Legal Theory Workshop
UCLA School of Law

Irit Samet
Professor in Law
The Dickson Poon Schoof of Law
Kings College, London

“Trusting the Trustee”
Thursday, November 2, 2023, 3:20 – 5:20pm
Faculty Library

Draft, October 2023. For UCLA Workshop. Please don’t cite or quote without permission.
Trust the Trustee

Irit Samet

Professor, School of Law, King’s College, London

Note to colleagues in UCLA

Thank you for engaging with my paper. This is a second chapter in a book I am writing about the philosophical foundations of trust law. In the first chapter I dealt with trust structures that aim to shield property form the duties of owners, mainly paying tax and debts (this is the OSITs that I sometimes refer to). This chapter therefore focuses on trusts that are created for legitimate purposes (like providing for children on a long term basis).

Contents

Trust the Trustee ........................................................................................................................... 1

Introduction ...................................................................................................................................... 3

A. The Ethics of Trust ............................................................................................................... 5
1. From reliance to trust .......................................................................................................... 6
2. Is it rational to Trust? ........................................................................................................... 8
3. Should the State promote Trust? ...................................................................................... 13
4. Purity of motive .................................................................................................................. 17

B. The Law of Trust as Substitution for Trust ........................................................................ 18
1. Parties to Contract .............................................................................................................. 20
2. Trustees and Beneficiaries ............................................................................................... 24

C. A platform for Trust .............................................................................................................. 34
1. Trusting a stranger ............................................................................................................. 34
2. Between contract and trust ............................................................................................... 37
3. Expressing Trust in the trustee ......................................................................................... 42
4. Structuring a platform for Trust ...................................................................................... 47

Conclusion and back to OSITs ..................................................................................................... 51
**Abstract**

In this chapter I am asking whether the trust as a legal institution is designed as a platform for encouraging, enhancing and protecting relationship of trust between the beneficiaries and the trustees. If it were so, it makes sense to argue that the requirements, value and moral psychology of Trust must be given due weight when delineating the normative contours of the law of trust. Central structural features of the trust strongly indicate that the allusion to the ethical term is not a mere remnant from the days of chivalry and strict codes of honour. Other conspicuous characteristics of the trust, however, militate against this idea: elaborated mechanisms for controlling the trustees' actions, ever expanding power to supervise the trustee, extensive trustees duties to provide information and sever sanctions to deter breach of duty can easily be read as indicating an attitude of scepticism and suspicion of trustee's faithfulness. I argue that such Trust scepticism in misconceived. Trusts still corresponds closely with the value of Trust, implement it, and (hence) draw legitimacy from its great utility to society. Following a conceptual discussion of trust in philosophy, I move to compare trusts to contracts and then attempt to show that the unique characteristics of trust are best interpreted as drawing on the thick concept of trust we find in moral theory.
Introduction

The origins of the term ‘trust’ to denote a legal relationship are fairly humble. Lawyers in the sixteenth century came to employ it to describe Uses that (due to their structure) survived the Statute of Uses.¹ The term caught, and the ‘trust’ was popularised as a ubiquitous form of property holding.² But it seems that few of the countless individuals who engaged and employed it over the centuries to serve a vast array of needs stopped to asked themselves what, if at all, is the connection between the legal relationship and the interpersonal attitude we know as Trust (in the text I use Trust with capital letter to designate the ethical stance, and trust to speak about the legal relationship). The medieval lawyers who coined the triad ‘use, confidence, trust’ for describing relationship where one party is obliged to manage property he owned for the benefit of another surely had some intuitive connection in mind between the relationships in ethics and in law.³ Modern law of trust still echoes their insight. Central structural features of the trust strongly indicate that the allusion to the ethical term is not a mere remnant from the days of chivalry and strict codes of honour: the trustee is typically required to actively manage a portfolio of assets for the benefit of the beneficiaries, with discretionary elements as to their shares, or even their identity, being highly popular; settlors are willing to entrust their property to another (a stranger or an acquaintance), and rely on her to fulfil their plans for the property. When viewed from this perspective, it makes sense to argue that the requirements, value and moral psychology of Trust must be given due weight when delineating the normative contours of the law of trust.

Other conspicuous characteristics of the trust, however, militate against this idea: elaborated mechanisms for controlling the trustees’ actions, ever expanding power to supervise the trustee, extensive trustees duties to provide information and sever sanctions to

¹ N. G. Jones, 'Uses, Trusts, and a Path to Privity' (1997) 56 Cambridge law journal 175, p.177
² In October 2022 there were 198,000 trusts registered in the Trust Registration office, (of which 38,000 newly registered), with total chargeable gains of £6,510 million (https://www.gov.uk/government/statistics/trust-statistics/statistics-on-trusts-in-the-uk-october-2022).
³ The Statute of Uses itself was framed to apply to seisin "to the use, confidence or trust" of another (Jones, 'Uses, Trusts, and a Path to Privity' p.181).
deter breach of duty can easily be read as indicating an attitude of scepticism and suspicion with regards to the trustee’s faithfulness. What started off as Trust-based relationship between friends, family or members of a small tight group united by shared values and mutual interests has morphed into professional relationship between strangers in which no room is left for real Trust. Sure enough, some trusts are still managed by a trusted aunt or a family solicitor that features on the settlor’s Christmas card list. But in general, one could argue, the modern trust has moved on from an offshoot of intimate relationships to an anonymous interest-based association. If so, the ethics of Trust cannot teach us much about the legal phenomenon of trusts, and should not count as a point of reference in a discussion about the its legitimacy.

In this chapter, I wish to show that such Trust scepticism in misconceived. Trusts still correspond closely with the value of Trust, implement it, and contribute to its flourishing in the community. The institution of trust, which is (as we saw in chapter 1) going through a serious legitimacy crisis, can draw moral validity from the great utility of Trust to society. If so, the concept of Trust must serve as an ethical point of reference for assessing the norms of trust law, and any suggestion as to how they should be developed. When the law about new formats of trusts, remedies for breach, or the right to information (to name just a few aspects of the law of trusts that are relevant here) hits a crossroad, the courts ought to consider how each course of action may affect the need to encourage Trust in trustees. But in order to add ‘supportive of Trust’ to the list of positive characteristics of trusts, we need to explain how, in spite of some conspicuous Trust-busting elements, the law of trusts serves as a platform for creating, extending and deepening a Trust-based relationship between the parties.

I begin with a conceptual discussion of Trust, highlighting the aspects that are most relevant for understanding its role in the law of trust and asking which account of trusting attitude is most useful for understanding this body of law. The ‘strange silence on the topic [of Trust] in the tradition of moral philosophy’, which Annette Baier laments in her famous 1986 paper, has been largely broken - owing to her ground-breaking work, as well as the growing evidence about the crucial role which Trust plays in the establishment of thriving
societies and relationships. This will allow us to draw from the rich conversations about Trust in philosophy, political theory and economics. Next, I move to examine the argument that trust law is designed to rip the benefits of Trusting relationship when the conditions for Trust do not obtain. Here, I find it helpful to study the trust against the foil of contract, by showing that problems that afflict theories that connect contract and Trust are (seemingly) deeper and wider when applied to the law of trusts. I then seek to show that if we pay due attention to the unique characteristics of the trust, we will see that what looks like Trust-busting feature of the legal relationship, in fact help the parties to the Trust to offer and respond to Trust.

A. The Ethics of Trust

After long period of neglect by philosophers, renewed interest in thick ethical concepts combined with mounting evidence about its utmost importance for the institutions of civic society brought a wave of new literature on Trust. This is, of course, not the place for reviewing this burgeoning scholarship, or assessing the merits of the different accounts of Trust that have been offered by the many philosophers, psychologist and political theorists that engaged with it. Instead, in this theoretical part, I look at three issues that would help us examine the extent to which the law of trust is and should be built around an attitude of Trust in the trustee: first we need to settle on a definition of Trust that is faithful to the wider phenomenon but also leaves room for the possibility that (ideally) trustees are Trusted. I then ask whether it is rational for individuals to Trust, and (relatedly) whether the state has reasons to cultivate Trust, especially among strangers. This question is of course highly relevant for both understanding and justifying any legal device that can potentially encourage people to Trust others. Finally, we need to look at the motivation for trusting, and more specifically at the question whether an agent can be Trustful if she has other strong reasons to behave as the relying party expects her to.

---

1. From reliance to trust

A standard definition takes Trust to be a ‘psychological state comprising the intention to accept vulnerability based upon positive expectations of the intentions or behavior of another’.\(^5\) Formulas of this kind escape, as we will see shortly, some contentious issues about the nature of trust, but it usefully brings to the fore the indispensable element of ‘vulnerability’. To Trust means to concede weakness and dependency on the trusted, with the hope, belief or feeling that he will support the trusting party in alleviating it, or at least, not exploit it to his own advantage. Given the human condition, such vulnerability and the stance it generates are prevalent, and it is therefore only to be expected that a whole cluster of such attitudes can be identified. It is therefore important for understanding the nature of Trust to distinguish it from other members of this family, and in particular from ‘reliance’.

If I were to say, ‘I can trust him to remember my birthday: he has given his bank a standing order to send the same flowers each year on that date. Short of bank collapse, I can count on it’, I would be speaking ‘at least ironically, if not sourly’.\(^6\) We can speak metaphorically about trusting the rain in Glasgow to fall, or the trains on the Continent to arrive on time. But even if I strongly believe about a human that something very personal to her, like a deeply entrenched habit or a profound emotion, is liable to prevent her from exploiting my vulnerability, this is still not an attitude of Trust; think of ‘she is shy and reticent, she won’t share the damning information she has on me’\(^7\). A clue to the missing element – that which transforms reliance to Trust – can be gleaned from the way we respond to violations: whereas frustrated expectations on the basis of reliance can reasonably give rise to emotions of disappointment, frustration and disillusionment, only actions (or states of mind) that contravenes expectations borne by Trust can sensibly be branded ‘betrayal’.\(^8\)

---


\(^7\) Baier, ‘Trust and Antitrust’p.234

\(^8\) Ibid p.235; ‘It is pointless to say you trust someone unless there is some risk of you suffering a loss ‘if it is betrayed Russel Hardin, *Trust* (Polity press 2006), p.28
risk of betrayal, Bayer explains, is always in the background of trusting relationship, and she therefore defines Trust as ‘accepted vulnerability to another’s possible but not expected ill will (or lack of good will) toward one’.  

It is not clear however, what this ‘good will’ - the lack of which is so sorely felt by the trustful - amounts to. Trust, we know, can exist, and play an important role in the dynamics between members of gangs and criminal families since it does not require good character or noble intentions by either the trustor or trusted. It is not even about honesty and empathy as between members of the group. The requirement of ‘good will’ is also problematic for the idea of Trust between friendly strangers: if we think that it is real, ‘good will’ cannot be a necessary condition for Trust. In his nuanced yet pragmatic account of Trust, Hardin suggests that to be trusting one need only believe that the trusted party is acting as she expects him to, in large part, because he wants to maintain his relationship with her. In that way the trusted can be said to ‘encapsulate’ her interest in his own. Rather than full blown ‘good will’, it is enough if the a trusting party develops an expectation that the trusted will ‘take our interest … as our interests, into account’. This is quite far from the altruism which ‘good will’ seems to denote, but still, the wish to preserve the relationship means that the trusted counts the trusting party’s interests as his own just because they are her interests.

This emphasis on the response to the attitude of Trust is also highlighted by Gerald Postema in his account of the dynamics of Trust. For him, what the trusting party looks to is ‘trust responsiveness’: she wants to see that the trusted party is ‘taking the manifested fact that the trusting party counts on him as a salient and significant reason to act as trusted.’ Trust responsiveness need not be an end in itself; it may, and often is, motivated by further

---

9 Baier, ‘Trust and Antitrust’ p.235
11 Hardin, Trust, p.8
12 Ibid, p.17
13 Ibid, p.19
considerations like the strive to gain esteem. What is important is that the trusted responds appropriately to another person’s manifested reliance – not to her need or dependency – and sees the mere fact that he is being trusted as (at least) an important reason to act as expected of him.\textsuperscript{15} This step further from Bayer’s good will requirement makes the attitude of Trust yet more inclusive, and accounts for the way in which Trust between people who are only loosely connected is a very real possibility in the eye of many.

