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The Castrated Trustee: Jouissance and Breach of Trust

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Abstract: As a highly prolific legal mechanism that both predated and subsequently found form amid the development of Anglo-American capitalist societies, the modern-day trust operates across manifold private, commercial, domestic and international spheres. As a consequence of their complex legal, economic and political significance that informs, for example, the worlds of global corporate finance as well as public pensions, trusts play a remarkably important role in helping shape the wider socio-cultural domain of Anglo-American jurisdictions and beyond. Yet trusts remain under- or ill-considered juridical sites in terms of continuing critical-legal dialogues, and especially the dialogue between equity and psychoanalysis. This article will explore how the trust mirrors or recreates in an external juridical form the internal regulation of desire and enjoyment that occurs within the psychic space of the subject-as-trustee. In particular, via duties and obligations a trustee holds on behalf of the subject-as-beneficiary, and the resultant *breach* that is said to occur when such duties and obligations are not met. Using two key formulations this article will aim to assess the trustee as castrated by means of a (re)interpretation and (re)imagination of some fundamental and formal aspects of breach of trust from the perspective of psychoanalysis. The first formulation relates to the continuous force of unconscious desire (the death drive) that pushes the subject-as-trustee ever onwards towards the thing (*das Ding*) and surplus enjoyment (*jouissance*), thus producing an (inevitable) affective paradox or trap in which the trustee finds themselves caught. The second, albeit intimately connected with the first, relates to the internal regulatory or prohibitive psychological mechanisms that prevent or seek to prevent the subject-as-trustee from pushing past the limit on enjoyment imposed by the pleasure principle. To be exact, a limit that has been consciously and deliberately recreated in the trust mechanism, and by extension the so-called “onerous” duties of the subject-as-trustee, as a means of preventing a breach of trust.

Keywords: equity, trust, psychoanalysis, desire, enjoyment, Freud, Lacan, breach, capitalism

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1 Introduction

As a highly prolific legal mechanism that both predated and subsequently found form amid the development of Anglo-American capitalist societies, the modern-day trust operates across manifold private, commercial, domestic and international spheres. As a consequence of their complex legal, economic and political significance that informs, for example, the worlds of global corporate finance as well as public pensions, trusts play a remarkably important role in helping shape the wider socio-cultural domain of Anglo-American jurisdictions and beyond. Yet they remain under- or ill-considered juridical sites in terms of continuing critical-legal dialogues, and especially the dialogue between equity and psychoanalysis. Of particular interest in this article is how the trust mirrors or recreates in an external juridical form the internal regulation of desire and enjoyment that occurs within the psychic space of the subject-as-trustee. Especially in light of the duties and obligations that a trustee holds on behalf of the subject-as-beneficiary, and the resultant *breach* that is said to occur when such duties and obligations are not met. In short, why the trustee must be castrated.

2 Psychoanalysis with trusts

Trusts are often defined in purposive and mechanical terms.¹ As such, definitions tend, beyond trusts confined to simply holding and retaining legal title over property, to highlight the basis of investment upon which trusts are created and upon which they rely.² Insofar as investment informs trusts, as well as the duties and obligations of the trustees that flow both from the general principles of trust law and individual trust arrangements, this can be further delineated into two categories. Firstly, a duty or obligation to facilitate the capital growth and income potential of the trust fund. And secondly, a duty or obligation to protect the beneficial interest – namely a beneficiary’s financial interest – from imprudent levels of investment hazard or risk.³

1 The purpose a trust is expected to achieve remains an important consideration in its creation, irrespective of the doctrinal issues that surround so-called “purpose trusts” (see *Re Astor’s Settlement Trusts* [1952] Ch. 534). As F.W. Maitland states: “the trustee is bound to exercise his rights on behalf of some other person or for the accomplishment of some purpose” (F.W. Maitland, *Equity* (Cambridge: Cambridge University Press, 1969), 50).

2 Jonathan Garton, *Moffat’s Trusts Law*, 6th ed. (Cambridge: Cambridge University Press, 2015), 443.

3 Lord Watson in *Learoyd v Whiteley* [1887] 12 App Cas 727 at 733.

But behind the technicalities of such definitions lies the incontrovertible role that trusts play within capitalist societies. That is, to facilitate on behalf of trust beneficiaries a greater and more absolute enjoyment of financial capital (via a range of investment methods and types). Moreover, enjoyment that is augmented by virtue of being unfettered by *inter alia* the managerial and administrative responsibilities that ordinarily accompany individual or independent investors. On this basis trusts entrench and even amplify capitalist dogma, primarily through the creation of the peculiar capitalist subjectivity embodied by the beneficiary who is free to enjoy and always primed to demand more enjoyment. Further, the trustee who is burdened with the onerous task of facilitating beneficial enjoyment must simultaneously disavow any sense of their own enjoyment. In particular if that enjoyment is held to breach: the general principles of trust law; the particular duties and obligations of a trust arrangement; or, and perhaps most importantly in terms of the morality of capitalist subjectivity, the duty or obligation not to oversee or facilitate financial loss for the beneficiaries by either intentionally or negligently devaluing the investment fund or appropriating the funds for themselves.

