

JUSTIFYING ANGLO-AMERICAN TRUSTS LAW

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Abstract

Is the existence of trusts law within Anglo-American law justified? The literature to date does not provide a satisfactory answer. Situating the doctrinal features of trusts law within the liberal tradition of political morality, this paper suggests that trusts law is justified because it enhances personal autonomy in a unique way. It is *comprehensively* autonomy-enhancing, with express, constructive, and resulting trusts each playing a unique role in achieving this aim. Thus, the law provides a facility for property owners to unilaterally deal with their own property (express trusts), allows individuals the freedom to enlist others in their pursuit of their goals (some constructive trusts), and ensures that only conclusive choices have long-lasting legal effects (other constructive trusts and resulting trusts).

1. INTRODUCTION

Is the existence of trusts law within the legal system justified? One would be hard-pressed to find a satisfactory answer in the available literature to date. Private law theorists have generally focused their efforts on justifying contract law, tort law, property law, the law of restitution, and even fiduciary law and equity (broadly defined), while trusts law has been side-lined. On one view, this is unsurprising, given that those areas of law—and not trusts law—are features that a mature legal system cannot do without. That is, trusts law is not (to borrow HLA Hart’s words) a “natural necessity” that provides a “minimum [form] of protection for persons, property, and promises”;¹ and (to borrow Randy E Barnett’s words) it does not form part of the “background rights of several property, freedom of contract, first possession, and restitution [which] are rights that we cannot do without”.² After all, numerous fully-functioning civilian jurisdictions do not have trusts law. On this view, trusts law is simply an optional extra that exists for instrumental purposes, and whose existence as such hardly bears justifying.³

Another reason for which there has been little effort to justify trusts law might be the lack of appreciation that express, constructive, and resulting trusts can be treated *as a body of law* for that

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¹ H.L.A. HART, *CONCEPT OF LAW* 199 (2nd ed. 1994).

² RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW* 200 (2nd ed. 2014).

³ J.E. Penner, *An Untheory of the Law of Trusts, or Some Notes Towards Understanding the Structure of Trusts Law Doctrine*, 63 *CURRENT LEGAL PROBS.* 653 (2010), discussed further below, at main text from note 215.

purpose.⁴ For example, there is a tendency conceptually to detach express trusts, which are said to be “intention-based”, from constructive and resulting trusts, which are said to arise “by operation of law”. This disconnection tends to affect how we approach those trusts: instrumentally, in relation to the former; remedially, in relation to the latter. Another example can be found in the Restatements of the American Law Institute, where constructive trusts are substantively treated in the Restatement (Third) of Restitution and Unjust Enrichment [hereinafter R3RUE], and divorced from express and resulting trusts which are substantively treated in the Restatement (Third) of Trusts [hereinafter R3T], on the basis that constructive trusts are merely “remedies” and are not really “trusts”.⁵ Further examples can be found in scholarly writings that argue that self-declared express trusts are conceptually unlike other express trusts;⁶ that constructive trusts are not trusts at all;⁷ and that resulting trusts are essentially express trusts.⁸ Underlying all these examples is one common assumption: that express, constructive, and resulting trusts share little in common with one another. Therefore, the possibility of and need for justifying trusts law in an inclusive manner is left unaddressed.

But a moment’s thought would reveal that express, constructive, and resulting trusts are not

⁴ For readers who take the view that charitable trusts are distinct enough from express trusts such that they ought to be treated as a category of trusts in their own right, their omission from this paper can be explained on the basis that charitable trusts are radically different from private express trusts such that the exercise of justifying charitable trusts clearly calls for considerations beyond the scope of those involved in justifying trusts law. As Kathryn Chan writes (THE PUBLIC-PRIVATE NATURE OF CHARITY LAW 181 (2016)):

[D]espite the common association of the law of charitable trusts with the private law sphere, it is appropriate to regard the common law charities tradition, in a general or categorical sense, as a true hybrid of public law and private law. The charitable trust is a public law–private law hybrid in the general sense that it represents the adaptation of a private law institution to a variant that is more of a public law nature. While the trust was specifically designed to enhance the autonomy of property-owning individuals to formulate and carry out their own projects, the charitable trust was an adaptation of this institution, whose development reflected the perceived public interest in the devotion of property to charitable purposes.

That “adaptation” is reflected in the fact that, from a historical perspective, charitable trusts derived from the ecclesiastical jurisdiction and not from the Chancery courts, and it was simply “a historical accident that the Court of Chancery hijacked the charitable gift and squeezed it (with some difficulty) into the pre-existing framework of the trust”. (Paul Matthews, *The New Trust: Obligations without Rights?*, in TRENDS IN CONTEMPORARY TRUST LAW 2 (A.J. Oakley ed., 1996)). All this is not to suggest that personal autonomy does not form part of the justification of charitable trusts, or that charity law cannot be understood by way of the state’s liberal commitments (for which see MATTHEW HARDING, CHARITY LAW AND THE LIBERAL STATE (2014)). Rather, charitable trusts reflect unique concerns that call for a unique justification. For example, it might be said that charity law explicitly raises issues concerning the allocation of state resources, a question that is hardly central to the justification of private express trusts (*see, e.g.*, Harding, *supra* note 4, ch. 3).

On the other hand, the omission of statutory trusts from the scope of this paper is easily explained: these are instances of the trust being utilized by the legislature in an instrumental way to achieve particular policy goals, those goals of which justify their use. They are therefore conceptually different creatures from trusts as developed in the common law.

⁵ AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW: TRUSTS § 1 Comment e (vol. 1, 2001) [hereinafter R3T].

⁶ *See, e.g.*, John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L. J. 625, 672–75 (1995).

⁷ William Swadling, *The Fiction of the Constructive Trust* 64 CURRENT LEGAL PROBS. 1 (2011); AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW THIRD: RESTITUTION AND UNJUST ENRICHMENT § 55 Comment b (vol. 2, 2010) [hereinafter R3RUE].

⁸ William Swadling, *Explaining Resulting Trusts*, 116 L. Q. Rev. 72 (2008). AMY MORRIS HESS ET AL., BOGERT’S THE LAW OF TRUSTS AND TRUSTEES § 454 (2019) [hereinafter *Bogert*] approximates to this position.

disconnected but interconnected. For instance, express trusts that do not exhaust property in the trustee's hands trigger resulting trusts for the return of the property to the settlor or her estate; and purported express trusts that fail to comply with a formality requirement may yet be enforced as constructive trusts. Most importantly, trusts (of whatever nature) confer significant rights and powers and impose stringent duties. Why does the law do so, if trusts law is simply an "optional extra" in the legal system? The existence of trusts law, as an inclusive body of law, calls for justification.

This paper attempts to answer that call. Situating the doctrinal features of trusts law within the liberal tradition of political morality, it suggests that a convincing justification can be found: the existence of trusts law is justified because it enhances personal autonomy in a unique way.⁹ To begin with, Part 2 of this paper does two things. First, it presents a (necessarily brief) sketch of how autonomy features within a particular conception of liberalism. Secondly, it provides an overview of how trusts law can be situated within that conception of liberalism, noting four lines of enquiry that arise for consideration, which form the basis of the discussion that follows. Parts 3–5 then flesh out the details of how express, (some) constructive, and resulting trusts enhance autonomy, with each Part dealing with one type of trust respectively. As this paper covers Anglo-American¹⁰ trusts law, some doctrinal ground-clearing exercise will precede the autonomy discussion where the trusts laws in these jurisdictions ostensibly differ. In Part 6, the proposed justification is strengthened by defending it against two possible counterarguments. Part 7 reflects on three ways in that the analysis may further our understanding of trusts law. Part 8 concludes.

2. AUTONOMY-BASED LIBERALISM

2.1. Two Responses to Value Pluralism

The liberal tradition of political morality has generated a rich diversity of perspectives.¹¹ Underlying most of these perspectives lies the recognition of value pluralism. This is the idea that there exists many equally valuable yet distinct forms of life that are incompatible or incommensurable *inter se*, in that they cannot all be realized within the lifetime of any single person or society.¹² This insight has engendered two main responses from liberals, namely

⁹ To be sure, the paper does not deal with every single trusts law rule. Nor does it claim that every trusts law rule enhances personal autonomy: as will be seen, certain rules place external limits on settlor autonomy. Rather, the aim of the paper is to justify *the existence of* trusts law: its central point is that trust law's *availability* enhances autonomy in a unique way. Naturally, therefore, many of the rules discussed concern the creation of express trusts, or the circumstances in which the law deems constructive and resulting trusts to arise. The paper is less concerned with the rules that, for example, come into play during the ongoing life of an express trust, or the termination of trusts.

¹⁰ Trusts law in America is not part of federal law but a matter for state law, and therefore there are variations between states in relation to trusts law rules. In this paper, "American" trusts law is generally taken to be that which is reflected in the R3T and R3RUE.

¹¹ "Liberalism' itself is not the name of a determinate set of social and political commitments. There are certain core positions and the various schools of liberal thought may have a family resemblance to one another. But in many areas they offer rival conceptions of the values that are characteristically associated with liberalism, like liberty, equality, democracy, toleration, and the rule of law": Jeremy Waldron, *Liberalism, Political and Comprehensive*, in *HANDBOOK OF POLITICAL THEORY* (Gerald F. Gaus & Chandran Kukathas eds., 2004).

¹² JOSEPH RAZ, *THE MORALITY OF FREEDOM* 133 (1986) [hereinafter Raz, *Morality*]; JOSEPH RAZ, *THE*

“political” and “comprehensive” liberalism,¹³ each of which entails a different conception of the role of the state within a liberal polity.

Political liberalism takes value pluralism as a given—a background fact that must first be accepted, from which any argument concerning the role of the state proceeds. Dealing with that background fact through the liberal prisms of equality and toleration, political liberalism argues that the state’s proper role is one of non-interference or neutrality:¹⁴ it must not assert any influence concerning incompatible forms of the morally good life, so that no one particular value is preferred over another. As John Rawls describes it, “[p]olitical liberalism ... aims for a political conception of justice as a freestanding view.”¹⁵ Through maintaining state neutrality, the argument goes, the liberty of individuals is enhanced, since they each have the freedom to choose their own form of life free from systemic interference.

