Id. at ***.
Fiduciaries might also engage in insincere deliberations, such as self-deceit or rationalization, in order to render legitimate that which counts, from an impartial point of view, as an impermissible course of action.¹⁸

These psychological observations, it is argued, provide a straightforward justification of the no-conflict rule and, in particular, the no-profit rule: A fiduciary must not engage in deliberation concerning a particular transaction whenever its pursuit is potentially beneficial to her interest as well. The worry is that under such circumstances, a fiduciary might fail to give sufficient deliberative priority to the interest of her beneficiary, hence the duty to act loyally by setting aside all interests save for the beneficiary’s.

While I see no compelling reason to believe that such traits are particularly destructive of fiduciary relations, I do not deny that they might occasionally fail fiduciaries (as much as they can fail anyone who is expected to act on the demands of right reason in the light of her partial commitments to herself, her family, her religious sect, her employer, her state, and so on). However, it is not clear why such traits necessitate the "no interest" rule in particular (and its remedial implication, namely, the disgorgement of the profit made in breach of the duty of loyalty). After all, the same traits do not appear merely at the stage of deciding how best to act in the face of possibly conflicting interests—indeed, they are just as real in the earlier stage of identifying whether a particular course of action is likely to place the deliberating fiduciary in a situation of possibly conflicting interests to begin with.¹⁹ And the same holds with respect to the more preliminary stage of identifying, among different classes of potential courses of action, which class is likely to implicate the fiduciary in bias decision-making, and so on. That is, the sole interest rule, because it does not come with a ready-made guide to identifying situations of conflict in advance, does not eliminate the difficulties posed by our imperfect psychological makeup. Indeed, contrary to the claims made by proponents of this theory,²⁰ this rule does not preclude the fiduciary’s deliberation in the shadow of potentially conflicting interests.

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¹⁷ Penner discusses the natural tendency to under- and over-compensate. James E. Penner, Is Loyalty a Virtue, and even if it is, does it really help explain fiduciary liability?, _____ ***.


¹⁹ Some anecdotal evidence from the lived experience of trust law in support of this worry is reported in Melanie B. Leslie, Helping Nonprofits Police Themselves: What Trust Law Can Teach Us About Conflicts of Interest, 85 CHIC.-KENT L. REV. 551, 551-552 (2010).

²⁰ The necessity of deliberation elimination is emphasized, for example, in Samet’s justification of the no-profit rule. See Samet, supra note 18, at 765 (stressing the importance of “eliminate[ion]” and “prevent[ion]” of fiduciaries’ deliberations in the face of potential conflict of interest).
This is not to say that the sole interest rule may not contribute to reducing the instances of abuse of fiduciary power. Rather, the point is that the psychologist justification of the sole interest rule does not produce the knock down argument it (arguably) purports to do—namely, the elimination of biased deliberation. It is, therefore, an open question whether, from an instrumental perspective, the benefits of reducing the potential level of bias exceed the costs of preventing fiduciaries from pursuing socially desirable ends while preserving the best interest of their beneficiaries.

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There exists a general suspicion running beneath many attempts to provide a unitary account of the duty of loyalty. The suspicion is general in the sense that it casts doubt on the notion that the legal concept of fiduciary is both necessary and sufficient in order to develop an account of the duty of loyalty across the entire gamut of fiduciary relations.

To begin with, any theory of the fiduciary’s legal duty of loyalty—much as its ethical counterpart—faces a familiar challenge. Such a duty can figure virtually everywhere in our everyday lives, ranging from some isolated business transactions to the most affective engagements with our loved ones. Moreover, and more dramatically, it can arise in connection with any number of legal forms (such as mere contract, agency, bailment, receivership, trust, custodianship) and against the backdrop of diverse contexts (such as those pertaining to financial investments or the intra-family division of legal estates). A unitary account is motivated by the correct observation that all fiduciary relationships pick out the challenge of mitigating, or even reconciling, the tension between the demands of right reason, on the one hand, and those associated with our partial commitments. I do not argue that the unitarist project is impossible or even inconsequential. Certainly, it may offer some valuable insights concerning the general idea of fiduciary in law (or in ethics) and illuminate our understanding of particular areas in which fiduciary relationships exist. Rather, the general suspicion just mentioned is that the unitarist approach will likely leave most of the important work, in terms of the existence and content of the fiduciary duty of loyalty, substantially incomplete. In particular, the suspicion is that the controversial aspects of fiduciary obligations can only be adequately addressed by taking more seriously the relevant legal form and the point of having this form in explaining the duty of loyalty (or any other piece of fiduciary-related doctrine). The argument going forward, therefore, seeks to develop an account of the trust, rather than fiduciary, relationship because, as I asserted at the outset, it may be the case that its distinctiveness matters in explaining the structure and content of the relationship in question.
II. THE TRUST RELATIONSHIP: UNCOVERING THE SKELETAL FRAMEWORK

A successful theory of fiduciary relationships that arise in connection with trusts must begin with an account of the trust form. And in order to gain precise understanding of the trust form, the preliminary task is to identify a sufficiently thin case of the trust relationship, by which I mean a case that does away with the contingent features of such a relationship. One familiar attempt to lay bare the trust relationship proceeds by investigating the difference between the trust and the contract-based alternatives to managing the partition of assets.\(^{21}\) And once the difference has been articulated, the next stage becomes that of comparing between two (or more) proprietary forms of partitioning assets—typically, the trust and the corporation.

But this way of approaching the subject matter of the trust is disappointingly inaccurate. To begin with, the contract-trust comparison is over-inclusive, because all that it can establish is that partitioning assets by using *in rem* rights is both qualitatively and quantitatively different from invoking *in personam* rights to achieve a similar effect. The trust form, in other words, is not a unique solution to the disadvantages that are associated with the contract-based scheme of partitioning assets. Other forms of organization, such as the private company, equally suggest themselves.\(^{22}\) At the same time, however, the move from the *in personam/in rem* comparison to the one between the trust and the corporation as two available forms of assets’ partitioning that invoke *in rem* rights and duties assumes too much.\(^{23}\) In particular, it assumes that the trust is just another property form on the menu of property forms so that, in principle, it is always up to a property owner to decide which property method of asset partitioning would be best for her to invoke.\(^{24}\) And this assumption, because it simply begins with the fact of

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\(^{22}\) That the trust and the private company are, in some measure, substitutive schemes of assets partitioning goes back to the early days of the private company during the latter half of the nineteenth century. See Harris, *supra* note 3.

\(^{23}\) I discuss the notion of *availability* in more detail in the main text below. However, one preliminary observation will be apt. The forms in question are available in the sense that an owner can choose between them according to the appropriate balance of considerations that apply to her case. Thus, “flexibility” is the advantage (or disadvantage) that is most mentioned in connection with the trust form when compared to the corporation form. *See infra* text accompanying note 46.

\(^{24}\) This assumption plays an important role in contemporary economic analysis of trust law. This trend is clearest in recent attempts to apply the agency cost theory (which is typically employed in the area of corporation law) to the trust context. *See* Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89
ownership, misses a key insight concerning the trust form—as I shall argue presently, unlike the corporation or private ownership itself, trust allows a person who either cannot or would not exercise ownership rights over a thing to benefit from this thing without being its legal owner. So the conventionally assumed starting point—the fact of ownership—overlooks what could turn out to be trust’s distinctive achievement.25

To be sure, setting aside contract as the baseline against which to appreciate the distinctiveness of the trust form is not merely helpful to gain analytical clarity on the form in question. Rather, it will also prepare the way for two far more radical claims than the one I have just made: That the trust relationship does not turn on contract relations at all and that the former is, in some sense, antithetical to the latter. It is not that a trust relationship cannot be created by contract, but rather that a contractual engagement does not and, indeed, should not play an essential role in understanding the structure of this relationship.26

To fix ideas, consider a skeletal case of the trust relationship that arises in connection with the control and management of absentees’ properties. Consider the notorious case of Arab-Palestinians who were expelled from their lands and goods during the war of 1948 (and, somewhat similarly, during the 1967 war).27 Most of these owners have not been able to return to their properties as a matter of (Israel’s) law or for various other good moral and prudent reasons. Israel has responded to their forced absence in part by enacting the Absentees’ Property Act of 1950 and subsequent legislations. The Act empowers a bureaucrat who holds a certain public office with the Ministry of Finance to act as the absentees’ trustee. Both historically and morally, the Act’s apparently bone-fide attempt to respond to the changing circumstances brought about by the 1948 war has ultimately failed due to several wrong turns on the part of the Israeli government that

25 To this extent, my rejection of the lawyer economist’s attempt to force trust law into the mainstreams of the economic analysis of corporation law is entirely different from the one developed in Lee-ford Tritt, The Limitation of an Economic Agency Cost Theory of Trust Law, 32 CARDOZO L. REV. 2579 (2011). Tritt emphasizes the non-economic motivations that typify, on her view, the trust law. On my view, her approach also overlooks the distinctive point of the trust relationship (on which more below).