Using two key formulations, this article will aim to (re)interpret and (re) imagine some of the fundamental and formal aspects of breach of trust from the perspective of psychoanalysis. The first relates to the continuous force of unconscious desire (the death drive) that pushes the subject-as-trustee ever onwards towards the thing (*das Ding*) and surplus enjoyment (*jouissance*), thus producing an (inevitable) affective paradox or trap in which the trustee finds themselves caught.

In accordance with the capitalist context informing modes of subjectivity which are of interest to this article, *das ding* and *jouissance* ought to be understood as primarily financial in nature, or at least financially-orientated. If, for example, we take seriously the suggestion that beneficial interests are *de facto* financial interests, as Megarry VC maintained in *Cowan v Scargill*, then the conclusion tends towards *das ding* as equivalent to financial capital.⁴ Furthermore, *jouissance* must equate to the product or “fruits” of investments, or indeed the potential fruits that one will only secure if willing to engage with the risks. The palpable uncertainty of attaining any further fruit from high-risk investments therefore informs the impossibility of *jouissance* as a corresponding potential failure of investment strategy.

⁴ Megarry VC in *Cowan v Scargill* [1984] 2 All ER 750 at 760.

Such a crude mapping of these things one atop the other, however, fails to account for the more complex nature that Lacan accords to both *das Ding* and *jouissance*, with the latter of those proving especially difficult to define in any concrete terms. “The specificity of *jouissance* is best established,” claims Adrian Johnston, “by contrasting it with the basic features of the pleasure principle.”⁵ Johnston then continues in a vane apposite to the context of this paper:

Based on Freud’s own characterizations of it, the pleasure principle (once placed in relation to the reality principle) acts like an economic speculator, assessing potential gains and losses of satisfaction in light of possible outcomes of various courses of action. It seeks to maximize satisfaction and correspondingly minimize pain/dissatisfaction. In Freud’s account, the pleasure principle qua economic speculator isn’t so much a function of the primary processes within the id, but is the strategy wherein the ego negotiates with the exigencies of reality on behalf of the id (of course, the ego often performs this function unconsciously). For Lacan, the ego feels pain (in the form of anxiety, symptoms, and the like) when the homeostatic balance sheet of the pleasure principle is thrown into disorder by an insistent enjoyment that pays no heed of the speculative gains or losses of a diluted, sublimated pleasure, of a principle that routinely “sells out” enjoyment in its ongoing bargaining with its reality-level complement. *Jouissance* is “beyond the pleasure principle” precisely to the extent that it breaks off negotiations with the reality principle, that it bypasses the moderating/mitigating influence of the ego on the drives.⁶

On the one hand, therefore, the trustee is barred from any chance for enjoyment or from attempting to grasp *das Ding* in accordance with the particulars of a trust arrangement and the law on trusts more generally. On the other, the trustee is continually tempted or baited by the insistent enjoyment that is at once a product of the effective performance of their duties and obligations, including, for example, the financial rewards of prudent investments that trust beneficiaries rely upon to guarantee their enjoyment. And a traumatic indication of the fact that they have been obliged to “sell out” their own enjoyment in order to satisfy the realities of trust law and trusteeship.

The second formulation, albeit one intimately connected with the first, relates to the internal regulatory or prohibitive psychological mechanisms that prevent or seek to prevent the subject-as-trustee from pushing past the limit on enjoyment imposed by the pleasure principle. In particular, how this limit has been consciously and deliberately recreated in the trust mechanism, and

⁵ Adrian Johnston, “The Forced Choice of Enjoyment: *Jouissance* between Expectation and Actualization,” *The Symptom* 2 (2002), access November 26, 2015, <http://www.lacan.com/forcedf.htm>.

⁶ Johnston, “The Forced Choice of Enjoyment.”

by extension the so-called “onerous” duties of the subject-as-trustee, as a means of preventing a breach of trust.⁷ Before examining breach of trust further, however, it is first necessary to consider trusts as more than simply mechanisms for facilitating beneficial capital growth through investment, but as intersubjective spaces, engines of desire or a juridical form of the pleasure principle itself.

3 Constituting *intersubjective* trusts

There is a basic duality, a product of the historical division between the jurisdictions of equity and the common law, which inscribes upon trusts a “double dominion” of legal title and equitable ownership.⁸ “What is important about separating the rights to property into legal and equitable ownership (strictly legal title to the trustee and equitable ownership to the beneficiary),” claim Pearce, Stevens and Barr, “is that it enables the powers of management to be split from the *beneficial enjoyment*” [my emphasis].⁹ As such, a trust guarantees or ought to guarantee the beneficiary’s enjoyment, including any capital accumulations or income streams that flow directly from investments (the “fruits”). Moreover, as outlined earlier, it is beneficial enjoyment that reflects the individual beneficiary’s freedom from the ordinary administrative and managerial burdens that accompany investment funds and property portfolios in modern capitalist contexts.