2. \textit{Is it rational to Trust?}

‘One of these days I am going to make the mistake which a man of my business dreads above all other mistakes. I am going to find myself doing business with a man I can trust and I am going to be just too Goddamn smart to trust him’.\textsuperscript{16}

On the face of it, the question in the heading seems strange. We are born and die vulnerable, prone to be harmed, and the creation of anything of value requires support from our fellow human beings. ‘No one is able by herself to look after everything she wants to have looked after’ - we have no choice but to Trust.\textsuperscript{17} And this, as a vast body of research proves, is exactly what we do: we have the ability and tendency to trust acquaintances and strangers; we developed the skills required for persuading others to trust us, and not to betray the Trust we place in them. In a standard protocol of what researchers in psychology and behavioural economics call ‘Trust game’, two players are randomly assigned one of two roles: a ‘trustor’ and a ‘trustee’ (not in the legal sense).\textsuperscript{18} The trustor is allocated an endowment (e.g. $10) and can hand over any portion of it to the trustee as she sees fit. The sum she chooses to pass to the trustee is tripled by the researcher, and the trustee can then decide how much to hand back to the investor. This highly popular game (‘workhorse to study trust’) was addressed in

\begin{itemize}
\item[Ibid p.251]
\item[16] Raymond Chandler 1955 118
\item[17] Baier, 'Trust and Antitrust', p.236
\item[18] The game was first designed by Joyce Berg, John Dickhaut and Kevin McCabe, 'Trust, Reciprocity, and Social History' (1995) 10 Games and economic behavior 122
\end{itemize}
more than a thousand scientific papers.\textsuperscript{19} The picture that emerges confirms what the game’s designers wanted to show, namely that Trust is an “economic primitive” which is as basic to economic transactions as self-interest.\textsuperscript{20}

In contrast with the prediction of liberal economics - in which the Nash equilibrium of the Trust game would be that the investor passes nothing to the trustee - about ninety percent of trustors chose to pass some money to the ‘trustee’. In the first experiment, that sum averaged over 50\% of the original sum handed to them by the researcher. The responses of the trustees are no less surprising for those who follow models of classical economics: eighty percent passed money back, with an average transfer of more than was originally handed to them by the trustor.\textsuperscript{21} The results of the trust game and its variations tend to demonstrate our intuition about Trust, namely, that it responds to relevant information, dependent on incentives to feel and fulfil the expectation it creates and that dialogue can have a most positive effect on the willingness to Trust and behave in a trustworthy way.\textsuperscript{22} Moreover, related studies found that those who tended to Trust were themselves more trustworthy, more personally satisfied and ‘no more gullible or easily suckered’ than the average person.\textsuperscript{23} Sadly,

\textsuperscript{19} Vincent Buskens, Vincenz Frey and Werner Raub, ‘Trust Games: Game-Theoretic Approaches to Embedded Trust’ in Eric M. Uslaner (ed), \textit{The Oxford Handbook of Social and Political Trust} (Oxford University Press 2018), p. 306

\textsuperscript{20} Berg, Dickhaut and McCabe, ‘Trust, Reciprocity, and Social History’, p.123


\textsuperscript{22} Wilkinson-Ryan, ‘The Psychology of Trust and Fiduciary Obligations’. p.90

\textsuperscript{23} Ibid. p.91. Surely, at least some of the players who chose to pass money did it for purely altruistic motives (as results of the ‘dictator game demonstrate), not out of Trust that the other party to reciprocate, but it is difficult to separate these motives, see an attempt to do so in James C. Cox, ‘How to identify trust and reciprocity’ (2004) 46 Games and economic behavior 260.
It has proven too difficult to measure the effect of one’s willingness to Trust on her economic outcomes in general.\textsuperscript{24}

If so, why might we think that Trust and rationality are in tension? The problem is rooted in the assumption that Trust is essentially a cognitive attitude, i.e. that it is fundamentally a matter of our beliefs or expectations about the trustworthiness of others.\textsuperscript{25} Standard accounts of rationality demand congruence between cognitive attitudes and evidence. But the point of Trust seems to be that, at least in some central cases, it is not fully supported by the evidence one has for believing that the trusted will act as expected; conditions of uncertainty, created by the open-endedness of the typical Trust relationships, and the discretion that is embedded in them, make the adoption of a trusting stance look like a leap of faith. The attitude of Trust and the downing of guard that follows may thus be viewed as conflicting with the requirement of rationality.

It is therefore no surprise that classic economic models, in which rational action equals self-maximisation of one’s utility, have no time for Trust-based interactions.\textsuperscript{26} When encountering risk, economic (i.e. rational) actors deal with it in a calculating fashion, using variety of means for anticipating and allocating risk, like insurance, contracts and the like. According to Williamson’s much revered economic model of Trust in economic settings, it is

\textsuperscript{24} Yann Algan and Pierre Cahuc, ‘Trust, Growth, and Well-Being: New Evidence and Policy Implications’ in Philippe Aghion and Steven N. Durlauf (eds), \textit{Handbook of Economic Growth}, vol 2 (Elsevier 2014), section 4.5: as you would expect, research shows generally that individual income is hump-shaped in relation to the intensity of Trust – she who trusts too much would be let down by untrustworthy partners, whereas the overly risk averse when it comes to Trust will lose safe opportunities for profit-creating cooperation.

\textsuperscript{25} But see Lawrence C. Becker, ‘Trust as Noncognitive Security about Motives’ (1996) 107 Ethics 43 for the argument that ‘it is a particular form of noncognitive trust that ought to be of central interest to political philosophers’ (p.44); or Karen Jones, ‘Trust as an Affective Attitude’ (1996) 107 Ethics 4, who suggests an account of trust according to which trust is ‘an attitude of optimism that the goodwill and competence of another will extend to cover the domain of our interaction with her, together with the expectation that the one trusted will be directly and favorably moved by the thought that we are counting on her’, Jones stresses that such attitude of optimism is ‘not to be cashed out primarily in terms of beliefs about the other’s trustworthiness’, but rather as ‘effectively loaded, way of seeing the one trusted’ (p.4). I cannot go into this argument at length here.

replaced by calculation, and "[c]alculative trust is a contradiction in terms." 27 Trust is only relevant for intimate relationships to which calculation is foreign, and not to interactions in the market. Of course, one may reason that in certain circumstances the chance of profit makes it worthwhile to make herself vulnerable to the other party in the hope that he will act in a way that is beneficial to her; but that, Williamson argues, is not Trust in the deep sense of the word; for '[w]herein is trust implicated if parties to an exchange are [merely] farsighted and reflect the relevant hazards in the terms of the exchange?' 28. This agent’s way of thinking is really like making a bet – a very different phenomenon to placing Trust. 29 "Trust" in commercial settings, is one more way to manage uncertainties, and once we realise that, as one writer puts it, ‘the romance is gone’. 30

But if we look back to the deep fissure between the way Trust operates in lab games and the predictions of neo liberal economics, it becomes clear that Williamson is missing something essential about Trust-based relationships. The way in which dialogue, especially a direct eye-to-eye conversation, is effective in persuading strangers to grant and reciprocate attitude of Trust, the chances that people are willing to take even with complete strangers, and their persistent reluctance to subscribe to well-established principles like the Nash equilibrium all lead to the thought that relationships need not be calculation-free in order to leave room for Trust.31 As the Nobel Laureate Kenneth Arrow famously wrote in 1972, ‘virtually every commercial transaction has within itself an element of trust’. 32 An analysis that abstracts from all human qualities, like Williamson’s account, is relevant only to a small

28 Ibid, p.469
30 Becker, 'Trust as Noncognitive Security about Motives', p.45
32 Kenneth J. Arrow, 'Gifts and Exchanges' (1972) 1 Philosophy & public affairs 343, p.357; The great importance of confidence and trusts has already been recognised by Keynes in The General Theon] of Employment, Interest and Money (Keynes 1936), p.161
section of economic relationships. Indeed, transactions and dealings that are geared toward making profit will likely have a hefty measure of calculatedness to them; but just as relationships that are oriented towards love are hardly ever calculation-free, gain-based relationships between humans have room for empathy, compassion and Trust: ‘it is impossible for all but the most pathological of us to avoid the development of some minimal affective sentiments’ towards the people we interact with’.\textsuperscript{33}

This insight applies also to a relationship where truster and trusted never interact directly. As lab experiments demonstrate, and everyday experience confirms, the sense of being trusted has an enormous effect on the question whether we act as the other person expects us to. The knowledge that we are trusted can motivate us to be trustworthy even without a personal acquaintance with the truster. The natural capacity for empathy is enough to make the trustee identify with the trusurer’s vulnerability, even if he does not know her personally and has not encountered the vulnerability at first hand.\textsuperscript{34}

To accept this expansive view of Trust-based relationship as based on shared empathy, even to strangers, you need not reject the cognitive view of Trust (according to which, recall, it is a set of beliefs about what the trusted is likely to do). Thus, according to Phillip Pettit, the key to explaining why it is rational to trust lies in taking seriously the perspective of the trusted. Pettit presents the act of coming to Trust as a bootstrapping exercise in which endorsing a trusting stance renders this very move (more) rational. One clear and not very surprising conclusion of the trust game is that prior positive experience with a stranger, e.g. in sets of repeated games, greatly enhances the willingness of player 1 to pass on money to player 2. But former experience or acquaintance is not a necessary condition for the rationality of an act (or attitude) of trusting, nor is a belief that the trusted possesses special virtue or is loyal to me. Instead, the truster can tap on to what Pettitt calls ‘trust-responsiveness’, that is, the trusted (selfish) desire to maintain good opinion of himself, and more specifically to attain the goods attached to being considered reliable: ‘the act of trust will communicate in the most credible currency available to human beings - in the gold currency of action, not the paper

\textsuperscript{33} Mitchell, ’The importance of being trusted’p.608

\textsuperscript{34} Ibid 611
money of words - that the trustor believes the trustee to be truly trustworthy, or is prepared to act on the presumption that he is’. The trustor, in manifesting trust, acts like a billboard for advertising to third parties their belief in the trustworthiness of the trusted. If they fail to rise up to the challenge of acting as is expected of them, they risk losing their reputation not only with the trustor but also among third parties who become aware of the betrayal. Thus, ‘in the very act whereby the trustor is put at risk, the trustee is given a motive not to let that risk materialize’. This idea of Trust as a developing dynamics will have particular importance as we get to discuss the case of beneficiaries and trustees.

It remains the case, however, that with regards to important matters, the willingness of trusters to face another person - especially a stranger - with their vulnerability exposed, expecting no harm, may look like a leap of faith. If we want to encourage people to move from a comfort zone where actions are only taken if their consequences can be calculated with a good degree of certainty, to a more daring, but ultimately rewarding, zone dominated by Trust, we must help them to do so. Below, I argue that the great benefits which willingness to Trust strangers brings to society and individuals render the creation of such Trust-friendly environment a worthwhile goal for the state. Thus, if the law of trust is assisting owners and beneficiaries in transitioning into Trust, and draws paths for manifesting Trust, it is to be praised for this.

3. Should the State promote Trust?

The question what connections, if at all, does the law of trust have with Trust is not a historical question, but rather an analytic and (relatedly) normative one. For if Trust - of the kind that is relevant to the relationship between settlors, trustees and beneficiaries, is of value to individuals and society and it turns out that the law of trusts indeed serves to encourage, embed and enhance it, this is an important normative fact about this law. This potential nexus serves not only as a justification for having the trust on the law books to begin with, but also

36 Ibid 217
as a benchmark for measuring all future developments of this body of law. In this section, I wish to highlight some of the now vast literature on the value of Trust, in order to motivate and set the stage for the question whether the law of trusts can indeed draw legitimacy from the way it promotes Trust-based relationships.

On a personal level, life without Trust would be deeply scary or impoverished since our limited ability to look after our interest means that ‘what matters to me would be unsafe, unless like the Stoic I attach myself only to what can thrive, or be safe from harm, however others act’. \(^{37}\) Life under an ever present cloud of suspicion is aptly likened by Othello to a captivity in the hands of a ‘green-eyed monster which doth mock the meat it feeds on’. \(^{38}\) However, at least in an inter-personal setting, Trust is important not only as an instrument that facilitates harmonic life of cooperation. As Charles Fried emphatically argues, ‘[s]o remarkable a tool is trust that in the end we pursue it for its own sake; we prefer doing things cooperatively when we might have relied on fear or interest or worked alone’. \(^{39}\) Our capacity to Trust is a brilliant expression of moral agency, as it assumes and enhances respect for others. Together with respect, Trust is therefore widely considered to be among the most fundamental building blocks of personal relationships. \(^{40}\) As a link in the chain that leads from respect to the capacity to promise, Trust partakes in a process in which ‘our moral powers are amplified, as if each raised to a higher power the moral capacity of the one before’. \(^{41}\) Most people therefore want to be the kind of person whose agency is thus expanded, regardless of the question whether they could secure the attainment of their goals without Trust.