26 This is not to deny that historically, the trust form offered, and still offers, some advantages that contract may fail to provide. In particular, the doctrines of consideration and (at least in England until the enactment of the Contracts (Rights of Third Parties) Act 1999) privity. Trust can bypass the obstacles posed by these two doctrines, but as I argue in the main text below, trust is conceptually and normatively independent of the idea of contract.

27 I say notorious in recognition of Israel’s failure to keep to its official (i.e., statutory) commitment to keep the property in question in trust for the absentees. Much of it has been transferred from time to time to other state agencies free of the equitable ownership interest of the absentees-beneficiaries. Cf. C.A. 58/54 Habab v. Custodian of Absentee’s Property of the State of Israel, PD(10) 912 (1956).
ought not to have been taken. But the moral failure on the part of Israel is beyond the conceptual point I seek to make here by reference to the case of the Absentees’ Property Act. This case, because it is so much removed from the typical, thick incident of trust-making and -administrating, provides a helpful analytical lens through which to investigate the formal structure of the trust relationship.

The trust relationship that exists—or, by hypothesis, can exist—between the trustee and each of the refugees with respect to the assets left behind by the latter is appropriately formal and, indeed, thin. It features a trustee who is formally vested with legal title over the property in question and, at the same time, subject to an obligation to act in the (sole) interest of the refugee-beneficiary who, in turn, holds a proprietary interest in the trust property. It leaves out several features that are widely associated with the trust relationship or even with the trust law, but that actually turn out to be inessential. I shall mention the three most important ones: The place of the settlor, the trustee’s motivation, and the contractual basis of the trust. I take each in turn.

Is the Trust Form Reducible to Causal Questions Concerning How It Came About? The get-go stage of calling the trustee/beneficiary relationship into existence is dramatically remade by the Absentees’ Act to reflect the exceptional factual circumstances that surround the trust arrangement in question. Whereas the normal case of creating a trust places the owner-settlor in the position of triggering the trustee/beneficiary relation, the Absentees’ case features a non-owner, the Israeli legislature, as the entity responsible for initiating the trusting relationship. There are any number of ways to explain why this otherwise important difference does not undermine, for the purpose of exposition, the rationale behind my deployment of the Absentees’ case. But they all seem to be beside the real point, which is that there is no compelling reason to think in the first place that the get-go stage is conceptually and normatively inseparable from the normative situation, the trust relationship, it brings about.

28 The most straightforward explanation is that the Absentees’ Property Act purports to work out a temporary solution to an exceptional situation faced by the State of Israel. Part of the problem is the difficulty, or prohibitive costs, of administrating a system of private property rights that allows refugees to reactivate their standing as owners from afar.

29 My account can, therefore, show why theories that reduce trust to voluntary undertaking on the part of the trustee fail to account for the trust form, properly conceived. Justice Edelman, for instance, takes this reductionist stance, but do so by explicitly ignoring instances of trust that arise by operation of law (such as by legislative fiat). See James Edelman, The Law of Status in the Law of Obligations: Fiduciary Duties, Common Callings and Implied Terms, [*** at 2-3]. Such a move is artificial, theoretically speaking, because it has no principled justification. Moreover, reducing trust to voluntary undertaking may leave nothing theoretically and doctrinally important to say about the trust form—the existence and content of the duties and powers that arise in any particular instance of forming trusting relationship are fully determined by the trustee’s undertaking. The law of trust, on this view, is essentially doing a purely epistemic service—deciphering the meaning of the undertaking in question. There is nothing interesting to say about
From a purely doctrinal perspective, a relationship of trust between a trustee and a beneficiary can and does arise in ways that do not depend on the active participation of the settlor—consider, for instance, trusts that arise “by operation of the law.” Bluntly put, not all trusts are express trusts. At a more fundamental level of analysis, the trust relationship and the duty of loyalty that lies at its normative center take a relational form. The trustee, after all, owes the duty to the beneficiary. Accordingly, the success and failure conditions of acting as a trustee are assessed by reference to how well she attends to the interest of the beneficiary. To be sure, a settlor—where one exists—influences the manner in which such an assessment is made; for instance, he may determine in his contract with the trustee or specify in his will what counts as serving the interest of the beneficiary and what the interest of the beneficiary requires. However, this possible exertion of influence on the part of the settlor does not turn him into a party in the trust relationship properly conceived—his intervention partly fixes the content of the duty and the expectations that arise in the course of the interaction between the trustee and the beneficiary. Thus, even given that the get-go stage is, by definition, causally necessary in order to set a trust relationship in motion, it forms no necessary part in this relationship going forward. This is precisely why the trust form can serve different agents (private individuals, for- and not-for-profit organizations, governments) to achieve any number of different objectives using a single formal structure, namely, the relation that exists between the property’s trustee and its beneficiary.

Need Trustees Act Out of Virtue? Need Legal Trust Track or Embody the Ethics of Trust? The language of trust law is shot through ethically laden concepts such as trust and loyalty. It might seem natural, at first glance, to cast the duty of loyalty in terms of the “duty to act (or not) with the right motive,” in which case loyalty turns on whether the trustee has acquired the appropriate psychological state.

the “duty of loyalty” or the “office of trusteeship” to which it gives rise; it all comes down to the actual terms of a particular instance of a trustee’s undertaking.

And even then, common law jurisdictions who reject the holding of Claflin v. Claflin, 20 N.E. 455 (Mass. 1889), which is about all none-U.S. common law jurisdictions, allow some measure de facto control on the conduct of the trustee by the beneficiary by way of exercising his or her right to the termination of the trust.

By analogy, the fiduciary relationship that exists between the U.S. government and its constituents does not include the Founding Fathers even though they exercised overwhelming influence on the basic terms of the government/citizens fiduciary relationship. Certainly, a similar fiduciary relationship could have been established even when the causal story (of who led to the creation of the U.S.A. and how) was entirely different (say, a philosopher-king urged the people to live together under conditions of freedom and equality).

Lionel Smith, The Motive, Not the Deed, in RATIONALIZING EQUITY, PROPERTY AND TRUSTS 53, 65 (Joshua Getzler ed., 2003). For a Kantian variation on this theme, see Irit Samet, Fiduciary Duty as Kantian Virtue, [THIS VOLUME].
However, language can sometimes be tricky and, indeed, the Absentees’ case suggests that there need not be ethically significant meaning that must be imputed to the trustee’s—or the state’s—undertaking toward the beneficiary’s property. After all, the trustee in this case is (just) a bureaucrat whose job is to discharge the state’s responsibility to manage the property of an absentee. It is not clear why would it be necessary the case that such a trustee, who adequately discharges her legal duty of loyalty, should act on—that is, acts from, not merely in conformity with—ethical reasons that apply to virtuous trustees. If anything, a public official such as the absentees’ trustee is supposed to be motivated by disinterestedness toward all, including the beneficiary, save for the state itself. This means that her commitment to retreat from her narrow, self-interested perspective is accompanied by a demand, which is often captured by the notion of the Weberian bureaucratic ethos, to make the public good her regulative ideal.  

The Absentees’ case also renders more vivid a tension which is inherent to the legal enforcement of virtuous motivation. Insofar as the duty of loyalty makes acting on the right motive the defining principle of the fiduciary relation, there is nothing the coercive force of the private law could or should do about it in particular. For, just like norms of politeness (to give one example), legal enforcement of sincere loyalty is contradictory, since compelled loyalty is not loyalty properly so called. Demanding the state bureaucrat “honestly” to display loyalty toward the absentees places the law in the implausible role of fixing the content of the motivation on which the trustee ought to act (or refrain from acting).