In contrast, comprehensive liberalism “maintains that it is impossible adequately to defend or elaborate liberal commitments except by invoking the deeper values and commitments associated with some overall or ‘comprehensive’ philosophy”.¹⁶ It does not approach value pluralism in the disengaged way of the political liberalist, but takes the view that liberty is fundamentally affected by *how* people come to endorse one form of life over others within a pluralist society. Because a liberal society is one where forms of the good life are chosen freely, that is, through the exercise of maximal and meaningful personal autonomy, comprehensive liberalism argues that the state has a positive duty to promote and protect personal autonomy in order to achieve the ideals of a liberal society. Certainly, the state must maintain a neutral stance in relation to the different morally good and incompatible forms of life. However, an autonomous life is not taken to be one of the forms of life available to be chosen; rather, autonomy has a “second-order”¹⁷ or “derivative”¹⁸ value: it is “not an independent ... ideal” that is separable from the multitude of valuable forms of life available to be chosen.¹⁹ That is, autonomy facilitates choice; it is not one of the subject matters of that exercise of choice. Therefore, the state has the duty to promote and protect personal autonomy, and this requires attention to be paid to the three “conditions of autonomy”, as Joseph Raz has famously argued,²⁰ namely: individual capabilities, an adequate range of options, and independence (freedom from coercion and manipulation). Indeed, for Raz, states that fail “to provide the conditions of autonomy” for its citizens cause harm to them.²¹ For Gardbaum, the reasons why the state’s positive duty is so extensive is that “coercion is not the only factor that can undermine autonomy”, and that the state “may sometimes be the only actor capable of countering

PRACTICE OF VALUE 43 (2003); Isaiah Berlin, *Two Concepts of Liberty*, in ISAIAH BERLIN: LIBERTY 216 (Henry Hardy ed., 1969).

¹³ See generally Waldron, *supra* note 11; Stephen Gardbaum, *Liberalism, Autonomy, and Moral Conflict*, 48 STAN. L. REV. 385, 385–86 (1996). This distinction is necessarily a rough-and-ready one; as Gerald F. Gaus argues in *The Diversity of Comprehensive Liberalisms*, in Gaus & Kukathas, *supra* note 11, the diversity of liberal views may mean that it is more accurate to speak of a *spectrum* of perspectives rather than opposing ones. However, the rough-and-ready distinction serves as important checkpoints along the spectrum, against which trusts law can be compared or contrasted.

¹⁴ See, eg, Waldron, *supra* note 11, at 92–93; Gardbaum, *supra* note 13, at 386; BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11–12 (1980). Or, ‘impartial’: JOHN RAWLS, POLITICAL LIBERALISM xix (1993); BRIAN BARRY, JUSTICE AS IMPARTIALITY (1995).

¹⁵ Rawls, *supra* note 14, at 10. See also CHARLES LARMORE, THE MORALS OF MODERNITY 125 (1996); Gardbaum, *supra* note 13, at 386.

¹⁶ Waldron, *supra* note 14, at 91.

¹⁷ Gardbaum, *supra* note 13, at 394.

¹⁸ Harding, *supra* note 4, at 53.

¹⁹ Raz, *Morality*, *supra* note 12, at 395.

²⁰ *Id.* at 372.

²¹ *Id.* at 415–16, modifying J.S. Mill’s famous “harm principle”.

constraints on autonomy generated in and by society”.²²

2.2. Trusts Law as Autonomy-Enhancing: An Overview

For the purposes of this paper, it is unnecessary to engage in a debate, as a matter of legal philosophy, as to which conception of liberalism is superior. It is sufficient to identify the conception that provides the best fit for the paper’s task of justifying trusts law.

Political liberalism does not provide a good fit, mainly because state inaction struggles to explain the continued availability of trusts law. Unlike other areas of (mainly private) law, it is not immediately obvious that trusts law is *fundamentally* necessary: personal autonomy is neither completely destroyed nor significantly deprived in the absence of trusts law, since other areas of law such as contracts, wills, and property remain available for individuals enter into meaningful legal relations with others. At best, trusts law has an *enhancing* potential, in that it allows people to form *more complex and sophisticated* legal relations with others. It is difficult to explain the state’s effort of making available, maintaining, enforcing, and improving trusts law with a conception of the state as being non-interventionist.

In contrast, comprehensive liberalism allows trusts law to be understood as the consequence of a positive effort on the part of the state to promote personal autonomy. Most obviously, personal autonomy is enhanced where trusts law increases property owners’ range of options for dealing with their own property, thereby providing an additional facility they may utilize to attain their personal aims and goals. Trusts law also secures personal autonomy where it allows individuals to enlist others to achieve their goals and ends, as well as where it ensures that only decisive decisions give rise to legally significant consequences.

The bulk of the discussion that follows explains how express, (some) constructive, and resulting trusts in Anglo-American law can be justified in terms of enhancing personal autonomy. To do so, it will be necessary to undertake four lines of enquiry.

The first is the most fundamental and straightforward one, which is to explain the *role* of each type of trust in protecting and enhancing personal autonomy.

The second can be termed *inward-looking safeguards*. A commitment to enhancing personal autonomy requires that legal consequences should not obtain in circumstances that do not call for them, for example, in the absence of a decisive decision on the part of property owners. If the law enforced decisions reached on a whim, it would detract from the aim of enhancing autonomy: “[p]roviding, preserving or protecting bad options does not enable one to enjoy valuable autonomy.”²³ So the second line of enquiry explores the extent to which trusts law safeguards people’s exercise of autonomy, such that only meaningful ones have legal effects.

The third can be termed *outward-looking safeguards*. Trusts always involve at least two parties; one cannot simultaneously be the sole trustee and sole beneficiary. Trusts are therefore always

²² Gardbaum, *supra* note 13, at 401.

²³ Raz, *Morality*, *supra* note 12, at 412. Or, more elaborately, Dori Kimel writes, in the context of promises:

When someone promises willy-nilly, makes promises that it is not in her interests to make, or makes promises to the wrong people or at the wrong time (etc.), she may be authoring more of her own obligations, but authoring them badly—and, most likely, “badly” precisely in the relevant sense: to the detriment of her personal autonomy. ... Personal autonomy in general depends for its value on the worthiness of its exercise, and its exercise through promising may be more or less worthy. The capacity to self-author obligations to others may be of great value, autonomy-wise and otherwise; but like most other capacities, it can be used and it can be misused, and it can indeed be misused in a way that undermines the very goals that (when used prudently) it is particularly suitable for promoting.

Dori Kimel, *Personal Autonomy and Change of Mind in Promise and in Contract*, in *PHILOSOPHICAL FOUNDATIONS OF CONTRACT LAW* 98 (Gregory Klass et al. eds., 2014) (citation omitted).

relationships. The relational aspect reveals that trusts law not only enables property owners to exercise their own autonomy, but also empowers certain actors within a trust by granting them rights and powers *over others*. Since it is a liberal principle that everyone should be granted equal access to personal autonomy, it is necessary that trusts law should sanction the exercise of autonomy only if it does not excessively intrude upon the autonomy of others.²⁴ Therefore, the third line of enquiry explores how trusts law ensures that a proper balance between the autonomy of different parties is struck.

The fourth line of enquiry can be termed *external limits*. “In autonomy-based liberalism, autonomy is the core value but it is not the only value, nor is it the ultimate value.”²⁵ Thus, other considerations lying beyond the scope of autonomy might validly constrain the autonomy-enhancing function of trusts law in appropriate situations. Some of these considerations may be legal ones—for example, property law considerations, such as pre-existing categories of recognized property interests; others may be non-legal—for example, economic or public policy considerations. The mere fact that these external considerations may limit the workings of trusts law does not detract from its autonomy-enhancing justification: their existence simply reveal that trusts law does not exist in a vacuum but operates within a complex framework that also contains other legal, economic, social, etc. norms. But trusts law’s commitment to personal autonomy also suggests that external constraints on autonomy ought to be the exception rather than the norm. The fourth line of enquiry, therefore, identifies potential factors that act as external limits on trusts law, and assesses whether their intrusion on personal autonomy is appropriately circumscribed.

3. EXPRESS TRUSTS

3.1. The Role of Express Trusts in Enhancing Autonomy

The express trust is an “amenity”²⁶—a facilitative device made available for people to “realis[e] their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law”.²⁷ The availability of the express trusts facility goes a long way towards attaining one of Raz’s three conditions of autonomy, namely securing an adequate range of options to individuals.

This point can be understood from two perspectives. First, when viewed alongside other devices such as contracts, wills, and property, express trusts add to the range of facilities individuals may choose to utilize towards achieving their desired goals. Consider Bernard Rudden’s famous description of an express trust as “a gift, projected on the plane of time and so subjected to a management regime”.²⁸ This brings out the unique, distinctive option presented by the express trust: it is neither a mere gift (replicable by property law), nor merely a promise to make a gift in the future (replicable by wills or contracts), nor a mere management arrangement (replicable by contracts), but provides the potential for bundling up these features all in one.

²⁴ See Hanoch Dagan, *Autonomy and Pluralism in Private Law*, in THE OXFORD HANDBOOK OF NEW PRIVATE LAW 21 (Andrew S. Gold et al. eds., forthcoming) (references are to Dagan’s draft available at <https://ssrn.com/abstract=3308688>), where this notion is rooted in the concept of “relational justice”—that private law is “premised on the right to reciprocal respect for self-determination”.

²⁵ Harding, *supra* note 4, at 52.

²⁶ Hart, *supra* note 1, at 96.

²⁷ *Id.* at 27–28.

²⁸ Bernard Rudden, *Book Review*, 44 MOD. L. REV. 610 (1981).

Indeed, many other well-rehearsed features of express trusts, for example, that trust assets are “bankruptcy remote”,²⁹ that misappropriated trust assets are traceable against third parties,³⁰ and that a comprehensive default regime regulates trustee duties and beneficiary rights,³¹ significantly increase the distinctiveness of express trusts as a facilitative device as compared to other facilities available within the law.