\(^{37}\) Baier, 'Trust and Antitrust'
\(^{38}\) Act III, Scene 3
\(^{39}\) Charles Fried, Contract as promise : a theory of contractual obligation (Oxford University Press 2015), p.8
\(^{40}\) Dori Kimel, From Promise to Contract : Towards a Liberal Theory of Contract (Bloomsbury Publishing Plc 2005), p.29
\(^{41}\) Fried, Contract as promise : a theory of contractual obligation, p.138
Sociologists, while they tend to think of Trust in instrumental terms, are no less in awe of Trust as a form of ‘social glue’. The willingness to Trust, and the corresponding virtue of trustworthiness have been found in ample research to be a real asset for the community as a whole. Trust in other members of society and in government is ‘a crucial element in the formation, stability, and productiveness of both individuals and large-scale social organizations’. As one of ‘the most fundamental cultural value that could explain economic development’, Trust holds the key for exchange and cooperation in all the numerous interactions for which detailed rules cannot be written. And so, in contract with mainstream neo-liberal economics which, we saw, is sceptical about the place of Trust in market transactions, economists which focus on growth across societies, came to see it as essential for overcoming market failures caused by incomplete contracts and imperfect information, and thus as a powerful drive for economic development. Coming to it from this angle, a positive relationship between Trust and development of financial markets has been shown in 86 countries over the course of the last three decades.

In his seminal work on Trust, John Braithwaite argues that it should be viewed as a highly successful means for controlling the abuse of power. Other mechanisms for achieving this goal like courts and auditors come with a price to tax-payers and limit the power of the body they audit, thus reducing its ability to supervise other powerful bodies. Trust, in contrast, can do the job without the double price tag. The success of Japanese corporations, Lloyds in the City of London and those regions of Italy that flourish economically, have all been attributed

42 Larry E. Ribstein, 'Law v. Trust' (2001) 81 Boston University Law Review 553, 554, This notion was popularized in FRANCIS FUKUYAMA, TRUST: THE SOCIAL VIRTUES AND THE CREATION OF PROSPERITY (1995). A standard definition of trust in research of this strand would be something like ‘plac[ing] resources at the disposal of another party without any legal commitment from the latter, but with the expectation that the act of trust will pay off’ (Coleman, Foundations of social theory, p.98)


44 Becker, 'Trust as Noncognitive Security about Motives', p.43


46 Ibid, 5.1 and sources cited there.

47 John Braithwaite, 'Institutionalizing distrust, Enculturating Trust' in V. A. Braithwaite and Margaret Levi (eds), Trust and governance (Russell Sage Foundation 1998), p.348
to the way in which Trust is woven into the fabric of these diverse societies, demonstrating how ‘resilient trust simultaneously limits the abuse of power and expands economic growth.48

‘There are countries in Europe’, J.S.Mill observed ‘where the most serious impediment to conducting business concerns on a large scale, is the rarity of persons who are supposed to be trusted with the receipt and expenditure of large sums of money’.49 There are a few explanations for the negative effect of low levels of Trust on growth and economic development. It is a question that is worthwhile investigating since it is a dramatic effect: one meta-analysis of the economic literature shows that a ten percentage point increase in the share of trusting people within a country should raise annual per capita real GDP growth by about 0.5 percentage point.50 Reduction in transaction costs is one obvious explanation.51 If every aspect of cooperation must be accompanied by writing and enforcing contracts, all workers and subcontractor must be monitored, and security protocols implemented on every step, the cost of making business sky rockets. Indeed, plenty of research shows that when greater Trust is built with stakeholders, such as employees and supply chain partners, organisations are able to divert investments in oversight and monitoring toward other parts of the business.52

The state, it is clear, would be right to foster trusting relationships among members of the community. If the law of trust instantiates and supports Trust, this conclusion is relevant for it on a few levels: first, if Trust-based relationships are an efficient and constructive way of doing business, the law should prima facie encourage owners to use the trust when it suits their plans for the property. Such legitimacy points are particularly important in light of the

48 Ibid, pp.348-51 and sources cited there.
52 Paul J. Zak and Stephen Knack, 'Trust and Growth' (2001) 111 The Economic journal 295, see in particular pp. 297-9 for explanation why reduction of transaction costs as explanation for the positive contribution of Trust, and sources on alternative explanation in pp..296-7
great potential for abusing the trust and the thought that we may do better without it.\textsuperscript{53} Second, when it comes to Trust between strangers in the market, trusts are an exemplar of such relationship. It therefore makes sense to think that if the law of trusts serves as a platform in which Trust in nurtured it has the additional value of helping people to develop the virtue of granting and reciprocating Trust. Third, even if Trust between trustees and beneficiaries/settlors is different in kind from the Trust between citizens and government, it makes sense to think that good experience with a well-managed trust will have positive influence on one’s willingness to Trust civil servants. This sort of spill over from personal Trust to public Trust gives the trust some more brownie points (which, in light of its legitimacy crisis, it should find very useful).

4. \textit{Purity of motive}

Another pertinent issue that crops up in philosophical discussions around the definition of Trust is motivation: to what extent should the actions of the trusted person be a response to the attitude of Trust for it to be considered an expression of trustworthiness? After all, the trusted can act as expected of him for selfish reasons or other reasons that have nothing to do with the truster. A mere coincidence between the trusted party’s actions and what the truster expected is clearly not enough to establish him as trustworthy. On the other hand, a requirement that the trusted acts purely out of a desire to respond to the Trust is too strict. Different writers who attended to the question position themselves somewhere along the continuum that stretches between the cynic and the pietist.

For Baier, Pettit’s solution to the rationality challenge in effect undermines the whole project since ‘Trust responsiveness’, as he describes it, removes the relationship from the realm of Trust: if one does what he is trusted to do only in order to avoid the great risks associated with being found out as untrustworthy, ‘then that very attitude, if known, would be a good enough reason for those who had trusted one to cease trusting.’\textsuperscript{54} Indeed,

\begin{itemize}
\item \textsuperscript{53} As we saw in chapter 1
\item \textsuperscript{54} Baier, 'Trust', p.112
\end{itemize}
the truster may still rely on him to do as she expects and hopes, but if (as it is the case according to Baier) Trust must feature the trusted’s good will, the relationship will no longer feature Trust. Or, as Mitchell puts it, in a fully-fledged Trust the binding glue ‘derives from the moral psychology that allows us to identify with other human beings for no other reason than that they themselves are, like us, human’.55

However, as we saw above, the requirement of ‘good will’ is too restrictive and leaves out many relationships - especially between strangers - that are commonly thought of as Trust-based. Hardin’s position, according to which the trusted person is only required to encapsulate the truster’s interests, seems to work better here: it is more inclusive but manages to maintain a difference between reliance and Trust. The two-step encapsulation account is also successful in distinguishing between coincidence of interests to actions that are rooted in, and establish, a relationship of Trust: “I might encapsulate your interests in my own for various reasons ..maintain my ongoing relationship with you... consider you my friend or... love you, and...value you’.56 Thus, I may be motivated to encapsulate your interest by my own interest, but it is ultimately my commitment to you/our relationship that moves me to act. In the next two sections we will ask whether, and if so how, trust law serves as a platform of a relationship of Trust. The theoretical aspects we focused on in this section will serve as a point of reference to many steps along the way towards showing that this is indeed the case.

B. The Law of Trust as Substitution for Trust

The benefits of Trust to society are well recorded. There is also good evidence to show that a tendency to Trust is valuable to the individual both as instrument for securing goods and as an end in itself.57 If those arguments are convincing, a legal norm which supports trusting relationship is valuable in this respect. The quality of ‘trust-enhancing’ becomes significant

55 Mitchell, ‘The importance of being trusted’ p.609
56 Hardin, Trust, p.19
57 See below xx
for the assessment of such norm, and the extent to which proposed developments augment or undermine its potential in this respect should be carefully considered. However, the relationship between legal norms and the advantages of any inter-personal dynamics that it seems to instantiate need not be so straightforward: it may be the case that a legal norm is designed to generate the benefits of a certain type of inter-personal relationship precisely in its absence. For example, according to some writers, the law of contracts allows strangers to secure future behaviour of others when the conditions that support the normal instrument for doing so, i.e. a promise, do not obtain.\textsuperscript{58} With the help of contract, so the argument goes, people can rely on the word of others as to their future conduct even when promising cannot do the work of reassurance because, for example, they are strangers. Thus, the law of contract, in spite of superficial appearance, does not embody the morality of promise; rather, it is designed to harness the power of law to materialise the benefits of promise when this useful instrument for assuming obligations cannot be meaningfully used since it only works in intimate settings.\textsuperscript{59}

The law of trust, it can be argued, has a similar structure in that respect: while it started off as an enforcement of a promise between members of a small ruling class, it has moved on to become a mechanism which successfully substitutes Trust where the relationship between the parties is not of the kind in which it can be expected to thrive. For sure, some trustees are still fully Trusted by settlors and beneficiaries since close personal connection was the drive for appointing them in the first place. But many other trusts, so the argument goes, do not follow this pattern, since the relationship with a professional trustee is not of the kind where fully-fledged Trust can be expected to thrive. The ingenuity of the law of trusts is in facilitating the transfer of great power over one’s interests into the hands of a stranger without the need to adopt an attitude of Trust in her at any point. Such Trust-sceptical understanding of the function of trusts can draw support from central aspects of the law that governs them. In what follows, we are going to look more closely at these features of trust law in order to assess the

\textsuperscript{58} Contract law supports obligation in conditions of personal detachment (Kimel, \textit{From Promise to Contract: Towards a Liberal Theory of Contract}, p.83)

\textsuperscript{59} I look closely at these arguments below xx
Trust-sceptic claim. The law of contract will serve as a useful backdrop throughout the discussion.

1. Parties to Contract

In his ground-breaking treatise on contract as a promise, Charles Fried famously wrote, ‘promising [is] a device that free, moral individuals have fashioned on the premise of mutual trust... The moralist of duty thus posits a general obligation to keep promises, of which the obligation of contract will be only a special case’. Charles Fried’s bold theory about the moral vocation of contract law has been subject to fierce criticism from legal economists and normative legal theorists alike. The idea that contractual duties draw their moral authority from the duty to fulfil promises, and hence, ultimately, from the duty not to betray a Trust one has explicitly invited has been targeted from various perspectives. To the Holmsea - for whom contractual duties boil down to ‘[perform or] pay damages if you do not keep it,—and nothing else’, Trust lies at the periphery of contracts as a possible, but certainly not a necessary, component of the normative landscape of contracts. Such a view sits well with the neo-classical economy understanding of Trust we encountered in part A, where it is depicted as a feature of private relationships and, as such, irrelevant to market transactions. But you need not adopt either of these positions to notice a deep tension between the idea that the duty to fulfil contractual duties is rooted in the moral duty to fulfil promise and respond to a Trust you encouraged, and the law of contract as we know it.

The problem, put succinctly by the legal economist Larry Ribstein, is that ‘[m]andatory regulation that forces people to attend to others’ interests cannot produce the disposition to

---

60 Fried, Contract as promise : a theory of contractual obligation, p.16; 17
61 Holmes, Harvard , p.462
62 See, e.g., Seana Valentine Shiffrin, ‘The Divergence of Contract and Promise’ (2007) 120 Harvard law review 708, where differences between the morality of promise and the law of contract is commented on, with partial endorsement due to the limits on the legitimacy of state enforcement of moral duties. Here, I am interested in the effect of sanctions on the ability to Trust, an not in the general question of the relationship between contract and promise.
trust or be trustworthy’; this is because ‘regulation impedes development of trust norms by interfering with opportunities to be genuinely trusting or Trustworthy’.

The apparent inconsistency between contract and Trust has already been noted by Fuller when he argued that in intimate settings a move to regulate an aspect of the relationship in a contract (in order to prevent the need for constructive trusts and other clarity-busting devices) would undermine the Trust that stands at their basis. But without further qualification and refinements, such claims are, as Matthew Harding observes, way too simplistic.

In the law of contracts, we find an elaborated mechanism which provides the parties with civil recourse in the form of sanctions against each other in case of non-compliance. The parties are fully aware of these mechanisms when they enter a contract, and they can therefore be said to hang over the relationship like the sword of Damocles. In the political context, as Meir Dan Cohen points out, the use of threats has a seriously adverse effect on the ruler’s claim that her subjects’ obedience is a response to her moral authority. This observation, he argues, carries over to Trust in general, as ‘in the presence of coercive threats there is no trust to justify’. Moreover, the enactment of sanctions casts a heavy shadow on the potential of a decision to comply to serve as a manifestation of Trust (to use Harding’s words). This, MD Cohen argues, is because ‘for all we know—and this includes the agent herself—compliance was motivated by fear of sanction, and is therefore devoid of expressive content’. When it is backed by a threat, the addressee of the request cannot demonstrate a belief in the worthwhile content of the request, even if she is so inclined. The worry lest she would be subject to sanctions crowds out other motivations in a way that makes it impossible for her to ascertain for herself, not to mention show others, the existence of a Trust-based motivation to comply.