Is Trust a Contract? The third aspect of the trust relationship that my deployment of the Absentees’ case self-consciously sets aside is the allegedly contractual basis of this

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33 On Max Weber’s familiar observation, the public official “takes pride in … overcoming his own inclinations and opinions, so as to execute in a conscientious and meaningful way what is required of him … even—and particularly—when [it does] not coincide with his political views.” Max Weber, Parliament and Government in Germany under a New Political Order, in WEBER: POLITICAL WRITINGS 160 (P. Lassman & R. Speirs eds., 1994).
35 Note that in contrast to trust theorists (such as Penner, supra note 17, and Dagan & Hannes, supra note 4) who criticize the hypermoralization of legal trust, I do not argue that the institution of trust may not accommodate core ethical demands. The fact that the law does not, or should not, compel trustees to act on, rather than in conformity with, ethical considerations of loyalty, such as those of displaying deliberative priority to the beneficiary over all other persons, does not imply that the true moral grounds of this body of law cannot be associated with the ethics of loyalty or trust. An account of the moral grounds of the law of trust (or of any other body of law) does not rest on the motivations that, in fact, move trustees to act in certain desirable ways. As mentioned in the main text above, there are good reasons why the law does not coerce us to acquire a benevolent attitude or good will toward others. Rather than accounting for motivations, a theory of the morality of trust law (or any other body of law) takes as its main objective to develop the reasons—the justifications—that make a certain behavior rational and, indeed, morally required.
relationship. My response is that there is no such necessary basis to begin with; in fact, the Absentees’ case renders vivid the independence of the formal structure of the trust from contract. More generally, it is perfectly possible to imagine a society with a private property regime, and so with an institution of trust, but with no legal practice of contract (especially a practice of executory contract).36

I shall begin with two familiar versions of the argument that contract underlies the trust relationship. The first one has already been mentioned in connection with the trust’s get-go stage. That discussion should be sufficient to set aside this way of explaining the trust relationship by reference to contract: The contract between the settlor and the trustee represents a, rather than the, way of triggering a trusting relationship between the trustee and the beneficiary.

A more plausible way in which the argument from contract aspires to establish a fundamental connection between contract and trust is that the organizing idea underlying the trustee/beneficiary relation is that of a contract. This claim is not a causal or a factual one—it should be clear by now that no actual contract must be made in order for a trusting relationship to arise. Rather, it is best understood to express a conceptual claim—that the duty of loyalty is modeled on a contractual engagement. Accordingly, the argument goes, the existence and the content of this duty are explained by reference to the contractual terms that, if possible, would have been enacted by the “contract” between the settlor and the trustee, on the one hand, and/or by the “contract” between the trustee and the beneficiary, on the other.

The best exposition of the contract thesis comes from the economic analysis of fiduciary law.37 On the economic approach, fiduciary duties are just those duties that economize on the transaction costs involved in fixing the terms of a tailor-made contract and in monitoring compliance with such terms. The thought is that a duty such as a duty of loyalty replaces the need to specify in advance and in sufficient detail the contractual terms that would govern the conduct of the trustee with respect to the beneficiary’s interest in the trust property. The trust form solves this shortfall by offering a stable and somewhat rigid framework of coordinating the relation between the trustee and the beneficiary. Let me explain why I think this view cannot render the connection between contract and trust sufficiently adequate.

I do not deny that at a high enough level of abstraction—the level at which parties in a Coasean bargaining stand—all that efficiency-enhancing private law does comes down to

36 And at least according to the well-known thesis of Maine, status (to which property belongs) came before contract. HENRY SUMNER MAIN, ANCIENT LAW (1861).
guiding conduct in ways that best approximate the agreements that would be made in a world of zero transaction costs. To this extent, the provocative assertion of Easterbrook and Fischel that “there is nothing special to find” in fiduciary duties that is not already fully contained in contract turns out to be far too modest an assertion than what they are really saying—there is nothing special to find in all other private law areas that is not reducible, from the Coasean point of view, to a hypothetical contractual analysis. For instance, the standard economic justification of the standard of reasonable care in negligence law is, in essence, an argument from the (hypothetical) contract that a risk-creator and a risk-taker would make in a world of zero transaction costs.39

This expansive view of “contract” is perfectly coherent.40 More importantly still, there may be good reasons to derive the content of the trustee’s duty of loyalty at least in part by reference to the actual or constructive choices of the beneficiary. That said, the emphasis on transaction costs obscures a distinctive characteristic of the trust relation that renders the argument from notional contract ultimately unsatisfactory. This characteristic manifests itself in two points. To begin with, the emphasis on transaction costs mischaracterizes the formal structure of the trust relation. Indeed, this structure does not merely assist busy people—viz., those who lack the time, energy, or expertise required to manage their assets—to specify contract terms and monitor compliance. Rather, it also responds to a different difficulty introduced by beneficiaries who lack the legal personality, rather than merely the time, energy, and expertise, to enter into a contract with another in the first place. Beneficiaries can be members of a future generation or simply infants. And as the Absentee’s case also exemplifies, beneficiaries may also be perfectly mature persons who are, nonetheless, legally disbarred from doing business with the citizens and the state where the relevant property is located.

Thus, it is one thing to say that the costs of contract-making and -monitoring are typically high; quite another to say that in some cases, engaging in a contractual transaction just is impossible, irrespective of the costs (or benefits) of making the "transaction." But by collapsing the case of trust to the transaction-cost-based analysis of contract, the economic approach misses a distinctive formal characteristic of the trust

38 Id., at 438.
39 The economic interpretation of the duty of care suggests that persons should not engage in acts whose costs surpass their benefits. Thus, the involuntary duty of care (i.e., a duty imposed by law) stands in for the voluntary transaction among participants of the Coasean parable. Rather than trading benefits and costs with others on an actively mutual basis the duty of due care induces each individual person to fix this trade-off on her own through incorporating cost-justified precautions into her preferred course of action. William M. Landes & Richard A. Posner, The Positive Economic Theory of Tort Law, 15 GA. L. REV. 851, 854 (1980).
40 In spite of this, the argument from (hypothetical) contract thus understood is extremely simplistic and reductionist if offered as an exhaustive account of the private law (including even of contract law in particular).
relation—its recognition of a trustee/beneficiary relationship even when no such relationship could take the contract form of interaction.

Second, it is of course true that not all beneficiaries are devoid of the minimal legal capacity to make and carry out contracts. However, even if they do possess this capacity, the contract model overlooks the passivity that, in contrast to the business corporation, is built into the position of the beneficiary.

Consider a simple case of forming a trusting relation with a legally capable adult. Suppose that I would love to benefit my father-in-law by giving him some of my stocks of a promising pharmaceutical company, but I do not trust his judgment in matters of finance. In light of this, I declare myself the trustee of the stocks for his benefit.41 The beneficiary in this hypothetical exhibits a certain passivity that seems to stand in tension with contract, hypothetical or otherwise, in two important ways: First, there is no “contract” in this case because I have literally drafted the beneficiary into a legal relationship.42 This unilateral drafting cannot be explained away by reference to the high transaction costs associated with specifying complete terms and monitoring the trustee’s actions. And second, a unilateral undertaking of a voluntary obligation does not thereby establish a contractual relationship, since the beneficiary, whose position is equivalent to that of a “promisee,” does not reciprocate and, therefore, is not required to engage the trustee in an active relation of exchange. Want of engagement, or of consideration if you like, is critical because it can explain why mere voluntary undertaking does not generate a contractual obligation owed to, and owned by, the beneficiary.43 The institution of trust creates the opening for a duty of loyalty to arise in spite of these two manifestations of beneficiary’s passivity. And, once again, beneficiaries need not always be passive in these two senses. However, the point of the argument is that reducing the trust relation to contract (and, by implication, to the transaction costs that might prevent the would-be parties to enter into a contract) will necessarily lead us to overlook the important ways in which trust does not turn on contract properly conceived. To this extent, to conclude, the Absentees’ case exemplifies the critical distance between the two legal forms, setting the stage for a more precise account of the duty of loyalty that the trust form underwrites.

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41 According to the reporter of the Third Restatement, this is (still) the most prevalent reason to create a trust. RESTATEMENT (THIRD) OF TRUSTS §15 cmt. a (1992) (“Most trusts are created gratuitously.”).
42 Freedom of contract includes the freedom from contract so that a person cannot be forced into a contractual engagement.
43 I do not assume here that contracts must generally involve consideration (or bargain). Most civilian jurisdictions reject the necessity of consideration. Rather, I make a less ambitious assumption: Since the kind of contract on which lawyer-economists focus is the one (or ones) that take the bargain form, my counterargument seeks to repudiate the reduction of trust to bargained-for contracts by showing that trust relations can arise even when no bargain is involved. Thus, it is against this context that I argue for the incompatibility of the beneficiary’s passivity and the economic, contract-based analysis of the trust relation.
In the preceding discussion, I have sought to show what does not (or, does not necessarily) constitute an essential part of the trusting relationship. Having addressed the question of what is not, the argument going forward will take up the affirmative question of what is. And a first step toward answering this question can be made by asking what does remain from the trustee/beneficiary relationship when the causal question of how it came about, the motive of the trustee, and its supposedly necessary contractual foundations are all set to one side. I shall argue that the trust relationship is formed in and around property and, in particular, private ownership. And it is against the backdrop of the problematics of private ownership that the fiduciary relationship between the trustee and the beneficiary gets its formal shape and (some of its) substance.