Secondly, when viewed from an internal perspective, the inherent flexibility provided for by the express trust structure opens up a world of options for property owners, securing for them “the greatest possible freedom as to how [they] may intentionally give [their property] away”.³² To borrow Raz’s words, express trusts may be set up with “long term pervasive consequences” such as dynastic, pensions, or investment trusts; with “short term options of little consequence”, such as a simple bare trust or short term trust; or with consequences that represent a “fair spread in between”.³³

Express trusts go far beyond the simple provision of a passive framework by which property owners “can organise her relations with others”:³⁴ they also provide an extensive set of default rules³⁵ that enhance settlor autonomy in a different way. If express trusts merely provided a blank slate for property owners to engraft their own intentions, then that facility would not provide a very meaningful choice after all: settlors “would not only have to consider the transaction costs of constructing [the rules that govern the trust relationship] from scratch; they would also face ‘obstacles of the imagination’ just coming up with the options in the first place”.³⁶ Moreover, given the inherent ascendancy of the trustee and vulnerability of the beneficiary, creating an express trust would hardly be a risk worth taking if the beneficiary’s position were protected only by those provisions expressly provided for by the settlor at the outset. The default rules of express trusts, therefore, serve to secure another condition of autonomy, namely individual capabilities: they do so by easing the burden of financial, human, and legal limitations that may inhibit meaningful engagement with the express trust device. At the same time, default rules do not encroach into settlors’ freedom to self-determine, as they can easily be overridden through provisions in the trust instrument.

This straightforward analysis might, however, face the charge of being too simplistic. Skeptics might argue that there are features *within* express trusts that point away from an autonomy-based analysis. To anticipate this charge, the discussion now turns to addressing four grounds upon which a skeptical argument might be built.

3.1.1. *Unilateral vs Bilateral Intention*

Implicit in the autonomy-based analysis above is the orthodox approach that express trusts respond to the unilateral declaration of trust of a property owner (as settlor). However, this conventional approach has come under attack, both in England³⁷ and in America,³⁸ for not

²⁹ See Lynn M. LoPucki, *The Death of Liability*, 106 YALE L. J. 1, 23–30 (1996); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L. J. 165 (1997).

³⁰ R3RUE, *supra* note 7, § 59.

³¹ Langbein, *supra* note 6.

³² SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS § 2.2 (3rd ed. 2011).

³³ These quotes are from Raz, *Morality*, *supra* note 12, at 374.

³⁴ J.E. Penner, *The (True) Nature of a Beneficiary’s Equitable Proprietary Interest under a Trust*, 27 CANADIAN J. L. & JURIS. 473, 494 n.53 (2014).

³⁵ These include (but are not limited to) fiduciary duties, duties of investment, the duty to adhere to the terms of the trust, the duty to account, and the duty of care.

³⁶ Dagan, *supra* note 24, at 13.

³⁷ See, e.g., Man Yip, *The Commercial Context in Trust Law*, 5 CONV. & PROP. LAW. 347 (2016); GRAHAM VIRGO, *THE PRINCIPLES OF EQUITY AND TRUSTS* 42–44 (2012).

³⁸ Langbein, *supra* (note 6).

sufficiently recognizing the trustee's role in the creation of some express trusts. For example, John Langbein argues that express trusts—excluding self-declared ones—are “functionally indistinguishable from the modern third-party-beneficiary contract”, and therefore he proposes that the “contractarian” basis of the trust should be recognized as such.³⁹ He finds support for his argument that the trust is a voluntary consensual “deal” representing a “bargain about how the trust assets are to be managed and distributed”⁴⁰ on the fact that “[n]o one can be made to accept a trusteeship”.⁴¹ Man Yip takes a different approach to the same end by arguing that the proliferation of trusts arising from commercial contracts means that it is now more meaningful to speak of trusts arising in response to bilateral rather than unilateral intention.⁴²

The distinction between unilateral and bilateral intention matters, because it affects how express trusts are understood from an autonomy perspective. If the orthodox approach holds good, then the express trust enhances *settlor autonomy*: it provides a facility for property owners unilaterally to decide on how their own property should be dealt with. Conversely, if (some) express trusts respond to bilateral intentions, then those trusts provide a facility *for the enforcement of promises*, just as contracts do. On this approach, an express trust is binding only because the parties have “intentionally involved a convention whose function it is to give grounds ... for another to expect the promised performance”.⁴³

There is good reason to reject the bilateral intention approach. While Langbein is right to say that trustees can disclaim trusteeship and thus in a sense the trustee's consent is required,⁴⁴ she is strictly limited to accepting or rejecting the office of trusteeship: she has no *legal* power to amend the trust terms that the settlor unilaterally intended.⁴⁵ Furthermore, it is trite that express trusts “can be created without notice to or acceptance by any beneficiary or trustee”.⁴⁶ Together, these rules indicate that express trusts serve first and foremost to make available choices *to settlors* as property owners, thereby enhancing their personal autonomy, and it is much less concerned with securing the trustee's exercise of autonomy, except in the negative sense of providing outward-looking safeguards, as discussed later below.

Certainly, in contractual settings it will often be the case that the settlor's unilateral intention to create a trust corresponds precisely to the trustee's intention to hold on trust. However, that is a matter of coincidence, and trusts law's primary focus on settlor autonomy should not be confused with contract law's general concern with bilateral autonomy. As Michael Bryan has helpfully explained, where a contract is ambiguous and a question of interpretation arises, courts might reach radically different outcomes depending on whether a “contract law perspective” or a “trusts law perspective” is adopted.⁴⁷ The different autonomy-enhancing work of express trusts

³⁹ *Id.* at 627.

⁴⁰ *Id.* at 627.

⁴¹ *Id.* at 650.

⁴² Yip, *supra* note 37, at 351–52. This proposition finds some support in the Australian High Court case of *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62 (Austl.), ¶¶ 40, 136.

⁴³ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 16 (2nd ed. 2015). See too Raz, *Morality*, *supra* note 12, at 175: a promisee “has an interest that promises made to him will be kept”; “invariably he has a *pro tanto* interest that promises given to him be kept”. See also Dagan, *supra* note 24, at 8: contract law ensures “the *reliability* of contractual promises for future performance”.

⁴⁴ This point is elaborated in detail below at main text from note 98.

⁴⁵ See *A v. A* [2007] EWHC 99 (Fam), ¶¶ 42–43: “[o]nce a trust has been properly constituted ... the property cannot lose its character as trust property save in accordance with the terms of the trust itself”. Langbein overlooks this point and over-emphasizes the consensual nature of trusteeship: Langbein, *supra* note 6, at 675 n.246.

⁴⁶ R3T, *supra* note 5, § 14. English authorities include *Jones v. Jones* [1874] WN 190; *Harris v. Sharp* (1989) [2003] WTLR 1541, at 1549; *Tate v. Leithead* (1854) Kay 658; 69 ER 279; *Bill v. Cureton* (1835) 2 My & K 503; 39 ER 1036; *Standing v. Bowring* (1886) 31 Ch D 282; *Naas v. National Westminster Bank* [1940] AC 366, at 375.

⁴⁷ Michael Bryan, *The Inferred Trust: An Unhappy Marriage of Contract and Trust?*, 69 CURRENT LEGAL PROBS.

and contracts law are best advanced by keeping separate these devices and their approaches to ascertaining intention.

3.1.2. *Informal Trusts*

In England, as in most states in America, the validity or enforcement of some inter vivos and testamentary trusts are made conditional upon the fulfilment of certain statutory formality requirements. In line with the R3T, these statutes will be identified in this paper as “Statute of Frauds” and “Wills Acts”. “Statute of Frauds” refers to formality provisions enacted in reference to s 7 of the (English) Statute of Frauds 1677, which required inter vivos trusts concerning interests in land to be proved in signed writing.⁴⁸ “Wills Acts” refers to formality provisions required for a will to be validly executed.⁴⁹

Sometimes, however, courts also enforce informally declared trusts, such as secret trusts.⁵⁰ In America, it is clear that the lack of compliance with the necessary formality requirements means that they are not enforced as express trusts, but as constructive trusts that rest on the basis of a different rationale.⁵¹ In England, however, the nature of the trust remains debated.⁵² Arguments have been advanced that informal trusts may be enforced directly as express trusts because the formality requirements are simply one of the means of proving express trusts;⁵³ and therefore, they can be disapplied by courts, paving the way for an informal trust to be enforced as an express trust, its existence being proven by oral evidence. On this view, “express” within the phrase “express trust” simply means “declared”.⁵⁴

The American approach is to be preferred for a number of important reasons. As a matter of positive law, a long line of English cases have enforced informally declared trusts as constructive trusts.⁵⁵ Even more importantly, the constructive trust approach is the only approach consistent with the autonomy-enhancing function of express trusts.⁵⁶ As will be discussed below, formalities serve as an inward-looking safeguard to settlor autonomy, and so it is dangerous to suggest that they can simply be disapplied by the courts.

Moreover, there is good reason to confine the use of the phrase “express trust” only to identify trust arrangements that are enforced due to the *successful* exercise of a property owner’s autonomy to create a trust relationship, as opposed to a looser usage of that phrase to include non-successful exercises of unilateral choice. Only then can express trusts be understood to have a distinct role to play in enhancing personal autonomy. To take but one example, in both

1, 3 (2016). *Cf.* Yip, *supra* note 37.

⁴⁸ In England, the provision is now found in s 53(1)(b) of the Law of Property Act 1925. In America, most states have enacted similar provisions, although in a minority of states the writing requirement has either been extended to cover other types of property or abolished altogether: see R3T, *supra* note 5, § 22 Comment a.

⁴⁹ In England, these provisions are found in s 9 of the Wills Act 1837. In America, each state has a respective Wills Act (see *Bogert*, *supra* note 8, § 101).

⁵⁰ England: *McCormick v. Grogan* (1869) LR 4 HL 82; *Blackwell v. Blackwell* [1929] AC 318. America: R3T, *supra* note 5, § 18.

⁵¹ R3RUE, *supra* note 7, § 46 Comment g, § 55 Comment j; *Bogert*, *supra* note 8, §§ 497–501. That rationale is ostensibly the prevention of unjust enrichment, but this is doubted below at [Section 4.1.2](#).

⁵² LEWIN ON TRUSTS ¶ 3-080 (Lynton Tucker et al. eds., 20th ed. 2020).

⁵³ See, e.g., Paul Matthews, *The Words which are Not There: A Partial History of the Constructive Trust*, in CONSTRUCTIVE AND RESULTING TRUSTS (Charles Mitchell ed., 2010); William Swadling, *The Nature of the Trust in Rochefoucauld v Boustead*, in Mitchell, *supra* note 53; William Swadling, *Substance and Procedure in Equity*, 10 J. OF EQUITY 1 (2016) [hereinafter Swadling, *Substance and Procedure*]; Swadling, *supra* note 7, at 417–18.