---


67 Ibid, p.38 N 6
Do these arguments indeed show that in the presence of sanctions, compliance with requests cannot possibly be expressive of Trust? MD Cohen’s argument surely works well in situations where the sanction is very serious indeed (violence for example). Sanctions are also more likely to take over the addressee’s cognitive space in the way he specifies if the authority behind them is formidable: something like the state or a criminal organisation. But the sanctions which contract law makes available to the parties do not seem to be of the kind that obliterates the possibility of discerning or expressing any other motivation for compliance but fear.\textsuperscript{68} It seems more likely that a party who complies with the contract terms can know for herself, and communicate to the other party, that she does so because she wants to work together towards the common goal envisaged by the contract.

The effect of adverse consequences in case of a breach cannot after all be that devastating since breach of promise will also usually entail negative repercussions for the promisor (e.g. a blow to his reputation), yet the connection between promise and Trust is clearly close and intense. As we saw in the previous section, in some key analyses of Trust - like those of Hardin, Pettit and Postema – the wish to preserve the relationship and avoid harm to one’s reputation as a trustworthy person is a good enough motivation for trustworthy behaviour (to distinguish from self-interested fulfilment of the other party’s expectations). If at all, it is only in the context of intimate personal relationship that one can expect the fulfilment of the truster’s expectations to be purely out of good will towards her (or something close to it). And even here, if the trusted does as expected of him to avoid the torments of a guilty conscience, the truster can hardly feel betrayed. The tension between the presence of sanctions for actions that frustrate the expectations of the parties, and the interpretation of the relationship as one of Trust, is therefore not as sharp as Meir Dan Cohen portrays it.

Things may be different, however, in the context of a contractual promise. According to Dori Kimel, the availability of negative consequences for breach has a different effect on the

relationship between *contract* and Trust on the one hand, and *promise* and Trust on the other.\textsuperscript{69} This is because, in contrast with the consequences of breaking a promise, ‘the legal aftermath of an unjustified breach [of contract] is not speculative and contingent but known and, for the most part, certain. And, significantly, it is administered by purposely designed and famously powerful institutionalised mechanisms’.\textsuperscript{70} Whereas the way that leads on from a break of a promise is often shrouded by mist, the road ahead from a decision to breach a contract is well sign-posted, and the parties know pretty well where it is going and what to expect if they decide to take it. True, many hurdles may lie on the aggrieved party’s way towards contract enforcement, or even sufficient compensation.\textsuperscript{71} But these detractions from the ideal, Kimel argues, should not obscure the matter of principle: when signing a contract, the parties need not Trust their counterpart beyond harbouring a very basic belief that they will act rationally when deciding whether to perform their part – a calculation that in most cases will lead them to comply with their contractual duties.\textsuperscript{72} The consequences of breaking a promise, in contrast, are often not nearly as clear.

Kimel’s conclusion is that contracts are there to allow parties to cooperate without creating the attachment that is necessary for Trust.\textsuperscript{73} The value of this body of law lies elsewhere, namely, in the protection of what he calls freedom from attachment.\textsuperscript{74} This view of

\textsuperscript{69} Although he may well exaggerate the difference, see criticism in Saprai, *Contract law without foundations : toward a republican theory of contract law*, pp. 84-5 and sources cited there.

\textsuperscript{70} Kimel, *From Promise to Contract : Towards a Liberal Theory of Contract* p.58,


\textsuperscript{72} Kimel, *From Promise to Contract : Towards a Liberal Theory of Contract*, p.64; see also Sophia Moreau, ‘Taking On Responsibility and Trusting Others: A Response to Shiffrin’ (2016) 66 The University of Toronto law journal 380, p.387 for the argument that the strict liability stifles the potential of the rules to serve as routes for manifesting Trust.

\textsuperscript{73} In that, he is joining other scholars, with differing normative commitments, who believe that the morality of promise does not and should not inform the morality of contract, see for example, Louis Kaplow and Steven Shavell, *Fairness Versus Welfare* (Harvard University Press 2002), p.157-64; chapters by Barnett, Penner & Murphy in *Philosophical Foundations of Contract Law* (Oxford University Press 2014) ; Saprai, *Contract law without foundations : toward a republican theory of contract law*.

\textsuperscript{74} Kimel, *From Promise to Contract : Towards a Liberal Theory of Contract*, pp. 78-80, 141-2
the function and moral foundations of the law of contract has been heavily criticised. But my purpose in invoking it here is merely to help us examine the question whether the law of trust builds on, facilitates and supports real Trust. Let us then focus on Harding’s observation that ‘it is important when developing the idea that confidence is present in some way in a contract… not to assume that because of this trust is not present’. In the next section, I will show why we might think that the relationship of trustee and beneficiary is even less hospitable to real Trust than the kind of relationship envisaged by contract law.

2. Trustees and Beneficiaries

Those of the view that contract law reflects, enriches and supports Trust must put in quite a bit of effort to show that this is indeed the case. A remedy that is calculated to restore the aggrieved party to where she would be without the breach is, we saw, a significant challenge in that respect. In this section, we will see why it is even more difficult to reconcile the way in which compliance with the trustees’ duties is protected with the conditions that seem necessary for fostering Trust. In the next section I look at a different aspect of trust law, that adds to the difficulty of showing that it serves as a platform for Trust. My interim conclusion is that one could be forgiven for thinking that trust law is best interpreted as aiming to secure the benefits of Trust in its absence.

---


77 E.g. the doctrine of ‘intention to contract’ as a necessary condition for contract, or the duty to mitigate the damage which are difficult to reconcile with the idea that contract law enforces promises (respectively, Saprai, Contract law without foundations : toward a republican theory of contract law, chapter 5; Shiffrin, ‘Enhancing Moral Relationships Through Strict Liability’ pp.371-75)
i. Remedies for breach of trustee’s duties

Tamar Frankel’s observation that ‘protections against abuse of trust are self-defeating because they signal mistrust’ rings like a truism.\(^{78}\) At the very least, it means that those who wish to interpret a relationship between the parties as built on, and supportive of, Trust, must justify the presence of an external apparatus for inhibiting actions that thwart the beneficiaries’ legitimate expectations. As all students of trust law know, beneficiaries can resort to some heavy-handed mechanisms to assist them in enforcing the trustee’s duties if he fails to follow them of his own accord, even innocently. The way in which this unique enforcement mechanism is implemented poses a large question mark over the claim that the relationship between trustee, beneficiary and settlor is an embodiment of Trust.

First, a disappointed beneficiary can expect that if she makes a successful claim, the court will (where possible) enforce the trustee’s obligation \emph{in species}.\(^{79}\) Thus, on top of the personal claims against trustees, including for gain-based remedies and even exemplary damages, beneficiaries can routinely expect to get specific performance – a form of remedy which claimants in contract can only expect in a small, well-defined set of circumstances.\(^{80}\) As a result, beneficiaries can rest assured that a breach of trust which comes to light would be fully corrected. And even where the trust property is no longer in the hands of the trustee, if the beneficiary can follow it, or trace its value into a new asset, she can expect, again, to take it \emph{in specie}.\(^{81}\) Moreover, when she traces into a substitution, the beneficiary has a unique right to pick and choose between different options so as to maximise the chance that her claim is fully satisfied.\(^{82}\) If the trust asset has been mixed with other assets, the law of trust again equips

---

\(^{78}\) Tamar Frankel and Wendy J. Gordon, ‘Introduction’ (2001) 81 Boston University law review 321, p.323

\(^{79}\) \emph{Re Hallett’s Estate} (1880) 13 Ch D 696

\(^{80}\) On remedies against trustee in breach generally see Glister and Lee (n 56) 24-001-24-028; Samuel L. Bray, ‘Punitive Damages Against Trustees?’ in D. Gordon Smith and Andrew S. Gold (eds), \emph{Research handbook on fiduciary law} (Edward Elgar Publishing Limited, 2018); \emph{Nutbrown v Thornton} (1804) 10 Ves 159

\(^{81}\) \emph{Foskett v McKeown} [2001] 1 AC 102, 127-8.

\(^{82}\) See Charles Mitchell and David J. Hayton, \emph{Hayton and Mitchell: commentary and cases on the law of trusts and equitable remedies} (13th edn, Sweet & Maxwell 2010) 13-17.
her with a superior set of rules that make it easier to fully satisfy her claim, in comparison with other owners of mixed assets; for example, if the trustee mixed trust property with his own assets, any uncertainty as to the contribution each made to the mixture is determined against him.\textsuperscript{83} And as is the case with a breach of contract, trustees are liable regardless of their state of mind.\textsuperscript{84} However, at least traditionally, this strict liability is not softened by a duty on the aggrieved party (i.e. the beneficiary) to mitigate the damage, a ‘but for’ requirement, or by rules on remoteness of damage that apply in contract law.\textsuperscript{85}

The overall picture of the enforcement aspect of trust law is thus one of a highly interventionist set of rules that keenly guards the beneficiary’s performance interest. The sanctions against a trustee in breach are extensive and wide-ranging and often go way beyond what a party to a contract can expect. It can therefore be argued that the negative effect of threats on the viability of Trust – the way they potentially poison the atmosphere between parties who contemplate the nature of the relationship and obscure the motivation for complying with what is required of the trusted - is more pronounced in the context of trust law than is the case in a contract setting. As a result, even those who defend the more optimistic view of contracts as embodying and promoting Trust may come to the view that the law of trust offers a substitution for Trust-infused relationship. Indeed, with specific performance as the default remedy and the (traditional) refusal to implement mitigation and remoteness rules, trust law does a better job than contract law in replicating the morality of promises and trust; for those who do believe in a strong connection (at least) between the morality of promise and contract that would be rather ironic. In the section I show how this

\textsuperscript{83} Re Diplock [1948] Ch 465 CA.

\textsuperscript{84} Magnus v Queensland National Bank (1888) 37 Ch D 466 (CA) at 472.

\textsuperscript{85} Ultraframe (Uk) Ltd V Gary Fielding & Ors [2007] WTLR 835. In a turn away from orthodoxy, the UKSC applied common law principles of causality to claims made by beneficiaries (Target Holdings Ltd v Redferrns [1995] UKHL 10, AIB Group (UK) plc v Mark Redler & Co Solicitors [2014] UKSC 58). This attempt to at fusion between equity and common law has been heavily criticised as undermining the special relationship between trustee and beneficiary, and in a string of cases the English court of appeal did not follow this new route (see S Williams, ‘Equitable Compensation, Trustees, and Disobedience in the Court of Appeal’ [2021] Conv 13). But see Shiffrin’s critical comments on the duty to mitigate Shiffrin, ‘Enhancing Moral Relationships Through Strict Liability’, pp.371-5
Trust-sceptic interpretation of the function of the law of trusts gets further support from the supervision element of the law trusts.

ii. supervision

One characteristic that marks Trust-based relationship from other forms of reliance is a ‘let go’ attitude. As Bayer points out, ‘[i]f one stands over one’s builder, watching and querying every move she makes, she may well refuse to finish the job, since what self-respecting builder would put up with such apparent lack of any trust in her professional skill and standards of care?.

When parents leave their child with a carer but install CCTV cameras around the house and ask a neighbour to check in on him every so often, they may have entrusted their child unto his care, but they cannot be said to Trust him. Only once they stop checking the videos or turn the cameras off while taking reasonable vigilant measures to ensure the safety and happiness of the child, we would say that they are moving towards trusting relationship with the carer.

But while in such intimate private sphere we can draw a clear route from supervision to Trust, in the public sphere there seem to be an unresolvable tension between what Phillip Pettit sees as a vital ‘eternal vigilance’ and an attitude of Trust towards government officials.

If the price of liberty is indeed a ‘sustained manifestation of distrust’, this is a real problem for a successful running of the state, since Trust in government, at least a democratic one, is essential for its proper function. Modern democracies have been grappling with this tension since they came to be, but in the last few decades we are witnessing a concentrated effort to tackle it; the failure in doing so is illuminated by Onora O’Neill in her lectures on Trust. Her insights on the dynamic of Trust in the public sphere have a direct bearing on the question we have about trust law, and studying her arguments is therefore a worthwhile detour.

