Trust Law Secrets, Revealed

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Mark J. Bennett & Adam S. Hofri-Winogradow, *The Use of Trusts to Subvert the Law: An Analysis and Critique*, **Oxford J. of Legal Stud.** (2021), available for free on SSRN as *Against Subversion, a Contribution to the Normative Theory of Trust Law*.

For those who pay attention to trust law developments, it's clear that a vast transformation in trust law is taking place. American states like Wyoming, Alaska, Nevada, Delaware, and South Dakota are rewriting their laws to permit trusts that promise perpetual duration, maximum asset protection, and continued settlor control in order to compete with offshore jurisdictions for billions of dollars in trust business. Even for those who don't usually take notice of trusts, trust law and the uses of the trust as a mechanism to create and perpetuate wealth inequality is becoming better understood. Katarina Pistor, for example, has aptly explained how trusts are "one of [the] most ingenious modules for coding capital" in Anglo-American law. Moreover, economists like as Emmanuel Saez and Gabriel Zucman, have increasingly started to look at the roles of trusts in building a landscape of wealth inequality.

Into this conversation step Mark Bennett and Adam Hofri-Winogradow with their new article entitled, *The Use of Trusts to Subvert the Law: An Analysis and Critique*. Their aim is to widen the scope of the debate and inquire into what constitutes a proper normative theory of the trust. This type of inquiry has been fraught, the authors remark, in part because the normative nature of the trust is law-subverting – a poorly kept secret but one that nobody wants to discuss in polite company.

The trust – to clarify, the authors are discussing private, family trusts that use discretionary distribution terms to preserve family wealth – has, as the authors point out, been law-subverting since medieval "uses" enabled English feudal lords to avoid "liabilities consequent on holding land" (otherwise known as taxes). Nevertheless, the authors comment, the trust's law-subverting powers have routinely been either ignored or minimized. Consequently, as they state, it is "high time to focus scholarly attention on the more problematic uses of the trust rather than on those which are obviously benign." Any complete theory of the trust, they suggest, should grapple with the fact that the trust has – both historically and presently – allowed individuals to avoid certain legal obligations, like debts to creditors (including the tax authorities).

Scholars have in the past theorized the trust in a number of ways without mentioning its law-subverting capacities. Some scholars have pointed to the protective nature and function of the trust. As Avihay Dorfman says, trusts are a way of "providing for people who cannot themselves directly hold private ownership rights to assets, whether because they are legally unable to manage such rights, as in the cases of infants or mentally disabled adults, or because owning property would subject them to some prohibitive cost that far exceeds the ordinary costs of private ownership, as where the pursuit of some vocations requires not owning property that would lead to conflicts of interest." Alternately, scholars have proposed economic explanations for trust law and have promulgated the facilitative nature of trusts.

Scholars have, in these normative discussions, justified the law-subverting uses of the trust in two main ways. The first justification is the "property autonomy" argument, which states that "people should have as much autonomy in using and enjoying their property as possible." The second justification is that

using a trust to subvert other (primarily tax) rules is a valid response to a confiscatory and overreaching government. That is to say, subversion is "a bulwark against unjust state demands." The authors contend that "such justifications are not valid in liberal democratic jurisdictions and cannot justify the characteristic use of the trust for subversion of the law." The outcome of this analysis – which should give trust scholars (as well as state legislatures) much food for thought and fodder for future work – is that "a legitimate law of trusts will require anti-subversion measures to be constantly improved to deal with the potential for subversion resulting from the flexibility of the trust device." And, if anti-subversion measures don't work, the authors warn that a last resort might be "a closed list of permitted trust types."

The authors, in this timely intervention, do an excellent job of revealing the secrets of trust law that have been hiding in plain sight for quite some time. In this respect, they build on the original insights of Roger Cotterrell, who pointed out some thirty years ago that "[t]he trust provides a way of freeing the property owner from constraints which the ideology of property otherwise imposes on her or him through its logic."

What the authors do not focus on, but what lies just below the surface, is the role or place of equality in law. The authors point out that a primary justification for trust law's subversive capacities is autonomy; what they leave unsaid is that this focus on autonomy all but erases equality concerns and values. In the theoretical domain, the erasure of equality values has created a normative vision of trust law that prioritizes individual freedom and benefit over collective good; and, in practice, this erasure of equality values is directly linked to staggering wealth gaps – all inflected with questions about race, gender, and class.

Ultimately, the erasure – or at least the suppression – of equality values in trust law begs two questions. We might first ask whether law has the capacity to incorporate and instantiate robust equality values. It may be argued that penetrating the inherent conservatism of trust law as a regime designed to uphold elite capitalism and historical privilege is an uphill battle. That is to say, the system is working this way by design and high-wealth parties will fight vigorously to maintain their interests. Nevertheless, if we embrace the idea of making change to the landscape of wealth inequality through the reform of trust law, the question becomes what can and must be done in order to recalibrate legal tolerance for law-subverting rules like trust law's support for asset protection trusts.

The authors of this excellent article give us a launching point for discussing all of these questions. They bring to light the open secret that trust law is law-subverting and, in so doing, gesture to the idea that trust law both suppresses equality values and promotes the economic welfare of elites. And, to be clear, the secret is a scandalous one that none of us should let pass unnoticed.

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