III. TRUST AND THE EXCESSES OF PRIVATE OWNERSHIP: OUTLINE

That the trust form is a creature of property (and ultimately of private ownership) is best understood by reference to the principle of *numerus clausus*. To see the novelty of the trust form, consider the impossibility of establishing a trusting relationship by contract alone, as when a property owner seeks the service of an expert in managing her assets. The argument from contract discussed above correctly presupposes that, in principle, it is up to the owner and the expert to establish the content of their expectations of one another. However, the trusting relationship is no mere contractual engagement—it invokes property rights and obligations that, because of their *in rem* effect, purport to change the normative situation of others, including those who stand far beyond the privity of the particular contract.

Accordingly, it is not up to private parties to engage in the private legislation of property *forms* of right and obligation. To this extent, the *numerus clausus* principle imposes, negatively, a restriction on the kinds of normative relations that owners may otherwise establish with non-owners through contract. And affirmatively, the principle publicly recognizes certain other kinds of relation, such as those arising between a lessor and a lessee or in connection with the grant of easement. Trust is one of these publicly recognized relations that *operate on* the basic property form, which is to say ownership.

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Just as the lease form, for example, renders permissible the separation of in rem rights and duties associated with the exclusive use of an asset from the right of ownership, so does the trust form create its own distinctive reconfiguration of the ownership form. In particular, the trust form makes it the case that the right of ownership may be broken down into two simultaneous, though distinct ways of relating to an owned asset—as an agent who authors actions and decisions with respect to the asset and as a patient on whose behalf others act. By implication, I shall argue at a later stage of my argument that the duty of loyalty helps to contain the agent/patient separation within the ownership whole by announcing, in essence, that the former speaks and acts directly in the name of the latter. But before I do that, I shall first investigate the formal structure of the trust relation.

A. Trust and Private Ownership

Viewing the trust relationship as being on a par with, or as continuous with, other legal arrangements of asset partitioning creates the risk of missing the distinctiveness of such a relationship. As mentioned above, a dominant trend that fails to mitigate this risk portrays the trust and the corporation form as neighboring arrangements for the management of other people’s assets. On this view, the two arrangements differ in the degree of organizational flexibility that each features and in the efficacy of markets in terms of disciplining fiduciaries’ performance. So given these considerations, the only live question becomes the choice of the fiduciary that would be more suitable to manage our assets—the trustee or the corporation’s officers and directors.

However, this way of approaching the subject matter of the trust fails to account for its distinctiveness. The trust does not merely add one more technology for the management of our privately owned assets (although it surely is this as well). Rather than assuming private ownership as a fixed starting point in deciding which fiduciary to prefer (the trustee or the corporation’s board of directors), the trust form begins with the opposite premise—that the capacity for private ownership itself may not be available and that the trust form is a solution to this difficulty. Indeed, as I shall argue presently, a trustee provides ownership, rather than merely management, services. This somewhat provisional way of casting the distinctiveness of the trust in terms of the provision of

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ownership services can also be extended to capture trust’s distinctiveness with respect to instances of fiduciary relations far beyond the trust versus corporation debate.\textsuperscript{47}

\textbf{B. The Excesses of Private Ownership and The Point of the Trust Form}

On the proposed account, private ownership generates a whole variety of excesses. These excesses render ownership (and, so, any other property form that builds on ownership) either categorically unavailable for some or substantially costly to others in particular. The trust form picks out this difficulty, allowing for those who could not, or would not, possess the authority of ownership the access to the ownership institution. It provides the needed access by neutralizing some of the excesses in question by forming the familiar division of ownership labor between the trustee and the beneficiary: The former is vested with title over a particular asset, whereas the latter holds, at the very least, the entitlement to the \textit{ownership of another} over this asset.\textsuperscript{48} In other words, the most basic entitlement of the trust beneficiary is to having another person in the position of ownership with respect to an asset.

To unpack the argument, I shall commence with sketching the main themes of the idea of private ownership followed by a discussion of the relevant kinds of excesses it generates.\textsuperscript{49}

\textit{Private Ownership as a Status Authority over (All) Others.}\textsuperscript{50} As I have argued elsewhere, the concept of private ownership picks out a kind of a \textit{normative standing}—a power to change the normative situation of others in relation to a particular object. Thus, private owners possess an unusual status, which is to say the standing not just to be in physical or metaphysical control of an object against the backdrop of non-owners’ competing

\textsuperscript{47} Precisely how far can this argument go is beyond the scope of the present argument. Suffice it to say that viewing the point of the trustee’s position in terms of providing ownership services makes the trust form special with respect to familiar cases of fiduciary relations (such as the lawyer/client, public official/constituent, and possibly the parent/child relation). The argument in the main text can, therefore, add another reason to be suspicious of the unitarist’s attempt to fix the content of fiduciary law across the different legal forms within which it operates.

\textsuperscript{48} Throughout, I shall refrain from deploying the distinction between legal and equitable ownership. I do that to emphasize that my account does not turn on historical idiosyncrasies (such as the then division of jurisdictional labor between common law and equity courts).

\textsuperscript{49} I emphasize \textit{relevant} kinds of excesses, rather than all kinds of excesses, to indicate that private ownership may possibly generate more excesses than the ones I shall be discussing below. I exclude these because they are far less important to the present purpose of my argument.

\textsuperscript{50} The following two paragraphs draw on Avihay Dorfman, \textit{Private Ownership}, 16 \textit{Legal Theory} 1 (2010); Dorfman, Private Ownership and the Standing to Say So (unpublished manuscript).
claims, but rather to determine what others may or may not be legally entitled to do with this object. This notion of standing in relation to other persons, rather than in relation to a thing directly, is what unifies the various incidents associated with exclusion and alienation rights that are often said to be characteristics of ownership—they are incidents of the distinctive standing that owners have to address others in the form of right-conferring and duty-imposing.

In that, private owners who seek to manage and use their assets in the face of others, such as strangers and collaborators, operate through a set of complex intentions and attitudes. To fix ideas, consider a pedestrian case that could shed light on the rather complex intentions involved, and so presupposed, in purporting to act as an owner. If I own a copy of Das Kapital and you like to take a quick, harmless look at one of the book’s arguments, I exercise an unusual standing over you. When I restrict your access to this copy, saying something like “That’s mine,” what I really am doing is demanding your recognition of my status as reason-providing for you. That is, owners are not merely providers of epistemic reasons, that is, reasons that apply to non-owners independently of the owners' own judgments; instead, they can generate—create, really—the reasons themselves by occupying the special status of private ownership. In particular, by saying "That's mine" under the appropriate circumstances, I intend that the reason for your conformity with my judgment, concerning the using of the book, be that you recognize that it is I, the owner, who judge so, or, in a colloquial sense, say so (that is, if I decide that you are not allowed to use the book, I expect that your reason for refraining from using it would be that I have said so).

51 The notion that ownership entails a special normative position with respect to the thing, either the position to make an exclusive use or to determine what can be done with the thing, has been emphasized in various occasions. With respect to exclusive use, see J. E. Penner, The Idea of Property in Law 147 (1997) ("normative position vis-à-vis the thing"); Henry E. Smith, Mind the Gap: The Indirect Relations between Means and Ends in American Property Law, 94 Cornell L. Rev. 959 (2009). Concerning the normative power to determine the use to which a thing can be put, see Robert Nozick, Anarchy, State, and Utopia 171 (1974) ("The central core of the notion of a property right in X … is the right to determine what shall be done with X; the right to choose which of the constrained set of options concerning X shall be realized or attempted."); A. Alchian & H. Demsetz, The Property Right Paradigm, 33 J. Econ. Hist. 16, 17 (1973) (noting that ‘[t]he strength with which rights are owned can be defined by the extent to which an owner’s decision about how a resource will be used actually determined the use’); Larissa Katz, Exclusion and Exclusivity in Property Law, 58 U. Toronto L. J. 275, 297 (2008).