⁵⁴ Swadling, *Substance and Procedure*, *supra* note 53, at 6.

⁵⁵ See YING KHAI LIEW, RATIONALISING CONSTRUCTIVE TRUSTS 38 n.9, 92 nn.131–32 (2017).

⁵⁶ Other reasons for which this view is to be preferred are found in Liew, *supra* note 55, Sections 4.1., 5.1.

America and England, courts do not enforce informal inter vivos self-declared trusts, that is, where a property owner declares *herself* as trustee for another, but does not comply with a relevant formality requirement.⁵⁷ If informal trusts were enforced as express trusts, then the non-enforcement of these informal self-declared trusts would provide reason to criticize the law for depriving settlors of their personal autonomy. Conversely, refusing to enforce informal trusts *as express trusts* sends a clear message: that there has been an *unsuccessful* unilateral engagement with the express trust facility, but *nevertheless* there may be other grounds—those that provide the basis of some constructive trusts, as discussed further below—upon which the informal arrangement may be enforced. The non-enforcement of informal self-declared trusts can then properly be understood an inward-looking safeguard, a point taken up later in the discussion.⁵⁸

3.1.3. *The Rule in Saunders v Vautier*

It is well-known that English and American law differs on the applicability of the “rule in *Saunders v Vautier*”.⁵⁹ According to this rule, a beneficiary who is (or beneficiaries who together are) *sui juris* and absolutely entitled to the beneficial interest under a trust may terminate the trust and compel the trustee to convey the trust property to the beneficiary even if the trust instrument attempts to postpone distribution of the property. While this rule remains applicable in England, most American states have followed the decision of the Massachusetts Supreme Judicial Court in *Clafin v Clafin*⁶⁰ in holding that the rule in *Saunders* does not apply, and that postponing terms are valid.

This difference is often presented as a “clash” of perspectives of autonomy. For example, Graham Moffatt writes that it touches on “a basic paradox at the heart of a property system operating within the tenets of liberalism: where a donor of an interest tries to restrict a donee’s freedom to dispose of that interest, then the legal system must choose between competing freedoms, that of the donor or that of the donee.”⁶¹ Gregory S. Alexander likewise writes that it calls for “a choice between state recognition of the ‘autonomy’ of the transferor and that of the recipient”.⁶² The premise of this analysis is that there is a trade-off between the autonomy of the settlor and that of the beneficiary: enhancing the autonomy of one curbs the autonomy of the other. Thus, autonomy is curbed in English law⁶³ and enhanced in American law.⁶⁴

However, this is too crude a way of looking at things, when in truth *both* regimes are autonomy-enhancing.

It is first necessary to recall that intention is ascertained objectively in private law, and so whether a property owner has successfully utilized the facilitative device of the express trust is a matter to be determined objectively. One expression of this objective approach is found in the fact that a person’s (subjective) words and actions are assessed against a background of pre-existing (objective) legal categories of case, and the legal consequence of her words and actions

⁵⁷ England: *Smith v. Matthews* (1861) 3 De G F & J 139; 45 ER 831; America: R3T, *supra* note 5, § 24(4).

⁵⁸ See below, [Section 4.3](#).

⁵⁹ *Saunders v. Vautier* (1841) 4 Beav 115.

⁶⁰ *Clafin v. Clafin* 20 N.E. 454 (1889).

⁶¹ Graham Moffatt, *Trusts Law: A Song without End*, 55 MOD. L. REV. 123, 129 (1992).

⁶² Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1241 (1985).

⁶³ *Goulding v. James* (1997) 2 All ER 239, at 247: “[t]he [*Saunders*] principle recognises the rights of beneficiaries, who are *sui juris* and together absolutely entitled to the trust property, to exercise their proprietary rights to overbear and defeat the intention of a testator or settlor to subject property to the continuing trusts, powers and limitations of a will or trust instrument.” See also Langbein, *Why the Rule in Saunders v Vautier is Wrong*, in *EQUITY AND ADMINISTRATION* 196 (P.G. Turner ed., 2016).

⁶⁴ *Clafin*, *supra* note 60, at 23: “[a settlor’s] intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy.”

is determined by the category of case to which those words and actions most closely approximate.⁶⁵ To take one example, in the celebrated English case of *Barclays Bank Ltd v Quistclose Investments Ltd*,⁶⁶ the legal effect of a lender's (subjective) intention to lend money to the borrower for an "exclusive" purpose was assessed against the pre-existing legal categories of "contract" and "trust"; and in holding that a trust was objectively intended, the House of Lords effectively determined that the lender's intention most closely approximated to an intention to create a trust rather than simply to enter into a contract.

For present purposes, pre-existing categories of recognized property interests⁶⁷ provides another background legal framework against which an individual's exercise of autonomy to create an express trust is measured. In England, "absolute interest" and "contingent interest" are neighboring categories; no finer intermediate category is recognized.⁶⁸ This is because English law requires "equitable ownership" to include "every component of ownership".⁶⁹ On the other hand, American law recognizes the intermediate category of a "restricted absolute interest": a property right can exist without the power to alienate the capital.⁷⁰ Such an interest is acceptable because in American law the notion does not offend "any concept of a minimal core content to beneficiary property".⁷¹

These differences are instructive for understanding the rule in *Saunders v Vautier*. In America, a postponing term creates a "restricted absolute interest", falling squarely within the recognized intermediate category of property interests, and is therefore enforceable in line with *Claflin*. On the other hand, since that category of property interest is unavailable in English law, the courts in construing such a trust term would have to approximate the settlor's intention either to an intention to create an absolute interest or a contingent interest. As Paul Matthews writes:⁷²

What will the English court do? It must decide what was the settlor's intention, as expressed in the trust terms. It will take full account of the postponement clause, suggesting that the gift was intended to be contingent. But if, ultimately, the court is satisfied that the settlor's intention was not to create a contingent trust, but to give the entire beneficial interest immediately to the beneficiary, it will disregard the postponement clause, because it is repugnant to the settlor's intention.

Understood in this way, the English approach is also autonomy-enhancing, for it demonstrates that the courts strive—as best as possible, against the background framework of legal rules—to

⁶⁵ This process is often described as an exercise of "construction", although that term tends to obscure the precise interaction between an individual's exercise of autonomy and the pre-existing background rules against which it is assessed.

⁶⁶ *Barclays Bank Ltd v. Quistclose Investments Ltd* [1970] AC 567.

⁶⁷ The pre-existing framework of recognized property interests reflects the *numerus clausus* principle, which provides that there is an exhaustive list of recognized property rights. It has been argued that the principle is underpinned by economic and practical considerations: see, e.g., Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *Yale L. J.* 3 (2000–1); Henry Hansman & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 *J. OF LEGAL STUD.* S373 (2002); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 *HARV. L. REV.* 621 (1998); Carol M. Rose, *Servitudes*, in *RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW* (Kenneth Ayotte & Henry E. Smith eds., 2011).

⁶⁸ Paul Matthews, *Why the Rule in Saunders v Vautier is Wrong: A Commentary*, in Turner, *supra* note 63, at 208–9.

⁶⁹ Langbein, *supra* note 63, at 191.

⁷⁰ Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 *THEORETICAL INQUIRIES IN L.* 455, 360 (2009) [hereinafter Getzler, *Transplantation*]. Or, in the words of Justice Miller in the 1875 US Supreme Court decision of *Nichols v. Eaton*, 91 U.S. 716: "[w]e do not see ... that the power of alienation is a necessary incident to a life-estate in real property".

⁷¹ Getzler, *Transplantation*, *supra* note 70, at 375.

⁷² Matthews, *supra* note 68, at 205.

give full effect to the settlor's choice. This analysis also demonstrates that the root of the conflict between the English and American approaches lies outside trusts law: the question of whether the pre-existing categories of recognized property interests are too narrow or too wide involves "broad considerations of policy",⁷³ to which the facilitative rules of the express trust have little to add. Disentangling the express trust rules from those debates over "background rules" allows us to appreciate express trusts—even with the rule in *Saunders v Vautier* as a live issue⁷⁴—as autonomy-enhancing.

3.1.4. Irreducible Core Content of Trusts

As part of their freedom to dictate the terms of the trust, settlors are generally free to provide for the ouster of trustee duties or to exempt trustees from liability for breaches. But in England, that freedom is subject to the non-violation of what Millett LJ termed the 'irreducible core of obligations' in *Armitage v Nurse*.⁷⁵ In his words:⁷⁶

[T]here is an irreducible core of obligations owed by the trustees to the beneficiaries and enforceable by them which is fundamental to the concept of a trust ... The duty of the trustees to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary ...

On this analysis, any clause that purports to exempt trustees from dishonest or bad faith breaches is of no effect. This has recently led Sir Philip Sales to suggest, extrajudicially, that this rule unduly fetters settlor autonomy. He asks, rhetorically: "trusts law is usually taken to be governed by a dominant principle of full autonomy on the part the settlor—a sort of 'freedom of trust' to match 'freedom of contract'. From this angle ... is Millett LJ's statement perhaps not generous enough?"⁷⁷

Quite the contrary. It is difficult to accept that a legal facility enhances personal autonomy if the law allows those who choose to make use of that facility to also negate or destroy the facility's structural features in the process. A purported contract the essence of which is that one "does not promise to" do something can hardly be a binding contract; a purported will that purports to dispose property inter vivos is hardly a will. Similarly, a purported trust that makes no room for trustees to be subjected to meaningful duties can hardly be recognized as a trust,⁷⁸ since it attempts to remove the relational aspect of what makes a trust a trust. "If the beneficiaries have no rights enforceable against the trustees there are no trusts."⁷⁹ This is not to deny that such an arrangement may still be enforced as a contract, thereby engaging the autonomy-enhancing function of contracts law. The point is, however, that maintaining an

⁷³ A.W. SCOTT & W.F. FRATCHER, SCOTT ON TRUSTS § 337.3 (vol. 4, 4th ed. 1989). See also Langbein, *supra* note 63, at 198; Matthews, *supra* note 68, at 205.