A key part of interpreting the existing jurisprudence from the point of view of psychoanalysis is the *split* that occurs between the legal and equitable title which is in turn mirrored by a split between property or fund management and beneficial enjoyment. It is in this sense that the trust can be said to consciously and formally recreate the type of unconscious split between demand and satisfaction that produces the subject’s desire. And a trust arguably achieves the aims of the pleasure principle, of maximizing satisfaction and correspondingly minimizing dissatisfaction, insofar as it manages to function in exact accordance with the terms of its constitution, including achieving significant

⁷ For example, see Sarah Worthington, *Equity*, 2nd ed. (Oxford: Oxford University Press, 2006), 74.

⁸ Robert Pearce, John Stevens, and Warren Barr, *The Law of Trusts and Equitable Obligations*, 5th ed. (Oxford: Oxford University Press, 2010), 55.

⁹ Pearce *et al.*, *The Law of Trusts*, 55.

gains from investments, far more effectively than the individual subject could ever hope to. However, in the regular event of dysfunctional trusts in which the ideal is not achieved, there is revealed an ever present influence of unconscious energies that refuse the trust harmony and plunge the “homeostatic balance sheet of the pleasure principle” into disorder by an insistent enjoyment that pays no heed of the speculative gains or losses of a diluted, sublimated pleasure.¹⁰

As a product of the trust, *jouissance* denotes beneficial enjoyment that is at once expected and also exceeds expectation. Yet *jouissance* ought not to be thought of simply as an excess. “*Jouissance*,” as Daniel Hourigan maintains, “is a limit-concept and as such stands for the failure of pleasure to meet the demand for satisfaction [...] *Jouissance* is not and should not be understood as an excess but rather as an *excessivity inherent to pleasure’s composite lack of satisfaction*” [my emphasis].¹¹ A beneficiary is by (ideal) definition expected to enjoy freely within the confines of the trust. Akin to a triggered intravenous morphine drip, the trust at once produces and satisfies what the beneficiary demands in a measured form, in terms of either income, capital or both with little or no input from them. Yet beneficial enjoyment will invariably remain finite and wholly dependent upon additional variables, most notably the initial size of the trust fund available for investment and the types of investment undertaken by the trustees in accordance with the investment schedule. Therefore, the beneficiary enjoys, but not to a point of excess (or suffering).

Only in certain circumstances, that will in all likelihood be prohibited by the trust arrangement or trust law more generally, would a beneficiary seek or demand something more than or beyond the (partial) enjoyment that the trust provides.¹² That is, seeking an absolute enjoyment that extends beyond the fantasy of which the trust forms a part. However, this is not fantasy as a *de facto* unreal or pretended state of being. The trust as a mechanism for regulating and channelling the desires of beneficiaries does exist in “reality.”

¹⁰ Johnston, “The Forced Choice of Enjoyment.”

¹¹ Daniel Hourigan, “Breach! The Law’s *Jouissance* in Miéville’s *The City & The City*,” *Law, Culture and the Humanities*, 9.1 (2011): 157.

¹² Jonathan Garton suggests that the complicity of beneficiaries in exceeding the limits of the trust and causing a breach to occur “is a recurrent theme in the history of trustee investment.” Talking directly to the issue of the evasion of statutory investment lists, Garton claims that trustees are found to be at fault, “possibly through ignorance *but also with the encouragement and consent of beneficiaries*” [my emphasis] (Garton, *Trusts Law*, 460).

The trust, in this sense, represents a form of “reality.” But it is not a reality free of fantasy. Nor is it the reality of, for example, efficient and productive property management that equity would have us believe. Instead, it is a reality that is structured and supported by fantasy. Fantasy in this context denotes what Žižek, following Lacan, defines precisely as a form of “reality” that is a fantasy-construction, which enables the beneficiary to mask the Real of their desire.¹³ Consequently, the trust space helps traverse the fantasy and for the subject (in trust law these are tellingly called objects) to identify with the fantasy which, as Slavoj Žižek maintains, “structures the excess resisting our immersion into daily reality.”¹⁴

On this account the trust operates as a mechanism via which the beneficiary is able to escape the traumatic kernel of their Real desire. Trust law tells us *inter alia* through a complex of formalities that the beneficiary must enjoy, but that certain limits to that enjoyment are inevitable and thus must also be accepted. The trustee on the other hand, employed or nominated in order to maintain the reality fantasy-construct of the trust, must never strive to enjoy the fruits of the trust, i. e. must never consider themselves a beneficiary. Thus, for the beneficiary and trustee alike, and for the latter in particular, this trust function recalls what Lacan says is at stake between the subject and *jouissance*. That is to say, that *jouissance* is the contravention of defined and strict limits.¹⁵ Moreover, for the trustee in particular, who must somehow learn to enjoy their *lack* of enjoyment, this can be further defined in relation to a mode of suffering that is *jouis-sans*.¹⁶

With the recurrent threat posed by both trustee and beneficiary who seek absolute enjoyment beyond the fantasy we are able to recognise a more radical interpretation of the trust. Explicitly, that trusts are ultimately a product of the desire to transgress a number, if not all, of the conditions required to fully constitute them. Trusts are engines for the creation and, ideally, the containment of desires. Captured within the trust mechanism, and thus informing its

13 Slavoj Žižek, *The Sublime Object of Ideology* (London: Verso, 2008) 45; also see: Jacques Lacan, *The Four Fundamental Concepts of Psychoanalysis*, ed. Jacques-Alain Miller, trans. Alan Sheridan (London: Penguin, 1979).