---

86 Baier, 'Trust 'p.121
87 Philip Pettit, 'Republican Theory and Political Trust,' in V. A. Braithwaite and Margaret Levi (eds), Trust and governance (Russell Sage Foundation 1998), p.309
88 Postema, 'Trust, Distrust and the Rule of Law', p.243
It is hard not to notice the huge efforts that currently go into ensuring a trustworthy performance of public duties: auditors, examiners, and police (to give just a few examples) invest ‘gigantic, relentless and expensive’ efforts in the hope to prevent the abuse of Trust. Such Trust-building measures are backed by extensive surveys of the ‘client base’, which, time and again, come back with disappointing results: instead of stemming public mistrust, these concentrated efforts coincide with mistrust and suspicion spreading across areas of life and towards institutions that were considered highly trustworthy just a little earlier. Can it be that there is a causal connection here between the unprecedented drive to monitor, measure and dictate measurable goals and the erosion of Trust? There is no conclusionary evidence which show that public bodies and institutions are less trustworthy, i.e., that they engage in more untrustworthy actions. In fact, O’Neill says, our actions when we go to doctors, seek the advice of professionals and appeal for government help, show that ‘the supposed ‘crisis of trust’ may be more a matter of what we tell inquisitive pollsters than of any active refusal of trust, let alone of conclusive evidence of reduced trustworthiness’. Yet, the remedy for any Trust crisis, imaginary or real, seems to be clear to everyone: increased accountability. The drive to increase accountability takes many forms, from regulation and endless memoranda to instructions, guidance and advice by various government bodies, that require procedures, protocol-taking, and detailed record-keeping.

This ‘Audit Explosion’ comes with some hefty price tag in terms of public-sector workers ability, motivation and satisfaction in doing their job. The negative effect that is relevant for this work is revealed by the coincidence between the accountability boom and the glum tendency of citizens to (at least) report on sinking levels of Trust. This can be (partly) explained by ‘culture of suspicion, low morale and… professional cynicism’ that demand for

---

89 O’Neill Onora, Reith Lectures: A Question of Trust (BBC 2002), lecture one, p.2

90 Ibid, lecture one, p.3 and evidence cited there. A more up-to-date (but less optimistic) results for the UK, can be found here: https://www.ons.gov.uk/peoplepopulationandcommunity/wellbeing/bulletins/trustingovernmentuk/2022#:~:text=42%25%20of%20the%20population%20reported,and%20legal%20system%20(68%25).

91 Onora O’Neill, ‘BBC Reith Lectures: A Question of Trust ’ lecture 1 pp.4-5

92 Ibid, lecture 3 p.1

93 As described in Michael Power, The Audit Society: Rituals of Verification (Oxford University Press 1999)
hyper accountability leads to. Similarly, the chase after complete transparency with regards to actions of bureaucrats, doctors, teachers and other public and semi-public servants has not led us to Trust them more. O’Neill suspects that at least some kinds of openness and transparency are inherently in tension with Trust: ‘I may trust my friends, colleagues and neighbours whole-heartedly, without any wish, or need, to know everything about their private lives - or to have them know everything about mine.’ This is, of course, not the place to consider whether the drive to accountability and transparency is worthwhile in spite of the price in public Trust (and other negative effects), if, for example, this is the only way to create an equal society free of racism, discrimination and well-entrenched biases. What is important for our purposes here, is the inescapable conflict between supervision and Trust: strike the balance wrong, and you undermine the whole project by either paving the way to abuse of power, or cutting the lifeline of Trust.

If in the public arena the drive towards heighten accountability and transparency is a recent phenomenon, in trust law it is a centuries old trend. In similar manner to public bodies, the accountability owed by trustees to stakeholders generates a right to information and a civil recourse to ask the court to scrutinise the actions and decisions taken by them. The power held by trustees is subject to many forms of control that aim to guard against abuse while allowing the trustees to exercise discretion. Trustees, like all fiduciaries, must perform their duties in good faith and comply with the requirements of the duty of loyalty, i.e. avoid taking decisions in conditions of conflict of interest. The inaptly named doctrine of ‘fraud on power’ allows the court to ensure that ‘power has [not] been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power.’ On top of these negative rules - which prohibit or proscribe certain conduct - trustees (baring nominees) come under positive duties which direct and prescribe the manner in which

---

94 Onora, Reith Lectures: A Question of Trust lecture 3 p.5
95 Ibid lecture 4 p.2-3
particular actions are taken, namely with care and proper skills.\textsuperscript{99} Trustees are inspected closely to ensure that these obligations are meticulously followed.

Scrutiny is not boundless. A concern least able women and men will not want to take on the role of trustee if it involves being supervised and criticised at every step probably played a role in the courts’ ruling that trustees are not expected to have reached the decision which, with hindsight, we can tell was the right one.\textsuperscript{100} Similarly, the delicacy of family and business matters that is often involved in trustees’ decisions, and the need to keep these confidential if the trust is to remain a popular instrument for holding property, are behind the rule that trustees are not required to give reasons to the beneficiaries on why they decided to exercise a power of appointment in a certain way.\textsuperscript{101} But beyond these common-sense limitations, trustees are subject to very high expectations of accountability and transparency that are backed by extensive court authority to supervise and, if needed, administer the trust and intervene in their actions. This supervisory function is not some neglible aspect of their existence, it is rather, as the courts emphasise a “cardinal” part of this legal instrument.\textsuperscript{102}

The structure of supervision over trusts is tripartite: the first layer comprises of an extended, and, so it seems, ever-expanding requirement of transparency: trustees must keep accounts and be ready to produce them to the beneficiaries upon request.\textsuperscript{103} While there is no duty on trustees to get the accounts audited (unless they are exceptionally complicated) the beneficiary can apply for a court order that external professionals audit the accounts and for their fees to be paid from the trust income or capital.\textsuperscript{104} But beneficiaries are routinely intitled to receive information about any matters currently affecting the trust if they so wish.\textsuperscript{105} The circle of those who are entitled to ask for information has been drastically enlarged by the

\textsuperscript{99} Speight v Gaunt (1883) 9 App Cas 1, 19


\textsuperscript{101} Re Londonderry’s Settlement [1965] Ch 918. On the duty of the liberal state to cultivate and preserve the trust as a means of property holding see

\textsuperscript{102} in Re Hall (Deceased) [2014] NICh 23

\textsuperscript{103} Ball v. Ball [2020] EWHC 1020 (Ch)

\textsuperscript{104} Trustee Act 1925 c. 19 s. 22

\textsuperscript{105} Tito v Waddell (No.2) [1977] Ch. 106 at 243
courts in recent decades. Thus, with discretionary trusts becoming ever so popular with settlors, the right to information has been stretched (subject to the court’s discretion) to discretionary beneficiaries and objects of a mere power of appointment.\textsuperscript{106}

On the second level, Chancery courts have always seen themselves as possessing wide discretion to scrutinise trustee’s actions and decisions when beneficiaries complain about them. We saw that trustees do not need to provide reasons for decisions to appoint or accumulate, but they do need to explain any administrative decisions they take.\textsuperscript{107} If the court finds that trustees exercised their discretionary dispositive power without fully understanding its effect, they may set it aside.\textsuperscript{108} The decision in such cases would normally be negative, but the court may even go as far as positively making a different decision on behalf of the trustees.\textsuperscript{109} The court may also intervene where beneficiaries can show that the trustees exercised a discretion in a way that appears to be seriously unreasonable.\textsuperscript{110} And they are sure to lean in where fraud is proved, the discretion is capricious, or where the trustees blindly followed the settlor’s wishes.\textsuperscript{111}

But the most potent threat, which can be found in the third layer of the supervision structure, is the court’s authority to oust the trustee. The power to remove a trustee and appoint a new one in his place is now enshrined in a statute.\textsuperscript{112} But the court’s ‘delicate jurisdiction’ to replace a trustee where they deem it necessary for the proper execution of the trust goes back to its early days.\textsuperscript{113} In that way, a trustee who abused the trust by endangering the trust property, or exhibited dishonesty, incapacity, or want of reasonable fidelity could be

\begin{itemize}
  \item \textsuperscript{106} \textit{Schmidt v Rosewood Trust Ltd} [2003] 2 A.C. 709
  \item \textsuperscript{107} \textit{Lewis v Tamplin} [2018] WTLR 215, [47]
  \item \textsuperscript{108} \textit{Pitt v Holt} [2013] UKSC 26, [2013] 2 AC 108, but only where the trustees breached their duty (in good faith).
  \item \textsuperscript{109} As in \textit{Klug v. Klug} [1918] 2 Ch. 67.
  \item \textsuperscript{110} James Glister and others, \textit{Hanbury and Martin Modern equity} (Modern equity, Sweet & Maxwell/Thomson Reuters 2021), 18.045
  \item \textsuperscript{111} \textit{Re Manisty's Settlement} [1974] Ch. 17; \textit{Turner v Turner} [1984] Ch. 100.
  \item \textsuperscript{112} \textit{Trustee Act} 1925, s. 41.
  \item \textsuperscript{113} (1884) 9 App Cas 371 (PC), at 387
\end{itemize}
subjected to forced removal.\footnote{Re Wrightson [1908] 1 Ch 789; Dobson v. Heyman [2010] WTLR 1151; see details in Graham Virgo, The principles of equity & trusts (Law trove, Fourth edition. edn, Oxford University Press 2020)sec. 12.6.4} There is no need for the beneficiaries to demonstrate actual misconduct on the part of the trustee as long as the court is satisfied that the trustee’s continuance in office would be prejudicial to the due performance of the trust.\footnote{See summary of the reasons for removal in Thomas and Agnes Carvel Foundation v. Carvel [2008] Ch 395.} The many cases in which trustees fought hard to remain in their position demonstrate the extent to which the prospect of removal is perceived as a serious threat by many of them.

‘Plants don’t flourish when we pull them up too often to check how their roots are growing’, Onora O’Neill reminds us; and the same, of course, works for interpersonal liaisons.\footnote{O’Neill, ‘BBC Reith Lectures: A Question of Trust ’ lecture 1 p.6} If trust law were geared towards breeding Trust, cultivating and supporting it, would it develop such a rigorous tripartite regime of transparency and supervision? Would it put in place an escalating scheme of threats spanning from an all-out enforcement including against faultless trustee and up to dismissal? Had they thought that trusts are a legal embodiment of Trusting relationship, would the many wise and pragmatic judges of the Chancery Court work to develop and expand mechanisms that are known to be in deep tension with, if not utterly destructive, of Trust? One can be forgiven for answering in the negative: a relationship of reliance, in which the weak party is encouraged to snoop on, criticise, and demand accountability from the party she relies on is not meant to be, nor can it become, a relationship of Trust. The very real possibility that the trusted party will be kicked out by an external intervention when things go wrong does not seem to contribute to his sense of being trusted either. And if we add to that the constant larking threat that the beneficiary’s (legitimate) expectations from the party-relied-upon will be enforced with vehemence by a powerful authority, the picture seems to be quite hostile to the warm glow of a Trusting bond.

The conclusion would be that the law of trust enables property owners to entrust their property to a person they deem fit to manage it without worrying about the question whether they truly Trust her; suffice it is if they believe that she will respond as expected to the well-calibrated system of consequences, punishments and rewards that is put in place by the law
to ensure that she acts for the best interests of the beneficiaries and refrain from exploiting her position for her own good. It may be that real Trust was there or could have developed with time, but the mechanisms the law of trust puts in place to ensure compliance are hostile to this sort of relationship. Perhaps, if you like, the relationship envisaged by the law of trust is what Postema dubs ‘Proleptic Trust’ in which ‘A … [entrusts] something of value to the care of B while not entirely trusting him… [so that] A’s conduct will communicate trust, by virtue of the public meaning such conduct typically has, without thereby manifesting A’s trust,’. But as far as a fully fledged Trust is concerned, the possibility of extensive snooping, supervision and dismissal seems to make sure that the attitude never moves beyond this empty shell to real Trust.

Divorcing the law of trust from the concept of Trust would have profound ramifications for the self-understanding of this area of law. If Trust is not a value which the various features of the law of trust is supposed to embody, promote or nurture, its current state and future developments should not be assessed by reference to it. When we are thinking about aspects of the law that are in tension with Trust - like the extension of the right to information to additional aspects of trustees’ job - we need not consider whether they should be curbed in order to allow Trust to flourish. Furthermore, new devices that make the notion of ‘Trusting the trustee’ sound hollow, like trust ‘enforcer’ and ‘rolling’ letter of wishes (in which the settlor keeps close tab on the trustee) cannot be criticised for being an anathema to the ethos of trust law. In the next section, I attempt to show that this reading of the trust as an attempt to claw the benefits of Trust for Trust-less relationship is incongruous.