53 For more philosophical discussion of the distinction between epistemic and practical reasons, see David Owens, Rationalism about Obligation, 163 Euro. J. Phil. 403 (2008); David Enoch, Giving Practical Reasons, 11 Philosophers’ Imprint 1 (2011).
Such a complex set of intentions only grows in complexity and intensity when the interaction between an owner and others involves contractual and other business transactions concerning the asset in question. Furthermore, the stakes are even higher insofar as the background circumstances against which an owner acts require substantial time or special expertise to make the appropriate decision as many business and non-business decisions often require.

*The Excesses of Private Ownership: A Brief Sketch.* Against this backdrop, I shall elaborate on certain kinds of excesses that arise (in the appropriate sense) in connection with private ownership. I shall divide them into two kinds—categorical and hypothetical excesses.\(^5^4\) Whereas some (categorical and hypothetical) excesses are the necessary outgrowth of the concept of private ownership outlined above, other (categorical and hypothetical) cases are merely coextensive with this concept.\(^5^5\)

*Categorical Excesses* (or the bar of ownership’s legal personality). The most obvious class of cases occupying this category pertains to persons who fall below the *threshold* of natural competency set by the concept of private ownership: Infants, mentally disadvantaged persons, and some members of the elderly people are first to come to mind in this respect. Another class of cases in this category concerns persons who possess all the requisite cognitive and non-cognitive traits, but, nonetheless, lack the legal personality to engage in authorizing actions and decisions with respect to assets. Some Arab-Palestinians who were forced to leave their homes and land several decades ago still cannot assert their ownership authority over their assets and even when some of them are not formally prevented from doing so, they are indirectly, but effectively excluded from the economic market through state sanctions on those who engage in any commercial transaction with residents of enemy states. Furthermore, the so called Massachusetts business trust was originally developed as a solution to the (then) statutory restriction imposed on corporations against holding ownership rights in land for purposes other than that of carrying on their business.\(^5^6\)

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\(^5^4\) I use hypothetical in the Kantian sense of the word to express conditional forms of pursuing ends (e.g., you ought to spend some time with a friend if you want to get to know her better).

\(^5^5\) It is worth pointing out at this stage that the excesses I shall discuss below focus on the substantial difficulties of persons to possess the standing of ownership. It might be argued that the while the trust form can mitigate some of these excesses, it may well be the case that it also gives rise, or merely allows for, other excesses, namely, those associated with the dominance of the settlor’s intent. My (brief and preliminary) response is twofold: First, as I have argued above, the settlor does not form a necessary part of the core of the trusting relationship; And second, it is not clear whether the settlor’s intent does pose excesses in the same sense I discuss in the main text below. That is, the former is the upshot of possessing ownership personality, which is to say the natural (even if not the socially desirable) outgrowth of holding the standing to say so; whereas the source of the latter is the unavailability (or the limited availability) of such personality.

\(^5^6\) Massachusetts, probably due to the traditional anxiety toward mortmain, forbade "organization of cooperations under general laws to deal in real estate" so that "all modern office buildings and hotels had to
morally justified the resort to the trust in order to ameliorate the excesses of private ownership is, of course, an open question. But such a question goes beyond the conceptual point I seek to establish, which is that sometimes the ownership form lies outside the reach of those lacking the requisite ownership’s legal personality. The trust form creates the legal space within which patients (by choice or by chance) could, nonetheless, gain some access to the institution of private ownership.

**Hypothetical Excesses.** Moving past the threshold of legal personality, private ownership may generate adverse consequences (in terms, for example, of forgone valuable choices) that far exceed the costs that are ordinarily associated with private ownership. Unlike the former category, those who are burdened by the hypothetical excesses generated by private ownership can in principle become, or maintain their respective positions as, members of the class of private owners. Nevertheless, the price they would then have to pay may be reason enough for the trust form to arise. Cases falling within this category can be subdivided, for the sake of exposition, into three: Heterodoxy, vocation, and welfare.

**Heterodoxy.** Pursuing one's political heterodoxy may sometimes come at the cost of ownership deprivation. One familiar historical example occurs during the Wars of Roses where "[m]en who were interested in politics had been unable to take part in that pastime without the danger of losing all their property" on account of committing treason against the king. But for some time they could deploy the trust form (including in its more primitive configuration) to ameliorate this threat while taking political and military action. More recently, the Zionist movement in Mandate Palestine experienced some private ownership excesses as it went about advancing its goals. The Zionist political program at that period—supporting the settlement of Palestine in preparation for the establishment of a Jewish state—took the form of purchasing, developing, and then selling the land to Jewish immigrants. This agenda, however, required the registration of the newly purchased lands, which is the formal act of asserting private ownership. But the invocation of private ownership by central Zionist institutions (such as the Jewish

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57 I say ordinarily in recognition of costs that most private owners incur and that circumventing them is clearly illegitimate. Two familiar illustrations are the practice of tax avoidance and the historical case of bypassing competition law (which is, after all, often described as anti-trust law). Both infamous cases represent private owners invoking the trust form in order to alleviate costs (in the forms of taxes and restrictions on anti competitive conduct, respectively). To be sure, there exists a separate question, about which people will surely disagree, concerning the characterization of legitimate and illegitimate circumvention of private ownership’s excesses. However, my ambition in this paper is to develop the meta-ethical question concerning the trust form’s point, rather than the ethical question of elaborating a complete set of the excesses that render the resort to the trust form justified.

National Fund) was bound to be resisted by the Mandate’s government officials and the local elites. Resort to the trust form, once again, helped smoothing out the excesses of private ownership. Indeed, by stepping down as owners and assuming, instead, the passive position characteristic of the beneficiary, Zionist bodies such as the Jewish National Fund could still make progress with realizing their political agendas.

Vocation. Now consider the pursuit of a calling in the face of private ownership’s excesses to the contrary. Two familiar historical examples are the crusader and the early Franciscan friar whose respective pursuits of religious devotion stood in tension with private ownership. The trust form, in turn, was enlisted to reduce, in some measure, such tensions. In the absence of the trust (or use) form, the former would have had to choose between going on a crusade and staying at home to keep his property (to himself and family). Whereas the latter would have had to face the existential trade off between the sanctity of property-free life and a secured stream of the material means for subsistence.

A structurally similar difficulty arises nowadays in the case of high-ranking public officials who cannot claim at the same time the status of private ownership with respect to some commercial enterprises and the public office. Lyndon Johnson, for instance, held a radio and a TV station in Texas upon his ascent to vice presidency (and, later on, presidency). Rather than stepping down from his office, Johnson created a “blind” trust to render ethically permissible his public office. In that, Johnson reduced himself to the position of a beneficiary, holding an entitlement to the ownership services of a secretive trustee.

Welfare (herein of the inconveniences of ownership). Unlike heterodoxy and vocation, the final category of hypothetical excesses associated with the institution of private ownership focuses on the welfare of the benefactor, third parties, or society as a whole. The promotion of personal and social welfare is often cited as a central justification of the institution of private ownership. That said, the welfare-enhancing effect of private ownership is not self-generating. It depends, in part, on how well do those who hold ownership rights perform. Normally, successful performance turns on skill (broadly defined to capture natural talent and acquired expertise). In many cases, skill poses no special challenge to the welfare-enhancing effect of private ownership, since it only takes ordinary skill to make a sufficiently optimal use of an object. But in

60 Id. at 855.
other cases, skill does matter. This may be so when control over an asset, or a large set of assets, calls for a special expertise, including even in the initial stage of determining what to do with the asset.

Here, too, historical and contemporary events are quite revealing. For instance, consider a classic worry among aristocrats—that is, an extremely improvident son (or daughter) who is destined to be in charge of the family’s estate. Or consider a wealthy person who is eager to support excellence in legal theory by granting generous scholarships to promising junior law faculty. However, doing so successfully requires expertise and professional reputation that the donor may not possess, hence the excesses of private ownership. That is, acting as an owner—i.e., asserting the standing to say so—might be self-defeating in the case at hand. Resort to the trust form, which is to say to the ownership services of another, could make the necessary difference for our wealthy donor (or, for that matter, for our aristocrat). Indeed, it would be better for the donor to relinquish her ownership authority altogether and vest it, say, in the wholly independent, and in this sense absolute, authority of the dean of the relevant law school.