14 Slavoj Žižek, “The Liberal Utopia: Section I – Against the Politics of Jouissance,” (2007), accessed October 30, 2015, <http://www.lacan.com/zizliberal.htm>.

15 See: Jacques Lacan, *The Ethics of Psychoanalysis, 1959–1960*, ed. Jacques-Alain Miller, trans. Dennis Porter (London: Routledge, 1992).

16 Lorenzo Chiesa, “Lacan with Artaud: *j’ouis-sens, jouis-sens, jouis-sans*,” in *Lacan: The Silent Partners (Wo Es War)*, ed. Slavoj Žižek (London: Verso, 2006), 354.

very structure, is desire. Moreover, trusts, and most notably those concerned primarily with investment, embody the desires of the trustee, the settlor and the beneficiary, all of whom have a vested interest, albeit to varying degrees, not only in the trust facilitating some benefit, but of maximising benefit and thus enabling attempts to push beyond the pleasure principle in order to catch the *jouissance* of the Other as property, as *thing*. This formulation will be examined in more detail later.

It is worth briefly noting that within the contemporary capitalist context the type of trusts that demonstrate precisely this type of maximisation ethos are also those that have benefitted from an increasingly liberal regulation regime. Hedge funds, for example, certainly prior to the financial crash in 2008, typified investment mechanisms that were almost entirely free from any form of regulatory restraint. That were, in a sense, demonstrative of a form of psychosis predicated on the lowering or removal of any barriers (of the fundamental fantasy). “According to Lacan,” Chiesa tells us, “the capitalist discourse epitomizes perversion precisely in so far as it pre-tends to enjoy real ‘*a*’ (the lack) accumulated by *jouissance*.”¹⁷

This, it might be said, corresponds with the morphine addict who is given a seemingly unlimited supply of their favourite drug with no restraints imposed upon or monitoring of usage, but who is simultaneously never able to maintain or recreate the first fix. It is undeniable that this little or entirely unregulated state of affairs produced, on the one hand, significant financial rewards for the vast majority of those who used them. But on the other hand, that lack of regulation – the lack of fantasy-construct able to mask (Real) desire for *inter alia* more and riskier investments – directly led to the creation of the conditions of complaint, namely the financial crisis and the plethora of regulation forced upon hedge funds by many jurisdictions as a result.¹⁸ A point on which we may query whether or not there is a certain masochism at play in the field of unconscious desire, which reveals *jouissance* as the essential condition (*conditio sine qua non*) “of the inextricable relationship between the drive and desire.”¹⁹

Whether as small private family settlements or international investment funds, trusts employ and reply upon demand, satisfaction the resultant desire of the split between those two, as well as the promise, if not always the

¹⁷ Chiesa, “Lacan with Artaud,” 354.

¹⁸ Garton, *Trusts Law*, 456.

¹⁹ Chiesa, “Lacan with Artaud,” 354.

actualization, of enjoyment in order to structure and substantiate themselves. Trusts, in that sense, precisely describe a dividing-up, distributing and re-tributing of everything that counts as *jouissance*. A mode of division analogous to what Lacan called “the essence of law.”²⁰ This may well pitch the juridical significance of trusts too high for the comfort of some. But F.W. Maitland, for one, claimed not only that the trust was the largest and the most important of all the exploits of equity, but that “it seems to us almost essential to civilization.”²¹

Thus far, we may argue, not only is the juridical significance of the trust well-placed, but so is the affective, psychological significance of trusts. And one of the major reasons that trusts do or ought to remain significant in the context of capitalism is because they allow or rather insist that the subject better know, understand and manage their perverse and wild desires. They are, in that sense, mechanisms capable of, if not entirely successful at, taming desire, but also a more effective way for the subject to attune themselves to powerful psychical energies and forces that all too often remain unconscious and beyond reason, namely those pertaining to the pleasure principle. This paints an undeniably detailed and rich picture of the function and place of trusts in modern society, and especially as intersubjective sites for the management not only of property, but also of desire.

4 Desire with breach

Desire, Lacan maintains, is the difference that results from the subtraction of satisfaction from demand; it is the “very phenomenon of their splitting (*Spaltung*).”²² In other words, when a person or persons demand something they believe will satisfy that demand, yet they are prevented from attaining it absolutely or at all, desire is the product and the consequence. In the context of trusts beneficiaries are not the only subjects who demand satisfaction or who have needs that account for their enjoyment of the trust, the trustee is also a desiring subject.

20 Jacques Lacan, *Encore, 1972–1973*, ed. Jacques-Alain Miller, trans. Bruce Fink (New York: W.W. Norton & Company, 1998), 3.