---

117 Postema, ‘Trust, Distrust and the Rule of Law’253

118 See chapter 1 part xx
C. A platform for Trust

1. Trusting a stranger

Cultivating Trust in trustees is both more urgent and more difficult than fostering Trust among parties to a contract. In spite of some points of similarity, the relationships these bodies of law are designed to support are materially distinct. And it is what sets them apart that explains how Trust-busting elements of the law of contract play a positive role in building Trust in the context of trust law, and why it is crucial that they do so.

Trusts, even if many of them come to this world via an agreement, are very different creatures from contracts. Whereas contract law is designed to create a framework in which each party is looking after their own interest while promoting a common goal, in a trust, all parties are focused, solely, on the interests of the beneficiaries: the trustee is the active party with the knowhow, plans, and discretionary power that are necessary to look after the interests of a passive beneficiary. Interestingly, while influential legal economists attempt (and fail) to explain the fiduciary obligation as a default contractual clause, in the very few works on the trust that are written from this perspective, it is not seen as a species of contract. Rather, these legal economists (unsuccessfully) try to capture the law of trust as an offshoot of organisational law (which encompasses the law of corporation and some such associations). Presumably, the gap in power and knowledge between beneficiaries and trustees, and the very unique nature of the trustee’s role render the interpretation in terms of contract too obviously implausible. These characteristics, I argue below, also mean that what can be interpreted as Trust-destroying elements of contract law, are not necessarily as harmful to the building of Trust when they feature in the law of trust. Moreover, when put in the right light, unique features of the law of trusts that appear to be in deep tension with a Trust-building exercise can in fact lend it an important support.

119 Daniel Markovits, ‘Good Faith as Contract’s Core Value.’ Philosophical Foundations of Contract Law’ in Gregory Klass, George Letsas and Prince Saprai (eds), Philosophical foundations of contract law (OUP 2014)

That an attitude of Trust towards the trustee is, or should be, a part of the trust relationship is easiest to show in the case of the traditional family trust. Where the trustee is a family member, an old acquaintance or a loyal family lawyer - as was mostly the case until fairly recently - close personal Trust was clearly an essential ingredient of the relationship. Where the beneficiaries are yet to be born (as was the case in many of these trusts) or unascertained, and hence unable to supervise a trustee's performance, the case for saying that the settlor and beneficiaries Trust the trustee is even stronger. But we have now largely moved away from such cosy familiarity, towards market-based relationship in which settlor and beneficiaries typically had no previous interaction with the trustee, and the latter is chosen purely on the basis of the settlor's assessment of her professional abilities. Depending on the nature of the trust, settlor and beneficiaries may never have met the trustee in person, especially when they are in a different jurisdiction, or when dealing with a large trust company. This, however, does not mean that Trust is no longer an important feature of the relationship envisaged by trust law; or so I shall argue presently.

In traditional family trusts, an attitude of Trust and confidence clearly precedes, and motivates, the election of a particular trustee. But what happens where the relationship of trusteeship is the first significant interaction between the parties? If the settlor engaged in an extensive and expensive search, or hired a highly reputable trustee, with fees to match, this may be enough to generate at least a rudimentary Trust before the trustee had a chance to prove his trustworthiness to her. But unless this is the case, a decision to Trust someone they hardly know sounds a little odd; ‘Trust me!’ is an invitation which we cannot normally accept at will. As for the beneficiaries, how can we expect them to Trust someone just because the settlor finds her trustworthy? For both settlor and beneficiary, though in a different way, it seems to be the case that an attitude of Trust towards the trustee can, but need not, spring into being with the creation of a trust.

122 Baier, ‘Trust and Antitrust’p.244. See section one above for the question whether Trust is a cognitive attitude pp.xx
But what can always coincide with the creation of a trust is a decision to behave as if you Trust. This is not necessarily an irrational decision. Rather, it can be a strategic choice that is based on the hope that the ‘as if’ Trust-expressing action will be met by trustworthy actions, and so kick-off a process in which Trust develops and deepens as positive experiences accumulate to a critical mass. Such reliance on what Phillip Pettit calls ‘trust responsiveness’ (see section xx above) is exemplified by the parents who decide to leave their teenager in sole possession of the house for a weekend without being able to dismiss a great worry that she may throw a wild party in their absence; while they cannot be seen as Trusting their child, their choice can nevertheless be seen as a first step on the way to Trust. For if they come home to find a well-stocked alcohol cabinet and friendly neighbours, Trust will start forming until they are able to leave the house resting assured that it is in their daughter’s good hands. The Settlor, in entrusting the trust property unto the trustee can engage in a similar exercise of Trust building that can coincide with lack of confidence, and even suspicion. If the law of trusts envisions an attitude of Trust in the trustees, it can play the role of assisting her, and the beneficiary, in the transition from an outer expression to a genuine Trust. This facilitative role in the build-up of Trust is important even where the settlors hired a trustee on the basis of solid information that enabled them to cross the threshold of Trust even before dealing with her directly; for Trust can develop, intensify and deepen, and the benefits it brings can accordingly grow in size and depth. Trust law can help them to move down the road, even they embarked on it independently.

Before asking how the law of trust performs this facilitative role in building Trust, let us say something about why it would be good if it does so. The trust is a wondrously versatile legal tool for holding property. We reviewed earlier the great service this form of property-holding can do to individuals and society. In earlier work, we explain why having an instrument like the trust is essential if English property law is to score highly on the autonomy-promoting scale by which liberal states measure their success. For all these

---

123 p. x
124 Hanoch Dagan and Irit Samet, ‘Express Trust As The Missing Piece In The Liberal Property Regime Jigsaw’ in Simone Degeling, Jessica Hudson and Irit Samet (eds), *Philosophical Foundations Of The Law Of Trusts* (OUP 2023)
reasons it is important that the trust remains a vibrant and accessible tool which people can use to tailor property rights to suit their needs. The present discussion reveals another potential contribution of the trust to the common good. As we saw earlier, societies thrive on Trust between their members, and a market with high levels of Trust is more efficient than one in which suspicion is ripe.\textsuperscript{125} If the trust serves as a platform for maintaining, developing and deepening Trusting relationships it partakes in building one of the foundations of civic society in general and the market in particular.

A society that strives to enjoy the fruits of Trust between members which do not belong to the same clan or a tightly-nit circle, ought to find ways to encourage people to Trust strangers (when it is the reasonable thing to do). Successful platforms for Trust-building initiate a benign circle where positive experience of trust-responsiveness accumulate, and as a result the tendency to adopt a stance of Trust consolidates, the risk of trusting is perceived as low, and the benefits of it become palpable so that new Trust-based initiatives are forthcoming. Hence, if the law of trust creates incubators for Trusting relationships, the case for preserving and protecting this legal device from abuse on the one hand, and lethal criticism on the other, is significantly enhanced.\textsuperscript{126} It also means that when we think about how to reform and develop the law of trusts, we have another consideration to keep in mind, namely, the need to uphold and expand its Trust-building potential.

2. \textit{Between contract and trust}

In this section, I argue that the deep differences between contract and trust in the way the parties orient themselves towards each other mean that what is as antagonistic to Trust in the contract setting need not be so in the trust setting. Above we saw that three core elements of the trust regime, namely, enforcement, supervision and transparency can be seen as hostile to the development and embedding of Trust in the trustee. The thinking was that a constant threat of enforcing the agreement to its letter, together with powerful supervisory tools, and

\textsuperscript{125} p. x

\textsuperscript{126} Reference to chapter 1
a right of standing to ask the court to pass judgment and even remove the other party take the relationship too far from Trust to make it relevant for a normative analysis of the trust law. However, this line of thinking is glossing over the deep differences in the dynamics between parties to contract and trustee-beneficiary-settlor relationship. Attention to these differences reveals that trust law can plausibly be interpreted as geared towards initiating and embedding a relationship of Trust.

Trustees, like all fiduciaries, take upon themselves the unusual commitment (in the context of private law) to work for another. That they do so full-heartedly and with no bias is both absolutely essential for the relationship to work, and very difficult to achieve. For what Kant called ‘self-love’, is an innate force that relentlessly pushes us to look after our own. Equity’s solution to this predicament is the unique duty of ‘loyalty’ which prohibits fiduciaries from taking decisions in situations of conflict of interest. The duty of loyalty, in difference form what you would expect of a key duty in equity, is strict. It has to be so is order to ensure that trustees who identify such conflicts do not fall into the unconscious trap set to them by self-love by convincing themselves that they are working for the beneficiary when in fact it is their own interest that motivates their decision. But with all the ingenuity of injecting this piece of public-law style thinking into private law, the duty of loyalty does not provide the beneficiary (or the settlor) with a fool-proof answer to their concern lest the trustees abuse their position. This very real possibility means that if owners are to feel comfortable entrusting their property unto trustees, the law of trust must put in place mechanisms to placate their concern that go over and above the provision in contract law. Let us how this works.

First, even though power gaps may well afflict parties to contract, the law of contract provides (or at least aspires to create) a framework in which the parties meet each other as

---


128 *Bristol and West Building Society v Mothen* [1996] EWCA Civ 533; Smith, ‘Fiduciary Relationships: Ensuring The Loyal Exercise Of Judgment On Behalf Of Another’

equals. In trust relationship, in contrast, inequality between the parties, deep and wide, is an inherent aspect of the dynamics. The trustee is hired in order to make decisions about the trust property, is given access to all the required information to do so – some of which she produces herself as she goes along – and bears sole responsibility for recording and managing it. The asymmetry is inherent of course since the trustee is elected, presumably, because of the skills and knowhow that the beneficiary cannot, or does not want to, apply. As a result, it is extremely difficult for the beneficiary to detect abuse of trustee’s power. Moreover, even trustees who work in good faith need to decide on their own whether a given situation can potentially give rise to a conflict (so that authorisation is needed) and this will be far from clear in borderline cases. Consequently, trustees who are determined to exploit their position and hide their illicit behaviour from the beneficiary should not find it too difficult to do so. But even when the beneficiary becomes suspicious, the rout to a claim in common law (tort or contract) is fraught with difficulties as much of the information that is required to prove the claim are in the hands of the trustee, who is many times the one who generates it. As one writer puts it: ‘Breaches of trust can be hard to detect and even harder to prosecute. Legal remedies are rare and undercompensatory’; her conclusion is that ‘[e]fficient, legitimate relationships require trust and foster trust in return’.

It is important to emphasise, as I do below, that once the beneficiary is successful in substantiating his claim - either by enforcing the trustee’s duty to account or by proving a breach of trust – equity goes to a great length to assist her in (re)gaining hold of the property and/or re-establishing her beneficiary interest. But these rigorous enforcement measures must be assessed against the difficulty in detecting breaches given the beneficiary’s inherent epistemological inferiority, and also compensate for the distinct risk that a breach can cause to the beneficiary. As to the latter, a breach of trust can easily result in the beneficiary losing his title to the trust property to a third party. The need to protect third parties who can be misled

131 worthington
132
133 Wilkinson-Ryan, ‘The Psychology of Trust and Fiduciary Obligations’p.88
by the façade of the ownership rights to the trust property (as the trustee appears to the world as the full owner), lead the courts to adopt the ‘equity darling’ rule which gives good title to innocent transferee of trust property who paid for it, regardless of any breach of trust. Indeed, in some circumstances a party to a contract may lose title to his property as a result of a breach of contract by a party in possession. But the risk to the beneficiary is far greater as the circle of third parties who can make use of the equity darling rule is very wide, and essential time will be lost until the beneficiary, who is not in direct control of the trust asset, will find out about the illicit transfer.

In light of this complex dynamics, in which the price for a betrayal of Trust and the ease with which trustees can get away with it, what would be a Trust-busting mechanism in the context of contract law, will not have the same effect in trust law, if it is harsher. This is not only because these mechanisms are proportional to the risks taken by the beneficiary and the settlor. In the next section I explain why the enforcement, supervision and transparency devices we find in the law of trusts have a positive effect on the beneficiary and settlor’s ability to show and feel Trust.

But first, I want to focus on the perspective of the trustee. In the pervious section it was argued that when reliance is accompanied by serious threats of adverse consequences for those who exploit it, it is hard for the party-relied-upon to interpret it as Trust. One may therefore conclude that the law of trust, even more so than the law of contract, does not lend itself to be interpreted as creating, building on or encouraging relationship of Trust: with its heavy mechanisms of enforcement it stifles any benign circle in which Trust is expressed, responded to and deepens. I wish to show now that this conclusion is incorrect.

The unique pattern of the relationship between trustees, settlors and beneficiaries, as we saw, means that breaches are very difficult to detect and have potentially far-reaching effects

---

134 ‘from such a purchaser, a Court of Equity takes away nothing which he has honestly acquired’ (Taylor v London and County Banking Company [1901] 2 Ch 231).