* * *

The preceding discussion has rendered vivid a more general theme concerning the point of the trust form, which is that of mitigating (some of) the excesses of private ownership. That is, the trust form is not just another form in the menu of property forms from which private owners are allowed to pick n’ choose. Rather, it creates the very possibility for those who could not, or otherwise would not, invoke private ownership (including in its various configurations such as the corporation) to pursue their or others’ ends. So understood, the trust is a property form that is not reducible to private ownership simpliciter. Nor is it reducible to the corporation form—whereas the corporation’s board of directors necessarily provides management services to the company and, ultimately, to the company’s owners-shareholders, the trustee necessarily provides ownership, rather than merely (or even necessarily) management, services.

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63 For a historical discussion of this point, see Ron Harris, Industrializing English Law: Entrepreneurship and Business Organization, 1720-1844 149 (2000).
65 The leading discussion of the powers that shareholders possess (according to the current law) and the powers they should possess is Lucian Arye Bebchuk, The Case for Increasing Shareholders Power, 188 Harv. L. Rev. 833, 837, 843-50 (2005). Note that the argument in the main text above is meant to be applicable even to the U.S. context, where shareholders activism has a very limited scope when compared, say, to England.
The trust form is, therefore, distinctive insofar as it establishes access to private ownership itself by way of constituting a legal office, the trusteeship, for the provision of ownership services. More specifically, the trustee becomes, by virtue of the law’s creation of the trust form, the author of the beneficiary’s actions and decisions in all matters related to the trust property. Or so I shall argue.

IV. THE TRUSTEE’S DUTY OF LOYALTY: A HOBBESIAN ACCOUNT

The final two stages of my argument will focus on the duty of loyalty. Eventually, I shall argue for a distinctive conception of the duty in question—the constitution conception. Almost all the familiar approaches to the duty of loyalty are split between two competing accounts. First, the constraint conception of the duty, according to which the trustee enjoys the liberty to adopt whatever course of action she sees fit subject to the constraint placed on her by the no-conflict rule. This conception of the duty is shared by other private law duties, such as negligence law’s duty of care. The second approach simply denies that there exists such a duty at all. Many such duty nihilists are lawyer economists, and some reductionists-realists who see (wrongly, in my view) the idea of legal “duty”—in trust law or otherwise—as anything but a mandatory reason for action. Likewise, James Penner has recently endorsed the view that fiduciary’s liability is freestanding in the sense that it does not presuppose a preexisting duty of loyalty, although he provides no support for such a view.

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66 For the notion that trusteeship is an office, see, e.g., HONORÉ, supra note 46, at 4; Bernard Rudden, Things as Things and Things as Wealth, 14 OXFORD J. LEGAL STUD. 81, 88 (1994); Joshua Getzler, “As If.” Accountability and Counterfactual Trust, 91 B.U. L. REV. 973, 981-2 (2011); TAMAR FRANKEL, FIDUCIARY LAW 279-84 (2011). As I argue in the main text above, the trustee holds a special office, a legal office rather than mere office, and in particular, an office of ownership. This way of approaching the subject matter of the trust can cast doubt on a recent trend to describe private ownership as an office in and of itself. See Christopher Essert, The Office of Ownership, 63 U. TORONTO L.J. 418 (2013); Larissa Katz, Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power, 160 U. PENN. L. REV. 2029 (2012). In my view, private ownership has nothing to do, conceptually and normatively speaking, with the idea of an office, especially if office is meant to charge private ownership with some “public law” meaning. See, further, Dorfman, Ownership and the Standing to Say So, supra note 50.

67 See, e.g., Edwards v. Honeywell, Inc., 50 F.3d 484, 487 (7th Cir. 1995) (Posner, C.J.) (wondering “[w]hy duty should be an issue in a negligence case is not altogether clear, however”).


69 Penner, supra note 17. See also Lionel Smith, Can We be Obliged to be Selfless?, ____. It seems to me, however, that Smith does not really deny the existence of a duty. He describes the duty of loyalty (as well as the no-conflict and no-profit rules) as a “requirement of loyalty” and “legal norms.” Id., at [**at 15, 17-18]. I find this description confusing. Semantics aside, talk of “rule,” “requirement,” and ultimately “norm” stands for the existence of reasons for action. And insofar as these reasons are also mandatory ones
I shall argue, by contrast, that there exists a duty of loyalty. However, I shall also argue that the constraint conception of the duty fails to capture a distinctive feature of the duty of loyalty. Unlike the tort duty of care and many other private law duties, the duty of loyalty picks out a constitution conception. That is, the duty to avoid conflicting interests (and to disgorge profits received through the breach of that duty) is partly constitutive of what it is to be a trustee to begin with. Or so I shall seek to show.

A. Setting the Stage: Trustees and the Notion of Ownership Personality

The argument can now return to the account of the duty of loyalty owed by the trustee to the beneficiary. Recall that the challenge that this account purports to address is that of explaining the demand to exclude all considerations that do not concern the sole interest of the beneficiary even when attending to such considerations is best overall, including from the perspective of the beneficiary’s interest itself. The union of the no-conflict and no-profit rules expresses this demand.\(^{70}\) I shall seek to argue that these two rules reflect the formal structure of the trust relationship analyzed above. In particular, I shall argue that, as in Hobbes’s argument from political authority, the ownership services provided by the trustee are, in the first instance, that of personating the beneficiary so that the actions and the decisions made by the trustee qua trustee are fundamentally those of the beneficiary.\(^{71}\) This is precisely what is meant by saying that the beneficiary’s basic entitlement is to the ownership of another in respect of the trust property.

To see this, begin with a trust-free legal regime of property featuring only private ownership \textit{simpliciter}. Normally, free and equal individuals negotiate their practical

\(^{70}\) There may be room to raise the question of whether the no-conflict rule and the no-profit rule are intentionally distinct so that each rule represents a different logic. \textit{See, e.g.}, MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES 114-20 (2010). It is beyond the scope of the present argument to explain why the two rules are, in fact, intentionally equivalent in the sense that they are \textit{ex ante} and \textit{ex post} manifestations of a single principle of concern and respect for the beneficiary. To provide a rough sense of the basic intuition, a mere profit can hardly justify, morally speaking, a duty of restoration or disgorgement. So there must be something—a prior wrong, namely, a breach of a preexisting duty of some sort—that could turn the \textit{fact} of profiting into a liability-triggering event.

\(^{71}\) According to Hobbes, the normative power of the sovereign is cast in terms of “the Right of bearing the Person of them all.” THOMAS HOBBES, LEVIATHAN 122 (Richard Tuck ed., 1996). In this way, Hobbes believes, every subject coauthors the “Actions[] and Judgments of the Soveraigne Instituted.” Id., at 124. To this extent, the absolutism of the Leviathan lies in its attempt to meet the challenge of governing a polity not so much by adopting the intentions, interests, and preferences of the subjects, but rather by appropriating them entirely. \textit{Cf.} HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION (1967).
affairs by authoring actions and decisions. The law, and private law in particular, sometimes constitute and at other times merely facilitate this capacity of authorship of ours.\(^{72}\) Private ownership renders possible the capacity to author actions and decision in the context of persons’ interactions with respect to external objects. It governs one practical arena, albeit quite an important one, among many others.\(^{73}\)

That said, the very existence of the institution of private ownership, I have argued, may also exert pressure toward excluding some persons from such an arena, which is to say persons who either cannot or would not assume the authority that is built into private ownership. The distinctive point of the trust form is to create the opening for a derivative form of ownership, according to which the law confers upon a beneficiary an entitlement to the very authority, rather than merely to the management, of another in relation to the trust property. To this extent, by invoking the trust form to establish a fiduciary relationship, the trustee becomes the \textit{author} of the beneficiary’s actions and decisions in all matters that are related (in the appropriate sense) to the trust property.

Note that this argument is \textit{not}, or not necessarily, a causal one—I do not argue for a substitution effect, according to which the beneficiary (or the benefactor) transfers his power to author acts and decisions to the trustee, in which case this power can be said to be derived (in the right sense) from the legal personality of the former.\(^{74}\) As I have observed above, the trustee may possess this power \textit{even when} the beneficiary has never held such power to begin with.\(^{75}\) Indeed, it is the trust form that creates a normative framework within which the trustee can assert the power to author acts and decisions with respect to the trust property in the name of the beneficiary.