21 Maitland, *Equity*, 23.

22 Jacques Lacan, *Écrits*, trans. Bruce Fink (New York: W.W. Norton & Company, 2006), 580.

The trustee is obligated and thus needs, for example, to ensure that certain investments will produce a more than reasonable capital return or income for the trust beneficiaries. This means that trustees also make demands they hope or strategically plan to have satisfied, and therefore this explains how desire relates to the trustee in terms of the day-to-day management and administration of the trust. This recalls Hourigan's reading of *jouis-sans* in light of Kant as a duty to the law (or equity in this instance) as that which is without enjoyment; and where the trustee as part of the official machinery of trust law must never exhibit any "heterogeneous" desire or private enjoyment in the course of executing their duties and obligations.²³ Traditionally the office of trustee was informed by notions of voluntary duty. Trustees did not, therefore, automatically expect remuneration or pecuniary reward for doing so.²⁴ Whilst the age of the professional trustee has altered this tradition to a large extent, and in particular s.28 and Part V of the *Trustee Act 2000*, it remains a strict rule that trustees must not seek to enjoy the fruits of their management and administration for their own benefit. Yet how does this rule reflect the "problem" of containing the desire of the trustee?

A trustee's demand that investments be rewarded or satisfied by strong returns, and beneficial enrichment is therefore a very particular form of balance that is struck between demand, satisfaction and desire that relates to the administration of the trust and fulfilment of one's duties and obligations. As such, it is not the same as the trustee either desiring, seeking to enjoy or indeed entirely satisfying their own demands with the fruits which trust law maintains ought to be exclusively for the beneficiaries. Lacan's "encore" can offer an explanation of what drives a trustee to want more than mere or partial enjoyment that is the product of their legally-mandated satisfaction.²⁵ And thus also an explanation of why the trustee risks allowing their own enjoyment of the trust to supersede that of the beneficiaries; the trustee who either consciously or unconsciously directs their unmet or unresolved energies – their need for more – towards satisfaction in any form, whether those forms represent legitimate demands sanctioned by the constituted terms of the trust or not. Here we find a trustee who coincides with the desiring subject, who, as Bruce Fink maintains, thinks there must be

²³ Hourigan, "Breach! The Law's *Jouissance* in Miéville's *The City & The City*," 157.

²⁴ *Robison v Pett* (1734) 3 P. Wms. 249; *Re Barber* (1886) 34 Ch.D 77; *Dale v IRC* [1954] AC 11.

²⁵ Lacan, *Encore*.

something better; says there must be something better; *believes* there must be something better.²⁶ This is a trustee that we find, for example at the centre of frauds, and whose behaviour, as a result, is construed as morally *bad*. The trustee who siphons off or redirects a portion of the fund for themselves, and continues to do so indefinitely or until such time as they are caught or admit fault.

Lacan's reading of Freud suggests that the function of the pleasure principle is as a *good*, and as that which "keeps us a long way from our *jouissance*."²⁷ Breach of trust, in that sense, marks an instant inscribed in legal time at which point the pleasure principle is transgressed, the line is crossed and the good disavowed in a deathly drive for unknowable or obscene *jouissance*. The subject-as-trustee in breach seeks an enjoyment unbeknownst but seemingly judged worth suffering for. Moreover, in pushing beyond the pleasure principle and unmasking the Real of their desire, the traumatic kernel that lies at the heart of the social reality of the trust designed to facilitate escape from just such desire, the subject-as-trustee risks continuation of that suffering for as long as it is bearable to them. Accordingly there is a definitive temporality that attaches to instances of breach which acknowledges that equity (law) is in itself broken, breaking up both time and space and consequently helping to create the gap or cut in the integrity of the trust in the symbolic; gaps that signal the out-of-jointness, the excessivity, of trust order that relates to *jouissance*²⁸

We can find a general example of this moral division, between the good of the trust as a form in social reality and the bad of disavowing and transgressing that social reality, within both historical and contemporary trusts embodied in the pervasive pseudo-religious concept of "temptation." "The trustees' obligation is to manage the trust solely for the benefit of the beneficiaries," Graham Moffat reminds us, "and if the trustees' own interests conflict with theirs, *then temptation exists*" [my emphasis].²⁹ Here a trustee confronted with two possible courses of action is tempted by a turbulent and continuous unconscious desire which leads them inexorably to a breach, rather than along the course which ensures the integrity of trust. Temptation also reveals another important aspect which will be dealt with in the following section, namely the role that *choice* plays in understanding the conditions that lead a trustee to breach.

²⁶ Bruce Fink, *Lacan to the Letter: Reading Écrits Closely* (Minneapolis, MN: University of Minnesota Press, 2004).

²⁷ Lacan, *The Ethics*, 185.

²⁸ Hourigan, "Breach! The Law's *Jouissance* in Miéville's *The City & The City*," 162.

²⁹ Graham Moffat, *Trusts Law*, 5th ed. (Cambridge: Cambridge University Press, 2009), 435.

5 The inevitable breach of trust

A breach of trust may be deliberate or inadvertent; it may consist of an actual misappropriation or misapplication of the trust property or merely of an investment or other dealing which is outside the trustees' powers; it may consist of a failure to carry out a positive obligation of the trustees or merely of a want of skill and care on their part in the management of the trust property; it may be injurious to the interests of the beneficiaries or be actually to their benefit.³⁰

One way in which to understand the inherent instability of the trust is that the trustee is always already pregnant with the desire to breach the trust. The trustee, as an agent lacking symbolic distance whilst acting or performing in the symbolic domain of the trust seeks to become or know the very equity of the trust itself (*jouis-sens*).³¹ And if trusts are to be maintained as a legitimate form in the socio-legal capitalist domain, then it is necessary to contemplate how the unconscious desire to breach functions as well as how the *choice* to accept the form of legal subjectivity known as trusteeship can avoid breach.