135 We explain and justify this difference in Dennis Klimchuk, Irit Samet and Henry E. Smith, ‘What Can ‘Equity’s Darling’ Tell Us about Equity? 264 Aruna Nair and Irit Samet’, (Oxford University Press, Incorporated 2020)
on the beneficiaries’ proprietary interest. Trustees, especially professional, understand this very well. Consequently, they are unlikely to interpret the powerful defence mechanisms that trust law provides as implying or encouraging mistrust in people (or companies) who occupy the role of trustees. They will recognise that far from assuming that trustees in general are untrustworthy, the unforgiving sanction regime is intended to tackle the few rotten apples that are inevitably found in such a large basket. They will take the intensity of the enforcement regime as expressive of a complex web of interests: the need to compensate for the inferior epistemic position of the beneficiary, the hope that corrupt trustees will be deterred in spite of the small chance that they will be caught red-handed, as well as an effort to protect the rights of third parties. They will also know that some aspects of this enhanced enforcement regime are just a result of the way equity tends to formulate remedies, namely, the proprietary way. ¹³⁶ This latter point will only assuage the concerns of trustees who are really in the know, but the broader picture should be clear to every professional trustee (at least): given the heavy-duty reasons for designing a rigorous sanction regime against trustees who fail to comply with their duties, it is not possible to deduce from it anything about the law giver’s view about the trustworthiness of trustees in general.

In designing these sanctions, equity did not mean to convey the message that reasonable settlors and beneficiaries ought to be suspicious towards trustees; trustees can and should feel trusted and trustworthy regardless of the enforcement and supervision mechanisms provided by the law. As Bayer explains, trusting relationship become ‘unhealthy’ if ‘there is such an exaggerated fear of insulting the other that any checking, even on matters where an honest mistake or miscounting is both easy and easily detected without offense’. ¹³⁷ In that respect, the law of trusts is more akin to criminal law than to contract law. Just as ‘most people do not take offence at being personally regarded by their state or their law-makers as potential perpetrators of each and every activity to which the penal code attaches a threat’, trustees

---

¹³⁶ Virgo, *The principles of equity & trusts*, 2.6

¹³⁷ Baier, ‘Trust ’p.121
need not busy themselves with the thought that the law of trust recommends a stance of suspicion and mistrust towards them.\textsuperscript{138}

3. Expressing Trust in the trustee

Moving now to the perspective of the settlor and beneficiaries, what kind of Trust is championed by trust law? As we would expect in a sensitive aspect of inter-personal morality - with political applications to boot - the definition of Trust is, as we saw, highly contested. But finding a definition that both fits the phenomena as we know it from our own experience, and applicable to the relationship between trustee, settlor and beneficiary, is critical for making the argument I wish to make here.\textsuperscript{139} The challenge is to explain in what sense trustees who were not elected due to a long acquaintance and/or intimate knowledge of the stakeholders are Trusted.

In part A of this chapter, we saw how the definitional scale for Trust spans from those who take their cue from close personal relationship and look for ‘good will’ towards the trustor, to definitions that seek to accommodate Trust between players who do not know each other well or at all (as in the Trust games we find in behavioural economics literature). In the case of the trust, at least where the relationship with the trustee is on purely professional basis, Hardin’s ‘encapsulating interest’ explanation works well. Recall: to be categorised as an attitude of Trust, it is enough if following an exposure of one’s vulnerability, she believes that the other party behaves as she expects of him (to help or at least not exploit it) because he wants to maintain their relationship. In that way, the trusted can be said to ‘encapsulate’ her interests in his own.\textsuperscript{140} Between friendly strangers, it is enough if the trusting party feels that

\textsuperscript{138} Kimel, From Promise to Contract : Towards a Liberal Theory of Contract. p.46

\textsuperscript{139} According to Kimel, we saw, contract law does not invoke the same type of Trust as promise and therefore the kinship drawn by the contract as promise school is misplaced (xxx but see Saprai xx )

\textsuperscript{140} Hardin, Trust, p.8
their relationship is important enough for the trusted to pursue her interest just because they are hers.\textsuperscript{141}

Trustees who work with the duty of loyalty in mind and advance (within the boundaries of the relationship) the beneficiary’s interest are very well positioned to be trusted in that way. While the settlor and beneficiaries often cannot judge whether the trustee has any good will towards them, they can deduct from her actions that being successful as their trustee is genuinely important to her. When the position of a trustee is taken seriously, benefitting the beneficiary becomes the trustee’s own interest as it constitutes the core of their relationship. The fact that the trustee is paid, and that her reputation is at stake does not undermine the encapsulation analysis either. As we saw in part one, there is no requirement that the trusted party would be motivated purely by concern for the trusting party. Such purist perceptions of Trust exclude many relationships that we would tend to classify as expressive of Trust, and limit this stance to the intimate private sphere (if at all).\textsuperscript{142} Concerns for reputation, for example, potentially motivate trustworthy actions in all but the most personal relationship. Beneficiaries and settlors therefore cannot be regarded as naïve just for feeling that they Trust a well-paid professional trustee. And as every teacher, doctor or civil servant knows, remuneration does not exclude true devotion to the person or cause you are looking after.

One might think, however, that all this cannot apply to trust companies – a popular device for the protection it awards individuals who work as trustees. But this is not necessarily the case. Large bodies can take part in trusting relationship. As Hardin explains, ‘institution may be the incubator or underwriter of trust – either robust interpersonal trust or more distant impersonal trust of an individual occupying an institutional role’.\textsuperscript{143} In what Postema dubs “institution-dependent” Trust, the trusted holds an official position in an institution, and the truster believes that the processes and procedures it maintains underwrite her competence

\textsuperscript{141} Ibid, p.19
\textsuperscript{142} See for example Williamson for the view that human beings are incapable of entirely dispensing with calculativeness, Williamson, ‘Calculativeness, Trust, and Economic Organization’, p.479
\textsuperscript{143} Postema, ‘Trust, Distrust and the Rule of Law’258
and motivation. This kind of Trust is to be celebrated as an important addition to the family of Trusting relationship as it properly enlarges the scope of entering such affiliation. Without going into details, it seems clear to me that we can draw on our understanding of how Trust in government/state bodies is possible in order to understand the mechanics of Trusting a trust company. Let us move now to examine some aspects of settlor-trustee-beneficiary relationship that are strong markers of Trust.

Two distinct features of typical trusts strongly support the idea that they reaffirm, encourage and support a relationship of Trust: entrusting and discretion. To kick-off a trust an owner must commend specified property to trustees who come under the duty to manage it for the benefit of beneficiaries. Entrustment is widely considered a paradigmatic way of showing Trust. Hardin, for example, makes the point that ‘[t]he type of action that is best-suited to manifesting the attitude of trust may be described in general terms as entrusting.’

The way in which a breach of trust is often hard to detect, while its consequences to the beneficiary’s property right (and hence to the settlor’s plans) can be very serious, create a profound vulnerability for the beneficiary/settlor which renders this particular act of entrusting an exceptionally strong expression of Trust. The power imbalance which the particular act of entrusting property unto a trustee inevitably creates means that, as a matter of principle, the creation of trust is potentially a far stronger manifestation of Trust than the signing of contract.

The expressive value of entrustment as attesting to Trust increases significantly when it is accompanied by granting discretion to the trustee in managing the entrusted property; and the stronger the discretion, the more intensive the effect. When trustees, as is routinely the case, are relied upon to use their skills, acumen and experience to make independent decisions about the best way to run the portfolio, the settlor and beneficiary thereby engage in a Trust-building and reaffirming exercise. The first decision as to the degree of freedom granted to

---

144 Ibid 258
145 Hardin p.253
146 For the idea that the duty of loyalty and the sanctions for its breaches need to not undermine the sense of Trust in the fiduciary, see Harding, 'Contracts, Fiduciary Relationships and Trust', p.59
the trustee is, of course, the settlor’s. Anxious settlors who attempt to micromanage the trustee – ahead of or during the lifetime of the trust- can hardly be said to Trust the trustee. In the last section of this chapter, I go back to the OSITs we met in the first chapter and ask what their peculiar structural feature does to the Trust element of the trust (spoiler alert: nothing good). Indeed, beyond a certain point, a trust in which the settlor is unable to lower the guard will make no sense. But to settlors who are willing to go along with the game of trust, the law offers great opportunities to demonstrate their Trust in the trustees and realise its potential. The scope of discretion which can be granted to trustees is very wide indeed, bounded only by requirements of certainty (that are interpreted in a pro-discretion manner).

In order to encourage the trustees to use their discretion in a creative, or even daring way, the settlor can raise the threshold of their responsibility for (non-malicious) breach of trust. Settlors can choose to either exempt trustees from liability for breach of trust, or indemnify them from the trust assets for personal liability for breach: ‘[...] no matter how indolent, imprudent, lacking in diligence, negligent, or wilful he may have been, so long as he has not acted dishonestly’. From the rule that responsibility for fraudulent or dishonest breaches cannot be exempted, we learn that these exemptions are not merely means for introducing more flexibility as to the price of trust services; rather, they are designed to allow the settlor to manifest, build and deepen Trust in the trustee’s discretion by cutting them some slack even for wilful breaches of trust, as long as no dishonesty is involved (e.g. investment

147 See for example Ho’s discussion of the inability of settlors who are first-generation to wealth to let go: Lusina Ho, ‘Breaking Bad': Settlors’ Reserved Powers’ in Kelvin F. K. Low, Richard C. Nolan and Tang Hang Wu (eds), Trusts and Modern Wealth Management (Cambridge University Press 2018), p.34

148 An extreme example is McPhail v Doulton [1970] UKHL 1, see in general

149 Section 61 TA

150 Armitage v Nurse [1998] Ch 241 , at [251G]; Millet LG comments in obiter that ‘it must be acknowledged that the view is widely held that [exclusion] clauses have gone too far’ [256B-D], but the basic idea that such exclusion should be available to the parties is recognised as valid (the decision has been maliciously followed in later decision in spite of the critique, see Toby Graham and David Russell, ‘Exemption clauses in the modern age: do they result in an “institution in crisis”?’ (2022) 28 Trusts & Trustees 54, pp.60-2). On the limits of such exemptions in different types of trust see Hofri-Winograd Adam, ‘The irreducible cores of trustee obligations’ (2023) 139 Law quarterly review 311.
outside the portfolio authorised by the trust terms in sincere belief that this will serve the beneficiaries’ interest).

The beneficiaries can also use the rules on discretion to *communicate* Trust in the trustee. Although it is the settlor who determines the scope of the trustee’s discretion, the beneficiaries can express their Trust in his ability when they choose whether and how to activate the extensive snooping mechanisms we reviewed earlier. Merely having the right to exercise supervisory powers, as we saw above, does not in and of itself disrupts the ability of the beneficiaries to communicate Trust, or of trustees to note it; *qua* necessary means for guarding a vulnerable party from dishonest or careless action of a powerful manager, these powers do not reflect any attitude of suspicion towards trustees in general. But there is also a way in which the supervision rights and civil recourse to sanctions granted to the beneficiaries can raise a *positive* contribution to the build-up of Trust. The ability of the beneficiary to *choose* whether and how to handle the extensive supervisory powers and enforcement mechanism she has access to, can serve as an effective instrument to communicate Trust. As Bayer reminds us, ‘to trust is to give discretionary powers to the trusted, to let the trusted decide how… one’s welfare is best advanced, to *delay the accounting for a while*, to be willing to wait to see how the trusted has advanced one’s welfare’.151 This way of manifesting Trust works best with professional trustees, as they will be (acutely) aware of the beneficiaries’ right to ask for information and recourse to complain about their actions to the court. When the beneficiaries refrain from doing so, the trustees - absent of other explanation, like age or indolence – may well conclude that the best explanation for this choice to lower their guard is that the beneficiary Trusts them. And this realisation, we already know, can trigger a benign circle of Trust responsiveness, deepening of the Trust, etc. This is a positive dynamic that should further assuage any concerns about interpreting relationship with professional trustees as a locus of Trust.

It’s worth noting, again, the difference between contract and trusts in this context. According to Hardin, discretion differentiates Trust from promise and contract:

---

151 Baier, ‘Trust’, p.217, my emphasis
‘[t]he assurance typically given (implicitly or explicitly) by the person who invites our trust, unlike that typically given in... a promise or contract, is not assurance of some very specific action or set of actions, but assurance simply that the trusting one’s welfare is, and will someday be seen to have been, in good hands’.  