It might be thought, as some proponents of fiduciary law may surely argue,\(^{76}\) that the law of trust merely \textit{replicates} other legal and extra-legal domains where one person, the beneficiary, receives the assistance of another, the fiduciary, in the pursuit of some ends. But this way of characterizing the trustee/beneficiary relation obscures an important

\(^{72}\) Of course, the law can and often does place limits on this capacity.

\(^{73}\) A parallel observation can be made with respect to other, partly overlapping, spheres of interaction such as those pertaining to bodily integrity and to joint ventures (corresponding to the legal practices of tort and contract, respectively).

\(^{74}\) The causal claim, to which I resist, can be cast in terms of an actual or hypothetical consent on the beneficiary’s part to transferring his power to the trustee. The notions of substitution and the power being derived from the legal personality of the beneficiary (or settlor) mentioned in the main text is defended in Miller, \textit{Duties}, \textit{supra} note 2; Miller, \textit{Remedies}, \textit{supra} note 2.

\(^{75}\) See the discussion of the categorical excesses of private ownership in \textit{supra} text accompanying notes 51-53.

distinction between acting directly in the name of the beneficiary and acting for him.\textsuperscript{77} The trust form renders the former—namely, the notion that the fiduciary acts directly in the name of the beneficiary—possible, but it is not clear to me that this must also be the case with respect to all other instances of fiduciary relations; it is not a coincidence, in my view, that leading students of fiduciary law have emphasized the power of the fiduciary to act for another person.\textsuperscript{78} Certainly, when I purchase some shares in a publicly traded company, I seek to exploit the advantages of this corporation in making business decisions for me, which is to say manage my money. The corporation’s business decisions, however, are not mine in the sense that the corporation does not act in my (and my co-shareholders’) name even as such decisions are meant to be made for me (in furtherance of my material well-being). Rather, it engages in activities that are, to an important extent, done for the shareholders. By contrast, I have argued that the trustee does not merely act for the beneficiary or for the beneficiary's interest, but rather “personates” the beneficiary. In particular, the trustee acts from a legal personality—an ownership personality—that the law (of trust) attributes to the beneficiary even when, and indeed sometimes because, the beneficiary possesses none.\textsuperscript{79}

\textbf{B. Elaboration: No Conflict, No Profit and the Role Morality of the Trustee}

It will prove helpful to connect the preceding analysis concerning the trust's distinctive point to the special role of the trustee. I shall employ this connection to

\textsuperscript{77} I elaborate on this distinction in Avihay Dorfman & Alon Harel, \textit{The Case Against Privatization}, 41 PHIL. \& PUB. AFF. 67 (2013).

\textsuperscript{78} See Austin W. Scott, \textit{The Fiduciary Principle}, 37 CAL. L. REV. 539, 540 (1937); FINN, supra note 34, at 15.

\textsuperscript{79} This contrast, namely, between fiduciaries that speak and act for me and in my name, is not peculiar to the trust/corporation distinction, to be sure. Consider the case of legislators as public fiduciaries by illustration. In a representative democracy, elected representatives take their offices only insofar as they are fully prepared to be loyal to the general interest (rather than to their self-interest or sectarian affiliations). That said, it is not clear (to say the least) why we must consider their acts of legislation as our doings. Matters could change so that legislative acts would be able to bear the mark of our doing, if rigorous processes of deliberation and participation on the part of the People supplement representative democracy. But when such processes are lacking or substantially lagging, representatives owe us, the people, an obligation of fidelity or loyalty, but it is hard to see why they have the power to speak and act directly in our names, rather than merely for us. For a familiar account of democratic representation along these lines, see 1 BRUCE A. ACKERMAN, \textit{WE THE PEOPLES: FOUNDATIONS} 181-86 (1991). Furthermore, it may also be argued, with Edmund Burke's famous observation, that elected politicians are expected to vote their conscious (and, therefore, act for us or for our interest as they view it), rather than our actual or hypothetical preferences. See Edmund Burke, \textit{Speech on the Fox's India Bill} (Dec. 1, 1783), in 5 THE WRITINGS AND SPEECHES OF EDMUND BURKE: INDIA: MADRAS AND BENGAL, 1774-1785, 378 (Paul Langford et al. eds., 1981). Once again, here is another reason to be suspicious of accounts that seek to marshal a unitary, one-size-fits-all account of fiduciary law and, in particular, the duty of loyalty.
explain the no-conflict and no-profit rules that fix the content of the trustee’s duty of loyalty. Arguments from role, especially role morality, insist that it may sometimes be critical to assess the desirable constraints on the conduct of a person by reference to the role this person happens to occupy.\(^{80}\) Indeed, accounts of the duty of loyalty are typically attentive to the role assumed by the trustee, especially its role as assets’ manager, with some accounts emphasizing the professional responsibility of the trustee for maximizing the beneficiary’s wealth\(^{81}\) while others the moral commitment to refrain from taking impermissible advantage of the discretionary powers of management.\(^{82}\) On my proposed account, by contrast, trustees occupy the role of an owner, rather than merely the manager, of the trust property. And in order to assume such a role successfully, the trust form creates a distinct legal personality—*ownership personality*—for the trustee to occupy in authoring acts and decisions with respect to the trust property.

Against this backdrop, the dual no-conflict and no-profit rules can be cast into sharp relief when viewed as those rules that define the ownership personality that is built into the position of trusteeship. Rather than arguing that the two rules call for either the morally permissible or the economically efficient management of another’s asset, I shall argue that they reflect a conceptually prior worry concerning the trust form and, in particular, the possibility of providing ownership, rather than merely management, services. In that, the trustee is demanded to assume the distinctive ownership personality of the beneficiary that the trust form institutes and she, the trustee, constitutes.

Thus, contrary to the commonly held approach to the explanation of the duty of loyalty—an approached which is shared by instrumentalists and non-instrumentalists—the rules of no-conflict and no-profit are not, or not necessarily, about the good or ill manner in which the trustee attend to the task of managing the trust property. On my proposed account, the doctrines that really take up the manner of the trustee’s management of the trust property are those pertaining to the administrative powers of the trustee.\(^{83}\) Indeed, a trustee may violate the two rules (of no-conflict and no-profit)

\(^{80}\) This claim is deeply controversial, to be sure. For instance, one basic question underlying contemporary debates among philosophers of international law is how ought we to proceed with the evaluation of the conduct of soldiers? Must they be viewed as *ordinary persons* engaged in certain violent activities or as *soldiers* participating in political acts that take a particularly violent form? I shall set such questions aside since they are of less importance in the case of the trustee.

\(^{81}\) See, e.g., Langbein, *supra* note 7; Easterbrook & Fischel, *supra* note 37; Dagan & Hannes, *supra* note 4, at ***.

\(^{82}\) See sources cited in *supra* note 13.

\(^{83}\) As Lionel Smith correctly observes, courts are reluctant to review the wisdom of the trustee’s decision to exercise (or refrain from exercising) these powers. *See* Smith, *supra* note 32. That said, there may be good reasons (some of which are familiar from the corporation law’s doctrine of the Business Judgment Rule) for this reluctance that are not inconsistent with the proposition that the object of the trustee’s administrative powers is in the first instance the good management of the trust property.
without thereby running afoul of managing the trust property in the best interest of the beneficiary. 84 A violation of these rules, by contrast, counts as a failure on the part of the trustee to maintain her unusual capacity to author acts and decision directly in the name of another with respect to the trust property.

On the proposed account, the act of taking the trusteeship office turns the trustee into the holder of (at least) two distinct legal personalities—the one she had all along and the ownership personality held in connection with the assumed office. The no-conflict and no-profit rules are simply the doctrinal manifestations of the need to sustain the insulation of the latter personality, which is the personality through which the trustee can speak and act directly in the name of, rather than merely for, the beneficiary. In that, the trustee’s ownership personality keeps its practical separation from the authority she can otherwise command by invoking her natural capacity to author acts and decisions (including in matters of her personal property). Whereas the no conflict-rule operates in this suggested fashion ex ante, the no-profit rule expresses the same idea—of personality insulation—but does so from an ex post perspective.

Begin with the rule against conflicting interests (or duties). This rule purports to guide the trustee’s conduct by demanding that she exclude from consideration her welfare as well as the interest of third parties. In that, the no-conflict rule defines what it takes for one person, the trustee, to transubstantiate oneself into the bearer of the ownership personality of another. 85 It does that in the negative sense of specifying what interests and duties should be set aside in the course of authoring acts and decisions in the name of the beneficiary. By implication, the no-conflict rule creates an arena of permissibility within which the interest of the beneficiary remains the sole interest left for the trustee to pursue qua trustee. Thus, the rule in question puts forward a rather rigorous norm of deference: The trustee must suppress her own interest and embrace the interest of the beneficiary.