⁷⁴ In the majority of modern trusts today, the rule in *Saunders v Vautier* at best provides a "theoretical" right, since, for a variety of practical reasons, beneficiaries cannot or will not exercise the right to collapse the trust and take the trust property. These include drafting strategies; open-ended beneficiary classes; beneficiaries not fulfilling the *sui juris* requirement; tax considerations; and so on.

⁷⁵ *Armitage v. Nurse* [1998] Ch 241. In America, the position is unclear: David Ramos Muñoz, *Can Complex Contracts Effectively Replace Bankruptcy Principles?: Why Interpretation Matters*, 92 AM. BANKR. L. J. 417, 437–38 (2018).

⁷⁶ *Armitage*, *supra* note 75, at 253–54.

⁷⁷ Philip Sales, *Exemption Clauses in Trusts*, in *Defences in Equity* 125 (Paul S. Davies et al. eds., 2018).

⁷⁸ David Hayton, *The Irreducible Core Content of Trusteeship*, in Oakley, *supra* note 4. See also John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1121–23 (2004). Another example is "illusory trusts", where settlors ostensibly divest their property on trust but the courts hold that they retain full control of the property in substance: see, e.g., *Clayton v. Clayton* [2016] NZSC 29; *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2017] EWHC 2426 (Ch).

⁷⁹ *Armitage*, *supra* note 75, at 253.

irreducible core of a trust is crucial to ensuring that express trusts are able to retain their unique autonomy-enhancing function.⁸⁰ Therefore, the “irreducible core” requirement is itself autonomy-enhancing.⁸¹

3.2. Inward-Looking Safeguards

There are a number of inward-looking safeguards that ensure that express trusts are only created where settlors conclusively intend to do so.

First, as discussed earlier, a Statute of Frauds and a Wills Act will often provide the requisite formality requirement for the creation or enforcement of certain inter vivos or testamentary express trusts. These ensure that an express trust becomes legally enforceable only where the settlor has “deliberately interacted”⁸² with the device, indicating a decisive decision to settle her property on trust. This is particularly critical because express trusts can be created unilaterally. Thus, where the settlor or testator fails to indicate a conclusive intention to create a trust, the purported arrangement is not enforceable as an express trust.⁸³

It might be asked whether the scope of the safeguard afforded by the formality requirements for inter vivos express trusts extend far enough. At the present time, in England and most jurisdictions in America, the formality requirement extends only to interests in land. This is perhaps explicable on an historical basis: land was the most valuable form of property when the Statute of Frauds 1677 was enacted in England, thus explaining the desire of the then legislature to ensure individuals meaningfully engaged with the express trust device before an interest in land was conclusively given away on trust. In the modern day, however, the justification for singling out land is of lesser force, since other types of properties—or high value assets whatever assets they may be—may pose an equal if not stronger case for formality protection.⁸⁴ It may well be that the hesitancy to extend the scope of formalities reflects the common

⁸⁰ There is a live debate as to whether Millett LJ correctly identified the content of the irreducible core: *see, e.g.,* James Penner, *Exemptions, in BREACH OF TRUST* (Peter Birks & Arianna Pretto-Sakmann eds., 2002); Sales, *supra* note 77. But even if one disagrees with Millett LJ, the point made remains valid: the irreducible core—whatever it is—does not curb autonomy but ensures that express trusts retain their integrity in order to enhance personal autonomy.

⁸¹ The same may also explain what Langbein has termed the “benefit-the-beneficiary requirement”, which are mandatory trusts rules that require “that the trust and its terms must be for the benefit of the beneficiaries” (Langbein, *supra* note 78, at 1107)—that settlors may not impose “manifestly value-impairing restrictions on the use or disposition of the trust property” (Langbein, *supra* note 78, at 1109). Langbein considers that such rules interfere with settlor autonomy but justifies them on the basis of “a change-of-circumstances doctrine”, which is the argument that those rules respond to the inability of dead settlors to change their mind where the consequence of their unwise course of action materializes. However, a better explanation, which covers all cases, whether the settlor is dead or alive, is found in another passage in Langbein’s paper—that “[t]rust law’s deference to the settlor’s direction always presupposes that the direction is beneficiary-regarding” (Langbein, *supra* note 78, at 1110–11). It is a structural feature of express trusts that they exist for the benefit of beneficiaries (*see* Derwent Coshott, *To Benefit Another: A Theory of the Express Trust*, 136 L. Q. REV. 221 (2020)). It is no surprise, therefore, that the law neutralizes trust provisions that threaten to erode that structural feature.

⁸² *See* Gardner, *supra* note 32, at 30; *see also* Langbein, *supra* note 78, at 1121.

⁸³ *See supra* note 57.

⁸⁴ As Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–801 (1941) writes, formalities secure the desiderata of providing a “evidentiary”, “cautionary”, and “channelling” function. “Where men make laws for themselves it is desirable that they should do so under conditions guaranteeing [that] desiderata ... Furthermore, the greater the assurance that these desiderata are satisfied, the larger the scope we may be willing to ascribe to private autonomy.” (Fuller, *supra* note 84, at 813–14). In the modern day, land does not hold an exclusive stronghold on the logic of requiring the satisfaction of that desiderata.

assumption that formality requirements unduly fetter settlor autonomy;⁸⁵ but this assumption is mistaken, since formalities secure personal autonomy. A strong commitment to autonomy may require the scope of formalities to be revisited and expanded.

Secondly, settlor autonomy is safeguarded through the requirement of an “external expression of intention”:⁸⁶ “the mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention before it can effect any result.”⁸⁷ “[T]he devil knows not the thought of man”.⁸⁸ Requiring intentions to journey from thought to deed ensures settlors meaningfully engage with the express trust device before legal consequences will ensue.

A third safeguard is found in the objective ascertainment of intention. A settlor is taken to have chosen to create a trust only where there is an expression of intention to create the rights and duties that constitute a trust relationship. Thus, unless the settlor “manifests an intention to impose enforceable duties on the transferee”⁸⁹ and “intends the wish to be imperative ... no trust is created”.⁹⁰ On the other hand, the law does not require the settlor also to appreciate “that the intended relationship is called a trust” or to understand “the precise characteristics of a trust relationship”.⁹¹ It is the substance of the settlor’s choices that the law objectively ascertains and gives legal effect.

It might be asked whether securing the settlor’s right to exit—to revoke a trust—is necessary to safeguard settlor autonomy. In the context of property and contract law, Hanoch Dagan has argued that self-determination requires private law to secure “people’s right to exit their existing property arrangement”.⁹² This is precisely what § 602(a) of the Uniform Trust Code provides: “[u]nless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust.”⁹³ If a default right to exit is necessary to secure settlor autonomy, then the common law position, which is that the settlor drops out of the picture once an express trust has been properly set up,⁹⁴ unduly fetters the autonomy-enhancing function of express trusts.

The answer is in the negative. Charles Fried writes that “over the last two centuries citizens in the liberal democracies have become increasingly free to dispose of their talents, labor, and property as seems best to them”.⁹⁵ That freedom provided by the liberal state loses its meaning if the default legal position is that a disposition can be recalled. This is why a donor who chooses

⁸⁵ See, e.g., Ross Grantham & Darryn Jensen, *Coherence in the Age of Statutes*, 42 MONASH U. L. REV. 360, 373 (2016): “formality provisions override individual autonomy in cases in which the required formalities or evidential requirements are not satisfied”; Franziska Myburgh, *On Constitutive Formalities, Estoppel and Breaking the Rules*, 27 STELLENBOSCH L. REV. 254, 256 (2016) (writing in the context of contracts law): formalities “limit contractual freedom in a legal system where the point of departure is that contractual liability is based on the will of the parties”.

⁸⁶ R3T, *supra* note 5, § 13 Comment a.

⁸⁷ *Re Vandervell’s Trusts (No 2)* [1974] Ch 269 (CA), at 294. The law does not, however, require that the intention is communicated to anyone (see, e.g., R3T, *supra* note 5, § 13 Comment a; *Standing v. Bowring* (1885) 31 Ch D 282 (CA), at 288–89; *Fletcher v. Fletcher* (1844) 4 Hare 67, 67 ER 564). Cf. Simon Douglas & Ben McFarlane, *Sham Trusts*, in *MODERN STUDIES IN PROPERTY LAW: VOLUME 9* (Heather Conway & Robin Hickey eds., 2017).

⁸⁸ Year-Book 17 Edw IV I (1478).

⁸⁹ R3T, *supra* note 5, § 13 Comment d.

⁹⁰ *Knight v. Knight* (1840) 3 Beav 148, at 174; (1840) 49 ER 58, at 68.

⁹¹ R3T, *supra* note 5, § 13 Comment a; *Paul v. Constance* (1977) 1 WLR 527.

⁹² Dagan, *supra* note 24, at 18.

⁹³ See D.M. English, *The American Uniform Trust Code*, in *EXTENDING THE BOUNDARIES OF TRUST AND SIMILAR RING-FENCED FUNDS* 326–27 (David Hayton ed., 2002).

⁹⁴ *Re Astor’s Settlement Trusts* [1952] Ch 534, at 542; *Re Murphy’s Settlements* (1999) 1 WLR 282, at 295.

⁹⁵ Fried, *supra* note 43, at 21.

to make a gift loses the right to exit once the gift is properly made: her autonomy would be unduly fettered if her clear actions to dispose were held to be ineffective simply because it was not accompanied by certain necessary words. This is not to say that the right to exit is never compatible with personal autonomy. However, “[a] change of mind that is truly relevant to personal autonomy, or to the safeguarding of authenticity in one’s pursuits, would be, for the most part at least, rational.”⁹⁶ A rule that provides that a settlor who properly sets up a trust loses the right to revoke the trust unless such a power is expressly retained better reduces the risk of irrational changes of mind. After all, a trust by default entails *divestment* instead of *retention*, and to reverse that default position would unduly curb settlor autonomy.

It might then be asked how § 602(a) of the UTC can be explained: what might guide American states in deciding whether to adopt that provision? An answer lies in cost-efficiency. As D.M. English explains, that provision reflects “the increasing if not predominant use of the revocable trust in the United States”.⁹⁷ In states where that is a demonstrably true empirical fact, then adopting a presumption of revocability may be justified since it would save overall transaction costs by institutionalizing that common practice. A balancing act is called for between cost-savings and personal autonomy, and where the balance tilts in favor of the former, then the adoption of § 602(a) is justified.