One reason for the difference is that discretion makes it harder for the beneficiary to monitor the trustee. Think of the trustee power to invest: unlike the fairly specific actions a party to a contract typically takes upon herself, trustees’ duty of investment is often loosely defined, and their success is largely dependent on factors over which they have no control. The question whether they complied with their duty to try their best to generate the maximum outcomes is therefore very hard to determine. As a result, when it is clear that the trustees are following the trust terms, and exercises their discretion to benefit the beneficiary, their actions have an expressive value, as confirming their commitment to the beneficiary and the settlor’s plans for her property. In contractual relationships, in contrast, a breach is normally readily discoverable, and fulfilment of duty therefore sends a weaker massage (if at all) about the trustworthiness of the complying party. Thus, the structure and economic rationale of trusts facilitate a smooth communication about Trust in all directions: the manifestation of Trust, Trust responsiveness, and the positive reaction to trustworthiness.

4. Structuring a platform for Trust

In this section, I wish to tie the strings and show how the law of trust helps settlors and beneficiaries to foster Trust in the trustee, and thus enables the parties, and the wider community, to reap its benefits. The act of entrusting, which is the beating heart of trusts, is one of the best ways to demonstrate Trust in another person. Letting go - allowing the entrusted to act on their own, with minimal, or no, enactment of available means to supervise

152 Ibid, p.118
153 See the complex rules in Virgo, The principles of equity & trusts 13.4
154 The courts find it hard to decide this issue as well even when data seems to suggest a clear answer, see for example Nestlé v National Westminster Bank plc [1993] 1 WLR 1260, 1281
155 Kimel, From Promise to Contract : Towards a Liberal Theory of Contract p.76
them – communicates Trust and attracts trust reciprocity that intensifies it. The road from the onset of Trust between friendly strangers to its expansion and enrichment can be long and windy. The law of trust supports the settlor and beneficiaries as they move from the initial phase of the relationship - where doubt is justified, and only a very basic form of Trust, or merely ‘as if’ actions make sense, to a stage in which mature Trust is balanced with a necessary consciousness of the risk of betrayal. The law of trust helps settlors and beneficiaries to come to believe that a stranger has indeed embedded their interests in her deliberations because they are their interests, without being gullible or naïve for that. If trust law is indeed successful in fostering Trust in strangers, the market as a whole stands to gain. Beyond the huge benefits that the prevalence of Trust generates in terms of efficiency in the market, increased level of Trust between strangers reduces the perception that market practices are by nature cutthroat, and players are better off leaving thoughts on justice and ethical duties when entering the market. In promoting an attitude that is anathematic to such cynical perception of the market, the law of trust is faithful to its equitable roots.\textsuperscript{156}

To support this optimistic view of trusts as embedding relationship of Trust, we must explain how different aspects of the law which on their face look hostile to Trust can be reconciled with it. In the context of contract, we saw, a powerful mechanism of enforcement is considered by some theorists as undermining the parties’ ability to base their belief that the other party will comply with her duties on Trust. In trust law, where the enforcement mechanism is even harsher, in term of the nature and scope of remedies on offer, and where a unique supervisory mechanism is in place, one could think that the law works to sever any potential connections between the legal relationship and Trust. An analogy with Trust in the public realm can help us see why this is incorrect.

The similarity between private fiduciaries and public office holders has been noted in scholarship for quite a while now, and generated deep and important insights about the duties

\textsuperscript{156} Irit Samet, \textit{Equity: Conscience Goes to Market} (Oxford University Press 2018), chapter 1
of public servants and private fiduciaries.\textsuperscript{157} Here I wish to touch upon a different angle of the analogy: how do we build Trust into the relationship with private and public agents who are in charge of running important aspects of our life when a gulf of power and knowledge exists between us?\textsuperscript{158} Political theorists that are thinking about the best ways to structure the modern regulatory state have been pondering since its inception about the best way to balance two apparently irreconcilable insights: on the one hand, we have Lord Vinson’s advice to fellow entrepreneurs: ‘trust everyone unless you have a reason not to’:\textsuperscript{159} Research, we saw, confirms his insight and shows that Trust plays a key role not only in the success of markets, but also in thriving civic societies. Applying Vinson’s suggestion to the relationship between public office-holders and the citizens they serve calls for heartwarming Trust in the good intentions, skills and execution abilities of the former. David Hume would disagree: in a famous council to drafters of constitutions and reformers of civil service he said: ‘[i]n contriving any system of government… every man ought to be supposed a knave, and to have no other end… than private interest’:\textsuperscript{160} Can we take good advice from both Vinson and Hume?

The secret for constructing the regulatory system in a way that pays each of these insights its due is to structure it as a pyramid. Its basis comprises of norms that are informed by Lord Vinson’s optimistic viewpoint, while norms at the top have Hume’s stern warning in mind: ‘[o]n top of a wide basis of Trust, the regulator must signal willingness to intervene - harshly if necessary - when Trust is being abused. The ‘paradox’ of such preparedness to

\begin{flushleft}
\textsuperscript{157} Paul B. Miller, ‘Political (Dis)Trust and Fiduciary Government’ in Matthew Harding and Paul B. Miller (eds), \textit{Fiduciaries and Trust: Ethics, Politics, Economics and Law} (Cambridge University Press 2020); Lionel, in the context of trustees in particular see Larissa Katz, Simon Douglas. For the view that the differences between public duties and the fiduciary duty are too deep for them to be analysed as such see Timothy Endicott, ‘The Public Trust’ in Andrew S. Gold and others (eds), \textit{Fiduciary Government} (Cambridge University Press 2018).

\textsuperscript{158} For an interesting analysis of Hobbs’ theory of governance as built upon Trust in the sovereign see Evan Fox-Decent, ‘Trust and Authority’ in Matthew Harding and Paul B. Miller (eds), \textit{Fiduciaries and Trust: Ethics, Politics, Economics and Law} (Cambridge University Press 2020), sec. 3

\textsuperscript{159} The Economist, Jan. 7, 1994, 93, as one of the most successful entrepreneurs of his time, his advice was eagerly listened too.

\end{flushleft}
escalate the response to betrayal of Trust is that this is the way to actually increase the proportion of Trust-based regulation’.  

The pyramid shape, with a wide array of regulations that pre-suppose and encourage Trust in the government and its officials, topped with a narrow sections of regulations that are geared towards guarding the public from abuse of government power, is intended to achieve two goals: one is to detect and uproot any betrayal of the Trust posed by the public; the other goal is preventative. As Pettit reminds us: it is important that citizens, at least sometimes, behave as if they had an attitude of mistrust by insisting on various safeguards and controls over office-holders’ power. For ‘it may be that however uncorrupt the authorities actually are, human corruptibility means that in the absence of the checks and constraints implemented in such distrustful behaviour, there would begin to develop habits of corruption’. Those who are in charge of issuing new regulations must keep a keen eye on preserving a fine balance between these two layers. Civil servants, on their part, must remember that ‘to be vigilant… is not (necessarily) to have an attitude of distrust towards the authorities… [rather, it can be expressive of] a demanding pattern of expectations in their regard’.  

The law of trust exhibit, I believe, a similar pyramid structure. The act of entrusting when a trust is settled is heavily controlled by the law with the aim of ensuring that it duly reflects the settlor’s wishes, and that these can be properly enforced by the court. Other elaborated sets of rules instruct the trustees how to use the power they are given for the benefit of the beneficiaries; while yet others regulate the more procedural side of running the trust. The bulk of trust law is thus taken by rules that apply to the commencement and management of trusts in ‘peace times’. The rules that set the enforcement and supervisory mechanisms,

---

161 Braithwaite, 'Institutionalizing distrust, Enculturating Trust', p.352  
162 Pettit, 'Republican Theory and Political Trust,' p.311  
163 Ibidp.310  
164 Although, as far as the content of the duty is concerned, there are significant differences between duties of public bodies to duties of trustees, see Endicott, 'The Public Trust', part 6.  
165 Many of these rules are now codified in statutes, see for example, Trustee Act (2000), Recognition of Trusts Act (1987), Trustee Investments Act (1961).
while they play an indispensable role in the fabric of the law, only play a (n active) role in the life of a small number of trusts and are (much) fewer in number. The great complexity of these norms (especially the enforcement mechanisms) means that they get lot of judicial and academic attention. But they are best conceived as adding a top tier to the regulatory pyramid and are not meant to colour the whole structure in dark shades of suspicion and mistrust. On the contrary; the upper section is there in order to enable the normal trusting relationship at the basis to flourish by preventing and detecting the few abusers that such large cohort inevitably includes. When trustees view the law that regulates their activities in this way, they feel Trusted and empowered to respond positively to it by engaging in trustworthy actions. They know that the upper tier is only there since it is ‘foolish, in one’s attitude toward a given person on a given matter, not to mix trust on some matters with doubts and prudent checkups on others.... [and that a] magic formula for the right mix of trust and suspicion’ is impossible to find.’ 166. The law of Trust is on a never-ending quest after this magic formula, but it seems to be doing a pretty good job at balancing cautious outlook with helping the parties to fulfil the great potential of trusts to serve as a media plate on which Trust can grow and thrive.

**Conclusion and back to OSITs**

‘There is a vast deal of magic in words; and among the words most highly charged with magic is to be found the word trustee.’ 167 Could this magic originate from the way trusts instantiate one of the most meaningful ways in which we can relate to each other? That we Trust others is an essential, inescapable characteristics of humanity. Few dispute that; but some doubt the usefulness of Trust anywhere outside our most intimate circle. If they are right, its relevance to the law of trusts is negligible, limited to those family trusts where a close acquaintance is a pre-condition to entrustment by way of settling a trust. Depending on how you define Trust, this very narrow view can be countered with ample research and multi-disciplinary academic analysis. Trust, according to a widely held and more inclusive understanding, pertains also


to association between friendly strangers, in the market and in civil society. This type of Trust is potentially highly relevant for the relationship between trustee, beneficiary and settlor. It therefore makes sense to ask whether the law of trusts builds on and encourages Trust in the trustee; the answer to this question is important both for the self-understanding of this body of law and for its future development.

But that does not mean that the answer is straightforward. Central elements of trust law are in tension with what we would expect to find in Trust-based relationships. Duties backed by sanctions and threats, a very real possibility that the trusted party will be ousted, and extensive transparency requirements may indicate that the law of trust is not there to support and enhance Trust in the trustee. Instead, so the thought might go, trust law is there to replicate the advantages of Trust when the conditions for its flourishing are missing; they are there to facilitate Trust-less entrustment. The move to understand why this is not the case, sheds light on important structural and substantial aspects of the law of trusts.

The key to understanding why the law of trusts is Trust-enabler is to take (very) seriously the inherent power gap between trustees and beneficiaries. In that respect, we saw, the relationship created by the law of trust are akin to the interaction, regulated by public law, between citizens and public authorities. The dynamics between what look like Trust-busting elements, and other elements of trust law, which enshrine and express Trust, should be understood in that light. The basic elements of the trust, namely, the entrustment of property unto the trustees and the discretion they are given on how to manage it, are excellent means for manifesting, deepening and encouraging Trust and trustworthiness. Since these acts constitute the trust and determine its day-to-day management, this Trust-building potential is fundamental to the trust. But given the power gap between the parties, which makes abuse of Trust easy to undertake and hard to detect, it is not realistic to expect owners/beneficiaries to embark on such a project without significant reassurance about their rights in case such misfortune hits them.

The inbuilt threats, sanctions and snooping mechanisms of trust law provide this necessary reassurance, and in that way, they enhance the trust’s Trust-building potential rather than hinder it. Trustees - knowing fully well that some of them will try to exploit their
position of power and must be stopped if the institution is to survive - do not see the enforcement or supervisory powers as ruling out an interpretation of the entrustment and discretion they are granted as manifestations of Trust in them by settlor and beneficiaries. On the contrary, they understand that such unequal relationship cannot be based on Trust unless a safety net, and a pretty strong one, covers at least some of the area where a fall is a real risk. The beneficiaries, especially as the relationship progress, can gradually ‘let go’, so that when they choose not to act on the supervisory powers they have, they get an additional opportunity to communicate their Trust in the trustee.

This function of trust law – to entrench and encourage Trust between strangers – further entrenches the trust as a normatively attractive component of property law. For Trust-based relationship are valuable in and of themselves as an expression of deep respect for the humanity of the other. Moreover, it is reasonable to believe that positive experience of such relationship – in person or by watching others – increases one’s willingness to Trust others and take the associated risk which downing of the guard always comes with. And while these Trust-based relationship can more easily be replicated between players in the free market, the positive effect may well spill over to inform one’s relationship to public bodies. The mixture of Trust building measures, and healthy doubt due to gaps in power can be highly useful when one considers her stance towards the state and its officials.