Paradoxically and of interest to this article is how this interpretation of breach of trust may also be capable of disrupting the mainstream deployment of trusts within capitalist society. That is, how the structure and function of trusts ought to be emphasized in order to better reflect the vital role that trusts play in containing and channelling the wild desires that are arguably a feature of modern capitalist societies. Rather than allowing trusts to be deployed as mechanisms or vehicles which, whilst still containing and managing desires to some extent, ultimately allow capitalist subjectivities to actualize more fully by, for example, facilitating tax avoidance.³² With the consequence that *inter alia* the gap between rich and poor is increased, socio-economic inequality is augmented through the preservation of wealth in the hands of the few, and the possibility of notions of community predicated upon egalitarian values are diminished or lost.

Dialogue between equity and psychoanalysis on the matter of how best to understand breach from the point of view of desire is extant but

³⁰ Millett LJ in *Armitage v Nurse* [1997] 2 All ER 705 at 710.

³¹ Jacques Lacan, *Television*, ed. Joan Copjec, trans. Denis Hollier, Rosalind Krauss and Annette Michelson (New York: W.W. Norton & Company, 1980), 10; Hourigan, "Breach! The Law's *Jouissance* in Miéville's *The City & The City*," 158.

³² See for example Thomas Piketty, *Capital in the Twenty-First Century*, trans. Arthur Goldhammer (Cambridge: Harvard University Press, 2014), 451–452.

poorly aligned. In other words, the equity's thinking on breach of trust is geared largely towards understanding and mitigating economic loss to beneficiaries – what we are otherwise calling from a psychoanalytical perspective, loss of enjoyment. Whereas, psychoanalysis attends to the root causes for a trustee's desire to breach and is therefore capable of searching beyond mere concerns for economic loss and the need for restitution, or to place the beneficiary “in the same position as he would have been had he not sustained the wrong for which he is now getting the compensation or reparation.”³³ In particular, Lacanian notions of conscious and unconscious submission by the subject-as-trustee to the Other reveals differences between the legal and psychoanalytical approaches, and produces very different conclusions as to the reasons underpinning breach.³⁴

To recap, in a conventional sense the demands the beneficiaries will make and that will require to be satisfied by the trustee, demands which are defined at least initially by the settlor, necessarily placate any sense of enjoyment that might otherwise be sought by the trustee. Moreover, duties and obligations that the trustee holds by virtue of the office also guarantee the grounds for account and remedy should the trustee seek their own enjoyment of the property. In short, and in accordance with the fundamental outline of trustee duties, the trustee must not enjoy, the trustee must simply manage in accordance with the applicable standards set-out for them.³⁵ This conventional position accords with *jouis-sans*. But in assuming the position of law-maker or knowing object of equity through *inter alia* seeking to enjoy the trust as or like a beneficiary, the trustee breaches the trust in light of what we have referred to here as *jouis-sens*.

Equity has long prescribed and defined those instances of deviation from the instructions given to a trustee within the four corners of the trust instrument as a strong signal of a breach, and enforces upon the trustee in such instances a strict liability for such deviations.³⁶ This aspect of trust jurisprudence betrays the belief that a *lack of trust* exists at the heart of the mechanism, or at the very least a strong expectation that a lack of trust will be realised at some point during the life of that particular arrangement. If indeed trustees are not to be trusted, and

³³ Lord Browne-Wilkinson in *Target Holdings Ltd v Redfern (a firm)* [1996] AC 421 at 432.

³⁴ The capitalized “O” of Other represents what Lacan calls the “big Other” or “*grand Autre*,” which helps to differentiate it from otherness, or “*autre*,” which itself represents the “lost object” or “*objet petit a*.” See: Lacan, *The Four Fundamental Concepts of Psychoanalysis*, 282.

³⁵ Lord Blackburn in *Speight v Gaunt* (1883) 9 App. Cas. 1.

³⁶ Worthington, *Equity*, 130.

the strict rule concerning liability that equity has over a significant period of time entrenched reflects this concern, then this would suggest that equity, as well as psychoanalysis, takes seriously the notion that energies of desire can and will become directed outside conscious awareness and attach themselves to the trust which, as a (juridical) idea, represents and facilitates a continuous unconscious desire that the trustee seeks to enjoy absolutely. The effect of this being, quite simply, the trustee's redefinition of the trust limits in contravention of the settlor's initial intentions, and thus a choice by the trustee not to submit to the settlor as Other.