3.3. Outward-Looking Safeguards

Express trusts are first and foremost concerned with enhancing settlor autonomy, an unsurprising proposition given that the settlor is the absolute owner of the trust property prior to the creation of the trust. However, this does not mean that settlors are given free rein to treat trustees and beneficiaries simply as a means to her desired ends. Given that trusts are relational in nature, certain outward-looking safeguards protect the autonomy of others who are potentially affected by the settlor’s choices.

Most obviously, trustees⁹⁸ are free to disclaim trusteeship and beneficiaries⁹⁹ are free to disclaim interests under a trust for any reason at all.¹⁰⁰ This ensures that their personal autonomy is not unduly curbed, a consequence that would follow if the law forced upon them rights and duties intended by the settlor. Even after indicating acceptance at the outset, trustees and beneficiaries are still capable of exercising their right to exit. Thus, trustees are free to resign,¹⁰¹ and beneficiaries are free to release¹⁰² (or assign¹⁰³) their interests to others. Of course, they may not do so without consequence if, for example, a trustee had committed a prior breach of trust, or the assignment of the beneficiary’s interest would impose a burden on the assignee.¹⁰⁴ To allow trustees and beneficiaries to have their cake and eat it would be to sanction undue encroachment into settlor autonomy.

Another outward-looking safeguard is found in the objective approach towards ascertaining

⁹⁶ Kimel, *supra* note 23, at 102.

⁹⁷ English, *supra* note 93, at 326.

⁹⁸ R3T, *supra* note 5, § 35; Robinson v. Pett (1734) 3 P Wms 249, at 251; 24 ER 1049, at 1050.

⁹⁹ R3T, *supra* note 5, § 51 Comment f; Hardoon v Belilios [1901] AC 118, at 123.

¹⁰⁰ See also, in general, Ying Khai Liew & Charles Mitchell, *The Creation of Express Trusts*, 11 J. OF EQUITY 133 (2017).

¹⁰¹ R3T, *supra* note 5, § 36; DAVID HAYTON ET AL., UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES [1.28](f) (19th ed. 2016) [hereinafter *Underhill & Hayton*]. An express trust does not fail for want of a trustee: R3T, *supra* note 5, § 14 comment b; Phillips v. School Board for London (1898) 2 QB 447, at 459; Re Frame [1939] Ch 700, at 703–4.

¹⁰² R3T, *supra* note 5, § 51 comment f.

¹⁰³ YING KHAI LIEW, GUEST ON THE LAW OF ASSIGNMENT ch. 3 (3rd ed. 2018).

¹⁰⁴ England: Tolhurst v. Associated Portland Cement Manufacturers (1900) Ltd (1902) 2 KB 660, at 668; *id.* at ch. 9. America: Uniform Commercial Code § 2-210; unless, of course, the assignee assents to this.

settlor intention, specifically the law's refusal to allow the settlor's secret or unexpressed intention to dictate the existence or terms of the trust.¹⁰⁵ In the Australian case of *Byrnes v Kendle*, a settlor argued that a trust instrument he executed was void and of no effect because he had subjectively and secretly intended not to create a trust when the instrument was executed. The High Court of Australia rejected his contention. Concerning the objective approach to ascertaining intention, Gummow and Hayne JJ made the following comment:¹⁰⁶

There is good sense in such a rule. Issues of the construction to be placed upon the words or actions of alleged settlors are apt to arise long after the event. ... Further, trusts give rise to proprietary interests, dealings which may engage third parties who are strangers to the original actors.

The point is clear. Putative trustees and beneficiaries, as well as third parties who have dealings with the trust, obviously ascertain the settlor's intention objectively, as they are not privy to the settlor's inner thoughts. By refusing to allow a settlor's subjective intention to override that objectively ascertained intention, the law ensures that the basis upon which others choose whether or not to be a party to (or deal with) the trust remains constant throughout the lifetime of the trust.¹⁰⁷

Finally, it is a mandatory rule, applicable to all equitable property interests generally, that an acquirer of equitable property who is a bona fide purchaser for value without notice takes free of any prior equitable interest in it.¹⁰⁸ Any attempt by settlors to negate this rule will therefore be of no effect.¹⁰⁹ This provides another outward-looking safeguard, which ensures that settlors' exercise of autonomy does not result in the overriding of bona fide third-party acquirers' interests during the lifetime of the trust without justification.

3.4. External Limits

Autonomy is not an absolute value, and therefore it must sometimes give way to other normative concerns. One of the most fundamental limitations is the need for choices to be "morally acceptable"¹¹⁰ and made pursuant to "legitimate ends".¹¹¹ Therefore, trusts or trust provisions that are formed for unlawful, criminal or tortious purposes, or those contrary to public policy, are void.¹¹² Moreover, express trusts set up solely to deceive others (such as the court or the settlor's creditors) are potentially invalid.¹¹³

Another external limit relates to economic concerns. Perpetuity rules may be understood in

¹⁰⁵ See R3T, *supra* note 5, § 4; *Cartwright v. Jackson Capital Partners, Limited Partnership*, 478 S.W.3d 596, at 626. *Re Vandervell's Trust (No 2)*, *supra* note 87; *Twinsectra*, *infra* note 176, ¶ 71; *Byrnes v Kendle* (2011) 243 CLR 253 (Austl.).

¹⁰⁶ *Byrnes*, *supra* note 105, ¶ 56.

¹⁰⁷ In the same vein, Fuller, *supra* note 84, at 808 writes, in relation to contracts law: "[i]t has been suggested that in some cases the courts might properly give an interpretation to a written contract inconsistent with the actual understanding of either party. What justification can there be for such a view? We answer, it rests upon the need for promoting the security of transactions." (citation omitted).

¹⁰⁸ See, e.g., R3T, *supra* note 5, § 2 Comment d; *Venables v. Hornby (Inspector of Taxes)* [2002] EWCA Civ 1277, ¶ 27.

¹⁰⁹ This is in line with the fact that beneficial interests under a trust have proprietary effects: see, e.g., Penner, *supra* note 34; Peter Jaffey, *Explaining the Trust*, 131 L. Q. REV. 377 (2015).

¹¹⁰ Raz, *Morality*, *supra* note 12, at 378.

¹¹¹ Raz, *Voluntary Obligations and Normative Powers*, in *NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON KELSENIAN THEMES* 458 (Stanley L. Paulson ed., 1999).

¹¹² R3T, *supra* note 5, § 29; *Underhill & Hayton*, *supra* note 101, ¶¶ 11.1(1), 7.1(f).

¹¹³ In England, by virtue of the sham trusts doctrine (see Ying Khai Liew, *'Sham Trusts' and Ascertaining Intentions to Create a Trust*, 12 J. OF EQUITY 237 (2018)); in America, see R3T, *supra* note 5, § 29 Reporter's Notes on Comment d.

these terms: they limit settlor autonomy in order to prevent trust property from being unduly incapacitated or sterilized within the free market, thereby facilitating market liquidity and the utilization of wealth.¹¹⁴

A third limit has been noted in the earlier discussion concerning the rule in *Saunders v Vautier*, which is pre-existing categories of property interests within the legal system. The interest that a settlor intends to grant to the beneficiary must be an interest the legal system recognizes. Where there is a misalignment between the interest intended by the settlor and the pre-existing categories of property interests, courts approximate the settlor's intention to the closest possible recognized category of interest. Since express trusts do not operate in a vacuum, choices made by the settlor may not always be given full legal effect.

4. CONSTRUCTIVE TRUSTS

4.1. Ground-Clearing

The law of constructive trusts covers a multitude of circumstances or doctrines, and it is clear that not every constructive trust doctrine enhances autonomy,¹¹⁵ although some clearly do. The aim of this section is to demonstrate how some of those do, and that they do so in such a way that complements the autonomy-enhancing work of express and resulting trusts.

Before embarking on that discussion, some ground-clearing work is called for. It is often thought that fundamental differences exist between constructive trusts in America and in England. For our purposes, two aspects of that perceived difference require investigation.

The first concerns the nature of constructive trusts. In America, “a constructive trust is ‘not a real trust’ since it is ‘only a remedy’”.¹¹⁶ In contrast, English courts have strenuously rejected “remedial” constructive trusts, preferring only to recognize “institutional” ones.¹¹⁷ The second concerns the basis of constructive trusts. In America, the prevailing view is that constructive trusts respond to unjust enrichment,¹¹⁸ and are therefore substantively dealt with in the R3RUE,¹¹⁹ and not in the R3T.¹²⁰ In contrast, English law does not view constructive trusts as

¹¹⁴ R3T, *supra* note 5, § 29 Reporter's Notes on Clause (b), Comments g–h; Paul Matthews, *The Comparative Importance of the Rule in Saunders v Vautier*, 122 L. Q. REV. 266, 277–78 (2006). At Matthews, *supra* note 114, at 278 n.111, Matthews doubts the economic rationale of perpetuity rules, but recognizes that the economic argument led to the invention of those rules.

¹¹⁵ For example, bribes or secret commissions received by those in breach of their fiduciary duties are held on constructive trust for their principals in order to ensure undivided loyalty (*see* R3RUE, *supra* note 7, § 43 Comment d) or to ensure that a fiduciary does not rely on her own breach to retain a profit (FHR European Ventures LLP v. Cedar Capital Partners LLC [2014] UKSC 45, ¶ 11).

¹¹⁶ R3RUE, *supra* note 7, § 55 Comment b.

¹¹⁷ *See, e.g.*, *Re Sharpe (a bankrupt)* (1980) 1 WLR 219, at 225; *Lonrho plc v Fayed (No 2)* (1992) 1 WLR 1, at 9; *Re Goldcorp Exchange Ltd (in receivership)* (1995) 1 AC 74; *Re Polly Peck International plc (in administration)* (No 2) (1998) 3 All ER 812, at 827, 831; *Sinclair Investments (UK) Ltd v. Versailles Trade Finance Limited (in administrative receivership)* [2011] EWCA Civ 347, [37]; FHR, *supra* note 115, ¶ 47; *Angove's Pty Ltd v. Bailey* [2016] UKSC 47, ¶ 27. On the institutional/remedial distinction, *see* Ying Khai Liew, *Reanalysing Institutional and Remedial Constructive Trusts*, 74 CAMBRIDGE L. J. 528 (2016).