On this view, the no-conflict rule is no mere side constraint on the otherwise unrestricted way a person taking the office of trusteeship may act; rather, it is partially constitutive of the trustee’s claim to hold such an office and, so, to possess the ownership

84 This is just another way to restate the spirit of Langbein’s celebrated argument in Langbein, supra note 7. As it should become clear by now, however, my disagreement with Langbein goes to the essence of the trust form.

85 The metaphor of transubstantiation stands in sharp contrast with other helpful metaphors in the context of fiduciary law. Agency law, as Professor Deborah DeMott suggested during the conference that has produced this volume, picks out the idea of agent as an extension of the principal. Other forms of fiduciary relationships, such as the corporation form, give rise to a substitution effect, that is, the fiduciary assumes the powers the beneficiary has held all along. The trust form, by contrast, is distinctive in that it can create a legal power where none existed before.
personality of the beneficiary. That is, the trustee is the bearer of another’s ownership personality by virtue of the no-conflict rule. She is not a trustee prior to it. Her authoring acts and decisions, like that of disposing of one of the trust assets, renders the constraining effect of the rule of no-conflict possible, but it is the rule in question that makes her a trustee.86

The no-profit rule sets out an *ex post* response, a disgorgement remedy, to the benefits received by the trustee through the breach of the fiduciary duty of loyalty.87 Any successful explanation of this rule must account for three seemingly puzzling features. First, in contrast to a familiar approach among trust scholars, the rule reflects a *restorative*, rather than deterrence-based, logic—a disgorgement of remedy can be systematically under-deterring88; second, it can give rise to a disgorgement remedy that takes a *proprietary*, rather than personal, form89—justifying the rule by reference to deterrence, including in connection with the threat of psychological biases in the trustee’s decision-making capacity, fails to explain the *in rem* effect of the remedial form; and third, it triggers a *strict*, rather than fault, liability90—a strict liability regime helps to induce an actor to reduce her level of activity, rather than merely the level of

86 Of course, the demand to suppress (the trustee’s own interest) and defer (to the beneficiary’s) need not amount to self-effacing conduct on the part of the trustee. In particular, it does not seek to inhibit the legal personality the trustee constitutes outside her engagement with the beneficiary.

87 In fact this conventional way of describing the rule may be somewhat conclusory. See Getzler, supra note 66, at 978-79. Another way to describe the rule in question is to say that, unless expressly decided to the contrary, *all* the benefits generated by the trustee in connection with the trust property are the beneficiary’s. Thus described, the interesting question becomes that of property (i.e., who owns what and why), rather than that of the consequences of wrongful or disloyal conduct on the part of the trustee. I shall resist this approach, because the real question is not property vs. obligation, since even the property question cannot avoid the normative questions that ultimately underlie both.

88 This is so for two reinforcing reasons. First, a disgorgement remedy cannot deter failed attempts of disloyalty, that is, whenever disloyal behavior happens to generate no positive value to the trustee. And second, it cannot provide adequate (including optimal) deterrence insofar as the trustee happens to profit from disloyalty, but can rather easily—i.e., with impunity—keep secret all or even part of the gain. This point plagues economic and other instrumental accounts that place the deterrence rationale at the center of their explanations of the duty of loyalty. This shortcoming is not merely a problem of fine-tuning; rather, it amounts to a structural deficiency, for a disgorgement remedy is *systematically* under-deterring. Indeed, since there exists some positive chance that the trustee will not be caught every time she acts in breach of loyalty, any remedy short of punitive damages may fail to produce the appropriate level of deterrence. For general discussions of this familiar argument, see JULES L. COLEMAN, RISKS AND WRONGS 185 (1992); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARVARD LAW REVIEW 869, 887-897 (1998) (arguing, in the context of tort law, that the chance of escaping liability must be incorporated into the calculus of liability for the harm caused). For more on the restorative, rather than deterrence-based, logic of the duty, see RESTATEMENT (THIRD) OF TRUSTS § 100 cmt. d (1992).

89 See, e.g., AG for Hong Kong v. Reid [1994] 1 AC 324, 336 (PC).

attentiveness and care, but the imposition of the duty of loyalty does not seem to stand for a policy of encouraging such a reduction (that is, a reduction in the choice of the would-be trustees to enter, or increase the level of engagement in, the trust business).

On the proposed account, all three features are surface manifestations of a single idea, which is the role of the trustee as constituting the ownership personality of another person. Like its ex ante counterpart (the no-conflict rule), the no-profit rule is best understood as an ex post expression of what it takes for one person, the trustee, to transubstantiate oneself into the bearer of an ownership personality of another. The acts and decisions authored by the trustee (qua trustee) purport to be the direct acts and decisions of the beneficiary. The profits made by the trustee in breach of her duty of loyalty are, nonetheless, the profits made by a person who purports to act (and, in this case, profit) in the name of the beneficiary, rather than hers. The fact that the trustee has violated her duty of loyalty (by acting under a possible conflict of interests) cannot be invoked as an argument for depriving the beneficiary of his entitlement to the ownership services of the trustee. Indeed, the breach of this duty is a violation of the norm of deference mentioned above, which is a norm that defines, rather than merely constrains, what it means to hold an office of trusteeship.

CONCLUSION

In these pages, I have sought to develop an account of the trusting relationship by reference to the core structural problem out of which it arises—the excesses of the institution of private ownership. Against this backdrop, the distinctive point of the trust form is to create the opening for a derivative form of ownership, according to which the law confers upon a beneficiary an entitlement to the very authority, rather than merely to the management, of another in relation to the trust property. To this extent, by invoking the trust form to establish a fiduciary relationship, the trustee becomes the author of the beneficiary’s actions and decisions in all matters that are related (in the appropriate sense) to the trust property. More specifically, the trust form creates a distinct legal personality—ownership personality—for the trustee to occupy in authoring acts and decisions with respect to the trust property. In that, the trustee holds an office, the essence of which is that of assuming the distinctive ownership personality of the beneficiary that the trust form itself institutes and that the trustee, by virtue of holding such an office, constitutes. This way of approaching the subject matter of the trust can

91 See Steven Shavell, Strict Liability versus Negligence, 9 J. LEGAL STU. 1 (1980).
92 I explain the two (conceptual and normative) senses in which my using the notion of “core” is appropriate. See supra text accompanying notes 2-6.
help explaining the duty of loyalty, or at least two key features thereof: The no-conflict and the no-profit rules.

Developing an account of the trust form in the light of the negative side-effects of the institution of private ownership is important for another important reason. The notion that the institution of trust mitigates some (normatively troubling) excesses of ownership can contribute to an underdeveloped subject in property theory—what are the legitimacy constraints on the institution of private ownership. An institution of private ownership cannot count as legitimate (whatever this may mean) where a few own everything and the rest nothing. My emphasis on the excesses of ownership gives rise to a different constraint on the legitimacy of the ownership institution as a whole. An otherwise desirable legal institution, such as private ownership, may suffer from a legitimation deficit insofar as it excludes persons, through no fault or choice of their own, from the positions and benefits that it confers, in principle, on all others. Needless to say, these positions and benefits are not picayune. Accordingly, the special normativity of the trust form is intimately related to the legitimacy of the institution of private ownership as a whole—the trust is a condition on the legitimacy of private ownership.

93 See, e.g., JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 115-17, 444 (1988); Carol M. Rose, Canons of Property Talk, or, Blackstone’s Anxiety, 108 YALE L.J. 601 (1998); ARTHUR RIPSTEIN, FORCE AND FREEDOM chs. 4 & 9 (2009); ERNEST J. WEINRIB, CORRECTIVE JUSTICE ch. 8 (2012).
94 For a brief discussion of this constraint, see Avihow Dorfman, THE NORMATIVITY OF THE PRIVATE OWNERSHIP FORM, 75 M.L. REV. 981, 1008 (2012).
95 The proposed argument allows us to see that there is a subtle question of comparative law that lies beneath (or above) the ownership/trust connection. Were traditional civilian jurisdictions offer absolutely no legal schemes to mitigate the excesses of private ownership, the legitimacy of their private ownership institutions would be wanting. It seems that some civilian jurisdictions provide at least some such institutions, but it is beyond the scope of the present argument to assess whether these are, separately and/or jointly, sufficient to meet the bar of legitimation.