Over the course of many generations of jurisprudential development of trusts, equity has dealt more effectively with questions of *how* a breach occurred, in terms of both evidence and a trustee's confessional account and thus which remedy ought to apply, than *why* it occurred. Or rather, and to be more forgiving of the general equitable approach, questions of why rarely stray beyond the confines of administratively expedient categories of individual standards of behaviour, i. e. those relating to prudence, negligence, reasonableness or unconscionability, that, whilst certainly categories in which a cause for breach might be located, remain ignorant of the influence and radical interpolation of the unconscious into matters of causality. A ubiquitous example of the type of conditions that often lead to a breach is whether a serious possibility of a trustee's conflict of interest was or could be identified, either prior to their trusteeship or once the trust was active.³⁷ But these are manifestly conscious causes. And whilst one might reasonably suggest that a trustee chooses to follow a particular path of their desire that begins with a so-called conflict of interest, a deeper analysis of that choice reveals notable incongruities with the equitable jurisprudence on breach. As such, analysis of the conditions and causes of the desire to breach and the enjoyment contingent on that breach, needs to attend not just to the conscious accounts for breach or pre-existing categories of fault-based behaviour, but on the role played by the unconscious.

For psychoanalysis the issue turns less upon what is known or can be readily predicted by equity as to the likelihood of a trustee's behaviour or motives within the four corners of the trust instrument. More apposite is the unconscious desire apprehended in the psychic space of the trustee who is caught in the frenzied and ecstatic space of the trust. That is, contrapuntal composition of demands (obligations) made by beneficiaries; the trust

³⁷ For example: *Keech v Sandford* (1726) Sel Cas Ch 61, *Boardman v Phipps* [1967] 2 AC 46, and *Regal (Hastings) Ltd v Gulliver* [1942] 1 All ER 378, [1967] 2 AC 134n.

instrument; the trustee's own unconscious; and the corresponding satisfaction of each of those, which constantly tests the limits and integrity of the fantasy-construct of reality. Within this heady matrix of split demands and satisfactions that produces competing desires, the trustee must all the while adhere to fundamental fiduciary obligations encompassing self-denial and deferment of self-interest. This is notable, for example, in cases where conflicts of interest are of concern and the "self-dealing rule" is invoked.³⁸ The fiduciary nature of trusteeship thus operates in order to deter the spectre of temptation and prevent transgression of the limit imposed upon the office of trustee. A limit, as we have already described, which is instituted in order to prohibit the trustee's drive towards the *jouissance* of the trust.

Analysis determines not only that limits exist relative to a trustee's enjoyment of the trust (equity tells us this as well) – what amounts to a necessary delineation between principles of reality and pleasure – but that the *thing* (*das ding*) desired by the trustee that resides on the "bad" side of the divide between reality and pleasure actually makes the trust possible.³⁹ And the same applies in reverse as well. "I can only know of the Thing," says Lacan, "by means of the Law [...] the Thing finds a way by producing in me all kinds of covetousness thanks to the commandment ['thou shalt not covet it'], for without the Law the Thing is dead."⁴⁰ This "lost object." or what Lacan called as a development of Freud's *das ding*, the *objet petit a*, or the object *cause* of desire, is precisely the type of formulation capable of examining beyond mere concerns for economic loss and the need for compensation or restitution that equity traditionally and conventionally favours in addressing cases involving a breach.

The lost object, the substitute in fantasy, is a vital cause that can be pointed to in order to explain why a trustee traverses the limits imposed by the trust. It is, to all intents and purposes, the *thing* which a trustee may well describe or attempt to describe in one form or another (by tracing its outline, so to speak) when asked to account for a breach. Whether the trustee who accounts for misappropriating trust property for their own ends, for example, is describing a substitution (in fantasy) for an object that is "originally lost, which coincides with its own loss, which emerges as lost," or whether they are describing substitution directly for loss itself is open to question.⁴¹ In determining the

38 See: Megarry VC in *Tito v Waddell (No 2)* [1977] 3 All ER 129 at 241.

39 Lacan, *The Ethics*, 73.

40 Lacan, *The Ethics*, 83.

41 Žižek, "The Liberal Utopia."

particularity of the *objet petit a* as such it is important to understand whether the trustee's breach was driven by an "impossible" quest for the lost object, or as a consequence of the direct enactment of the original loss itself – that is, an enactment instituted in the unconscious by the subject's cut or distancing from their original object of desire.

6 Alienation and separation of the subject-as-trustee

In accordance with trusteeship as the paradigm fiduciary obligation, circumventing or ignoring equity's restriction on personal autonomy will result in breach of trust.⁴² This is nothing more than the failure of a trustee to adhere to the deceptively simple if painful instructions set out in legislation and case-law as to how trusts ought to operate generally, as well as the particular demands instituted by the individual trust instrument itself. Breach of trust not only signals that a trustee has sought their own share of the surplus enjoyment generated by the trust, however, but that the breach is also a *sine qua non* of enjoyment that is obscene. For a trustee to breach the integrity of the trust is not simply a failure in their administrative abilities, but an obscene perhaps indecent act that reveals all too human imperfections.

In order to guard against the temptation to breach, the trustee must acknowledge castration. More precisely, castration that allows entry into the symbolic world of the trust through a remittance of *jouissance* to the Other. Even though the settlor technically "drops out" of the picture once a trust has been fully and validly constituted, a powerful fragment of the settlor's being-in-the-world, namely their intentions, continue to flow through the operation of the trust and direct the will and actions of the trustee. In this sense, and although there is an administrative framework for trusts established by statute and in case-law that prevails once the settlor has dropped out of the equation, it is the settlor as ultimate creator of the trust and the reason for the trustees being, who acts as Other. And it is the trustee's unwillingness to submit to this Other that ultimately and arguably establishes grounds for a breach, or proves that breach is inevitable.