¹¹⁸ The extent to which unjust enrichment is said to underlie the law of constructive trusts varies from author to author. For example, *Bogert*, *supra* note 8, § 47 suggests that “the imposition of a constructive trust to prevent unjust enrichment is probably the *primary* basis at the present time” (emphasis added); while R3T, *supra* note 5, § 15 Comment e simply asserts that (all?) constructive trusts are imposed “to redress a wrong or to prevent unjust enrichment”.

¹¹⁹ R3RUE, *supra* note 7, § 55.

¹²⁰ *See* R3T, *supra* note 5, Comment e § 1.

being susceptible to a single unifying rationale: they are understood as being “imposed in a wide variety of circumstances, and for a number of different reasons”.¹²¹ Moreover, English courts have never “subscribed to the view that all constructive trusts respond to unjust enrichment, [although] they have held that some do”.¹²²

If these differences are material differences, then American constructive trusts fall to be theorized and justified within the law of remedies and/or the law of unjust enrichment (along with some of those that respond to unjust enrichment in English law), as opposed to *trusts law*. But careful examination indicates that those differences are in fact often more apparent than real.

4.1.1. Remedy?

First, the way in which American constructive trusts are “remedial” is demonstrably different from the “remedial” constructive trusts objected to by English courts, as utilized, for example, in Australia.¹²³ In *Westdeutsche Landesbank Girozentrale v Islington LBC*,¹²⁴ Lord Browne-Wilkinson described an “institutional constructive trust” as a non-discretionary trust arising “by operation of law as from the date of the circumstances which give rise to it: the function of the court is merely to declare that such trust has arisen in the past”; while a “remedial constructive trust” was described as “a judicial remedy giving rise to an enforceable equitable obligation: the extent to which it operates retrospectively to the prejudice of third parties lies in the discretion of the court”. American constructive trusts do not fall within This conception of “remedial”. For example, the R3RUE rejects the view that constructive trusts are “created” or “imposed” by judges; instead, the phrase “constructive trust” is taken to be “a judicial shorthand describing the parties’ pre-existing interests in particular property”: a constructive trust is “a declaratory judgment about the state of title to property”, therefore “the constructive trust ‘exists’ from the moment of the transaction on which restitution is based”.¹²⁵ Thus, American constructive trusts do not provide for the kind of discretion envisaged by English courts.¹²⁶

Discretion aside, however, it remains to be asked whether American constructive trusts are “real trusts”, as in England, or simply “a remedy”. In the R3RUE, “constructive trust” is touted as a “metaphor” that should be abandoned in favor of a direct recognition of the fact that:¹²⁷

¹²¹ CHARLES MITCHELL ET AL., *GOFF & JONES: THE LAW OF UNJUST ENRICHMENT* ¶ 38-36 (9th ed. 2016) [hereinafter *Goff & Jones*]. This is not to deny that common rationales may underlie seemingly disparate constructive trust doctrines, and that it may be useful to understand constructive trusts by way of those groupings. For arguments of this kind, see, e.g., GBOLAHAN ELIAS, *EXPLAINING CONSTRUCTIVE TRUSTS* (1990); Ben McFarlane, *Constructive Trusts Arising on a Receipt of Property Sub Conditione*, 120 L. Q. Rev. 667 (2004); Simon Gardner, *Reliance-Based Constructive Trusts*, in Mitchell, *supra* note 53; Liew, *supra* note 55. The point is that constructive trusts are not understood as susceptible to a *single* explanation, as is thought to be the case in America.

¹²² *Goff & Jones*, *supra* note 121, ¶ 38-36.

¹²³ *Muschinski v Dodds* (1985) 160 CLR 583 (Austl.).

¹²⁴ *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669, at 714–15.

¹²⁵ R3RUE, *supra* note 7, § 55 Comment e.

¹²⁶ See too Andrew Kull, *The Metaphorical Constructive Trust*, 18 TRUSTS & TRUSTEES 945, 953–54 (2012). It might be thought that the word “may” in R3RUE, *supra* note 7, § 55(1) suggests the potential for the exercise of discretion. That subsection provides: “[i]f a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant’s rights, the defendant *may* be declared a constructive trustee, for the benefit of the claimant, of the property in question and its traceable product” (emphasis added). It would seem, however, that the term “may” is used to indicate that *some but not all* categories of unjust enrichment will attract the constructive trust. It does not entail that judges have discretion *on a case by case basis* to determine if a constructive trust ought to be imposed.

¹²⁷ R3RUE, *supra* note 7, § 55 Comment b.

[E]very judicial order recognizing that ‘B holds X in constructive trust for A’ may be seen to comprise, in effect, two remedial components. The first of these is a declaration that B’s legal title to X is subject to A’s superior equitable claim. The second is a mandatory injunction directing B to surrender X to A or to take equivalent steps.

At least in certain circumstances, however, this analysis is unhelpfully reductive, because it does not provide any conceptual room for recognizing that a real (constructive) trust may have arisen prior to the judicial order, and that that real trust might serve as the basis for the declaration and injunction awarded by the court.

Consider, for example, the case of *Re Duke of Marlborough*.¹²⁸ The Duchess of Marlborough assigned the leasehold of a house to the Duke absolutely, on the basis of an informal agreement that he would raise a mortgage in his own name and re-convey the equity of redemption back to the Duchess. The Duke died before he could re-convey, and the court held that the Duchess, and not the Duke’s creditors, could lay claim to the equity of redemption. The only way to explain this outcome is that the Duchess was a beneficiary under a real (constructive)¹²⁹ trust that arose from the moment the Duke obtained legal title to the house. How else could the court justify according priority to the Duchess over the Duke’s creditors?

Another example is where a claimant seeks equitable compensation against the defendant on the basis that a constructive trust arose in the past over property in the defendant’s hands and that the defendant had wrongfully disposed of the property.¹³⁰ Although the remedy sought is not a declaration of a constructive trust, nevertheless the fact that a real (constructive) trust historically arose would inform the court as to whether the claimant succeeds and (if so) the extent of the compensation award.

In sum, it would be mistaken to suggest that all constructive trusts in America are *simply* constitutive of the remedies awarded by the court in the relevant action. As in England, the constructive trust may well be a real trust, arising at an identifiable point in time before the judicial order, and which serves to explain the remedy ultimately awarded, whether a declaration of a constructive trust or some other remedy.

4.1.2. Unjust Enrichment?

Secondly, in some instances, including those that are substantively discussed in this paper, “unjust enrichment” fails to suffice as an *explanation* or rationale for why constructive trusts arise. As Lusina Ho explains, by treating the diverse range of situations¹³¹ in which constructive trusts arise as involving unjust enrichment, “R3RUE has stretched the concept of unjust enrichment so widely that it fails to offer any meaningful guidelines on how the discretion will be exercised”.¹³² In other words, “unjust enrichment”, presented as a rationale, is sometimes question-begging.¹³³

¹²⁸ *Re Duke of Marlborough* [1894] 2 Ch 133, a case that the US Supreme Court has found occasion to approve: see *Smithsonian Institution v. Meech* (1898) 18 S Ct 396, at 411.

¹²⁹ Because the arrangement was made informally, it could not have been enforced as an express trust: see discussion above at [Section 3.1.2.](#)

¹³⁰ See, e.g., the facts of *Pain v Pain* [2006] QSC 335.

¹³¹ For example, enrichment arising from impaired or qualified intent, wrongdoing, ownership in real estate of unmarried cohabitants, informal oral trusts, and secret testamentary trusts.

¹³² Lusina Ho, *Proprietary Remedies for Unjust Enrichment: Demystifying the Constructive Trust and Analysing Intentions*, in *THE RESTATEMENT THIRD: RESTITUTION AND UNJUST ENRICHMENT: CRITICAL AND COMPARATIVE ESSAYS* (Charles Mitchell & William Swadling eds., 2013) 211.

¹³³ Ho, *supra* note 132, at 215: “this begs the question whether the relevant property is beneficially owned by the insolvent recipient”. Indeed, tellingly, R3T, *supra* note 5, § 7 Comment d says that a constructive trust is imposed “because the court *concludes* that the person holding the title to the property, if permitted to keep it, would profit by a wrong or would be unjustly enriched” (emphasis added).

Take for example what English law calls “the rule in *Re Rose*”,¹³⁴ a substantially similar rule of which is found in § 16 Comment c R3T. The rule provides that a constructive trust arises where a property owner (A) does everything in her power to transfer property to another (B), either as a gift to B or for B to hold on trust, but the title remains in A due to some “technical defect or incompleteness in the intended transfer”.¹³⁵ The explanation provided in the R3T is that the constructive trust arises “to prevent the unjust enrichment that would occur if the property owner's successors in interest were allowed to retain or acquire property that is satisfactorily shown to have been intended to benefit others”.¹³⁶ But this merely states a conclusion, and not the reason or rationale for the rule. In particular, it does not explain *why* the constructive trust would arise when B is clearly a volunteer, and given that a mere promise short of a contract or a properly declared express trust is not normally enforceable. Once we look beyond unjust enrichment, however, an explanation can be found. As is the case in England,¹³⁷ the rationale lies in a consideration of A's actions—that A “had arrived at a definite, considered intention to create a trust either immediately or soon thereafter”.¹³⁸ This is the *reason* why A's successors in interest would be unjustly enriched if permitted to keep the property.

Take secret trusts as another example. The R3T suggests that the reason why they give rise to constructive trusts¹³⁹ is that the testator's “testate or intestate successor would be unjustly enriched if permitted to retain the property”.¹⁴⁰ Again, this provides a conclusion and not the reason or rationale for the rule. Digging deeper, however, it can be seen that secret trusts arise because the “testator leaves property to a recipient in reliance on the recipient's promise to convey the property to specified third persons, and the recipient repudiates the promise after the death of the testator”.¹⁴¹ As in England,¹⁴² it is the elements of promise and reliance that explain *why* the testator's successor would be unjustly enriched if permitted to keep the testator's property.¹⁴³ Indeed, once promise and reliance are properly recognized as the rationale for secret trusts, it becomes clear that they also provide the reason for other Anglo-American “agreement-based constructive trusts”, that is, those arising in the context of an informal agreement. These include¹⁴⁴ inter vivos iterations of the secret trust situation, where a property owner (A) transfers property to another (B) in reliance on the latter's informal promise to hold on trust;¹⁴⁵ purchases at a judicial sale or auction where one party (A) allows another (B) to purchase the property in

¹³⁴ The rule is in fact reflected in the two coincidentally named cases of *Re Rose*, *Midland Bank Executor and Trustee Co Ltd v. Rose* [1949] 1 Ch 78 and *Re Rose*, *Rose v. IRC* [1952] 1 Ch 499.