⁴² Worthington, *Equity*, 127.

Further, the subject-as-trustee who breaches, having seemingly accepted castration as necessary to the office of trustee, latterly seeks to conceal or disavow the castration in order to try and convince themselves and others that they continue to have access to unbridled *jouissance* that circulates outside of the Other. Correspondingly, the disavowal that underlies the breach supports the illusion that the trustee has not had to alienate their *jouissance*, or rather has *chosen* not to alienate their *jouissance*, meaning that they have refused the mode of legal subjectivity that can reasonably be called “trusteeship.” As a counterpoint to the equity’s definition of the relationship between the trustee and the settlor, whereby equity says that the settlor “drops out” of the picture once a trust has been formally and validly constituted therefore, we find via Lacan a suggestion of quite the opposite. That is, the trustee’s castration, as indicative of the formal steps taken by the subject towards full acceptance of the office of trusteeship, involves a form of subjective disappearance. This means that the subject must *themselves* drop out of the picture, giving rise to a pure possibility of being-as-trustee, and in order to become a trustee.⁴³

On this basis trusts and trusteeship are defined by opposing yet not complementary ontological conditions. On the one hand the equity maintains that the settlor does or must materially disappear once the trust has been created, which leaves the trustee to enact and perform duties and obligations that are in essence signifiers of the manifest intention and will of the settlor. On the other hand, presented with a choice as to whether to alienate their *jouissance* in confrontation with the Other – what Fink dramatically refers to as “an *exclusive* choice between two parties, to be decided by their struggle to the death” – the subject, in order to accede absolutely and without qualification to a new (or perhaps true) form of subjectivity represented in the symbolic office of trustee, must disappear.⁴⁴ Confronted by the choice of whether to remit *jouissance* to the Other-as-settlor, the subject-as-trustee in waiting really has no choice at all. Fink explains this “forced choice” between the subject and the Other via Lacan’s concept of *separation*:

The cause of the subject’s physical presence in the world was a desire for something (pleasure, revenge, fulfilment, power, immortality, and so on) on the part of the child’s parents. One or both of them wanted something, and the child results from that wanting. People’s motivations for having children are often very complex and multi-layered, and a child’s parents may be very much at odds concerning their motives. One or both parents

⁴³ Bruce Fink, *The Lacanian Subject: Between Language and Jouissance* (Princeton, NJ: Princeton University Press, 1995), 51–52.

⁴⁴ Fink, *The Lacanian Subject*, 51.

may have not even wanted to have a child at all, or may have wanted only a child of one particular sex [...] If then, alienation consists in the subject's causation by the Other's desire which preceded his or her birth, by some desire not of the subject's own making, separation consists in the attempt by the alienated subject to come to grips with that Other's desire as it manifests itself in the subject's world.⁴⁵

Here we can exchange the trustee for the child in Fink's account. This helps to explain one of the main contributions that Lacan is able to make to interpretations of breach of trust. Moreover it is an interpretation that not so much contradicts equity's own ideas (jurisprudence), as enlivens and deepens them. Key to an understanding of how separation features in the context of the trust, therefore, is to re-consider the influence on the trustee's administration and performance of the trust that is inaugurated by the prevailing desire of the settlor as it continues to flow through the trust. The trustee, it might be said, is constantly in the shadow of the settlor.

Following Fink's interpretation of separation we find that the desire of the settlor not only creates the trust, but also creates the trustee who must then get to grips with the settlor's desire as it manifests itself in and through the trust. That is, a desire that manifests itself in the subject-as-trustee's world. More precisely the subject-as-trustee attempts to get to grips with what is lacking in the settlor's desire as it manifests in the trust. The trustee is in this sense convinced of something that is lacking from the trust, perhaps a particular instruction of how to deal with the property or which investments to make that will maximise the potential of the fund. Something which they subsequently try to fill with their own desire by assuming intimate knowledge of the desire of the Other-as-settlor. Moreover, they do so in spite of equity's insistence that the trust is valid and that the requisite intention of the settlor is in evidence. The result of the trustees' attempts to both claim a lack at the heart of the settlor's desire-cum-intention, and then fill that lack, is what equity calls "breach of trust."

This formulation accords with what Fink refers to as, "a chimerical, unrealizable moment."⁴⁶ Quite simply, the trustee's attempts to realize and fulfil what they perceive to be a lack written into the trust instrument, itself a direct indication of lack in the Other, can never be resolved. It is analogous to a rather banal and everyday instinct or belief that says one person must know or understand better than another what is required to, for example, maximise the

⁴⁵ Fink, *The Lacanian Subject*, 50.

⁴⁶ Fink, *The Lacanian Subject*, 55.

enjoyment within a given context. And there are many ways such instincts or beliefs are *a fortiori* labelled. As self-assurance perhaps, or even arrogance. Notwithstanding such labels, through breach of trust we are given a demonstration not only in the conscious and formal enactment of administration and management standards, but of attempts to contain and regulate desire and enjoyment.

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