¹³⁵ R3T, *supra* note 5, § 16 Comment c.

¹³⁶ *Id.* at § 16 Comment c.

¹³⁷ In *Milroy v. Lord* (1862) 4 De GF & J 264, at 274; 45 ER 1185, at 1189, Turner LJ held that, “in order to render a voluntary settlement valid and effectual, [A] must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him”. This statement is taken to be the basis for the rule in *Re Rose*: see *Mascall v. Mascall* (1985) 50 P & CR 119, at 126.

¹³⁸ R3T, *supra* note 5, § 16 Comment c.

¹³⁹ Secret trusts are enforced as constructive trusts (R3RUE, *supra* note 7, § 46; R3T, *supra* note 5, § 18) and therefore exempted from any formality requirement due to s 8 of the Statute of Frauds 1677 (see *Bogert*, *supra* note 8, § 67).

¹⁴⁰ R3T, *supra* note 5, § 18 Comment a.

¹⁴¹ R3RUE, *supra* note 7, § 36 Comment g.

¹⁴² Liew, *supra* note 55, at ch. 4.

¹⁴³ Wrongdoing, in the form of repudiation, is not in fact required (*cf. Bogert*, *supra* note 8, § 471). This can be demonstrated by asking what would happen if the recipient dies soon after the testator, without having had the opportunity to renege (or to carry out her promise). Clearly the arrangement would be enforceable as a secret trust. This demonstrates that wrongdoing is not necessary after all.

¹⁴⁴ All these are further discussed in Liew, *supra* note 55.

¹⁴⁵ England: *Rochefoucauld v. Boustead* [1897] 1 Ch 196; America: *Bogert*, *supra* note 8, §§ 495–497.

reliance on B's promise to hold the property (wholly or partly) on trust;¹⁴⁶ and mutual wills cases, where one party (A) dies leaving property to another (B) in reliance on B's promise to leave the property at B's death to another.¹⁴⁷

The point of the examples cited above is not to deny that unjust enrichment may well provide a sound¹⁴⁸ explanation where constructive trusts secure restitution in circumstances where the relevant triggering event—the discrete source of rights—is unjust enrichment.¹⁴⁹ Such constructive trusts project rights *backwards*: being “restitutionary in pattern”,¹⁵⁰ they return or restore an interest to a property owner. Therefore, in these cases it may well be that the explanation for why a constructive trust arises to compel B to restore the property to A lies in unjust enrichment. But these are not the only type of constructive trusts:¹⁵¹ others, including those discussed above, have the effect of projecting rights *forwards*, that is, conferring beneficial interests to those intended to benefit. Given its inherent restitutionary logic, unjust enrichment is unable to provide a sufficient explanation for forward-projecting constructive trusts. Once we are prepared to look beyond the unjust enrichment rhetoric, however, it becomes clear that forward-projecting constructive trusts have a crucial role to play within trusts law in enhancing personal autonomy.

4.2. The Role of Constructive Trusts in Enhancing Autonomy

Take agreement-based constructive trusts first. These give content to the relational aspect of autonomy: they allow property owners “to extend their reach by legitimately *enlisting others* to their own goals, purposes, and projects”.¹⁵² This complements the autonomy-enhancing role of express trusts, which gives effect to a property owner's *unilateral* engagement with the trust facility.

The autonomy-enhancing work of constructive trusts can be appreciated from two points of view.

From A's point of view, the law would unduly curb A's autonomy if she was prevented from enlisting B to achieve her goals simply because the informality of the arrangement prevents it from being enforce as an express trust. Certainly, as discussed above, formality requirements provide an inward-looking safeguard to ensure that express trusts are only created where property owners conclusively wish to do so; and property owners are most at risk of purporting to set up trusts without due consideration when they declare themselves trustees of their property for another. But in agreement-based constructive trust situations, A relies on B's promise, and such reliance supplies part of the reason why the law enforces the informal agreement between the parties: A not only obtains B's consent to participate in the compact, but relies in a maximally decisive manner by giving up A's own property (or A's clear opportunity to acquire property) in order to vest the property in B's hands. This justifies protecting the relational aspect of A's autonomy through the constructive trust. The element of reliance here is “not as an independent or competing basis of liability but as a ground supplementing and

¹⁴⁶ England: *Pallant v. Morgan* [1953] Ch 43; America: *Bogert*, *supra* note 8, § 471.

¹⁴⁷ England: *Dufour v. Pereira* (1769) Dick 419; 21 ER 332; America: *Bogert*, *supra* note 8, § 499.

¹⁴⁸ Albeit partial: see HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* (2004).

¹⁴⁹ In America, the preference is to treat the triggering event as “unjustified enrichment”, that is, where there is “enrichment that lacks an adequate legal basis” (R3RUE, *supra* note 7, § 1 Comment b). In England, the defendant must have been enriched unjustly at the claimant's expense on the basis of established “unjust factors” (*Goff & Jones*, *supra* note 121, at ¶ 1-21ff).

¹⁵⁰ *Goff & Jones*, *supra* note 121, ¶ 38-46.

¹⁵¹ It is arguably better to categorize trusts responding to unjust enrichment as resulting trusts, as is increasingly the trend in England, since resulting trusts are invariably restitutionary in pattern.

¹⁵² Dagan, *supra* note 24, at 8 (emphasis added).

reinforcing the principle of private autonomy”¹⁵³ from a relational perspective. A’s reliance on B’s promise justifies the constructive trust, which enhances A’s autonomy by giving her the freedom to enlist B to achieving A’s goals and aims.

From B’s point of view, when B acquires the property in question,¹⁵⁴ B becomes its legal owner and for that reason is empowered with the legal power to exclude all others from interfering with the property. But it would unduly undermine A’s autonomy if that empowerment went unchecked such that B could exclude A, given the background story leading up to B’s acquisition of the property. B’s acquisition of the property was directly facilitated by A’s act of reliance, and B’s promise was not simply *any* promise, but a promise that B would take only a qualified interest in the very property that B obtains through A’s reliance on B’s promise. It is unsurprising, then, that striking a balance between A’s and B’s autonomy requires a constructive trust to arise from the moment of acquisition, to compel B to hold the property according to the terms of her promise.

Next, consider *Re Rose* constructive trusts. These give content to the idea that autonomy is determined as a matter of substance and not form.¹⁵⁵ Where A does everything in her power necessary to transfer property to B, A “arrive[s] at a definite, considered intention”¹⁵⁶ to make the transfer. The constructive trust secures A’s substantive decision, indicated through her actions, and endows it with legal effect, even though in form the legal title remains in A’s name.

The substance-over-form approach is not at odds with the formality requirements necessary for the transfer of the legal title of certain forms of property. It was discussed earlier, in the context of express trusts, that statutory formality requirements enhance personal autonomy by ensuring that certain express trusts are only created or enforced where settlors conclusively intend to create one. The same logic, which applies to formality requirements for the transfer of legal title, is consistent with the autonomy-enhancing role of the *Re Rose* constructive trusts. Thus, compliance with any relevant formality requirement for the transfer of the legal title is a prerequisite for a *Re Rose* constructive trust to arise, since non-compliance entails that A would not have done “everything in her power” to transfer the property to B.¹⁵⁷ Where such formality requirements have been complied with, however, then excessively requiring form as an indicator of A’s exercise of autonomy—that is, by taking the location of the legal title of the property as conclusive indication of A’s choices—unduly fetters A’s personal autonomy. *Re Rose* constructive trusts ensure that the substance of A’s choices is respected.

4.3. Inward-Looking Safeguards

Agreement-based constructive trusts safeguard A’s autonomy because they do not arise *whenever* A informally declares a trust. As discussed earlier, formality requirements protect settlor autonomy by ensuring the decisiveness of decisions. However, if B is party to the informal agreement, having made a relevant promise upon which A relies in the requisite way, then an

¹⁵³ Fuller, *supra* note 84, at 811. Hence, the outcome does not depend on the extent of detrimental reliance A incurs, as it does in the context of estoppel (England: Liew, *supra* note 55, at ch. 6; America: R3RUE, *supra* note 7, § 27 Comment c).

¹⁵⁴ In secret trusts, mutual wills, and the inter vivos context, B acquires the property directly from A; in the context of a purchase at a judicial sale or auction, B acquires the property from a third-party vendor.

¹⁵⁵ *Corin v Patton* (1990) 169 CLR 540 (Austl.), at 558: the rule “gives effect to the clear intention and actions of the donor rather than insisting upon strict compliance with legal forms. It is a reflection of the maxim ‘equity looks to the intent rather than the form’”.

¹⁵⁶ R3T, *supra* note 5, § 16 Comment c.

¹⁵⁷ Thus, in *Milroy v. Lord*, *supra* note 137, A’s attempt to transfer shares to B failed because the regulations of the company provided that such transfers could only be effectuated through compliance with certain formalities, and A had instead attempted to transfer shares by executing a deed poll: *see* observation in *Re Rose*, *supra* note 134, at 508–09.

agreement-based constructive trust is justified because it strikes a balance between both A's and B's autonomy. This explains why, where A informally declares herself trustee for another, no balancing act is called for, and therefore, without more,¹⁵⁸ the need to protect settlor autonomy prescribes that a constructive trust will not arise to compel A to carry out the informally declared trust.¹⁵⁹

Re Rose constructive trusts, on the other hand, provide two inward-looking safeguards. The first is found in the rule that a constructive trust will not arise if A “expressly or impliedly by inaction [had] manifested an intention to retain or reacquire the property free of trust”¹⁶⁰ in the event the legal title fails to be transferred to B. This ensures that A is not coerced into accepting a legal consequence against her own choice.

The second safeguard is found in the fact that a constructive trust will not arise simply because A intends to make an immediate transfer of property to B: it is necessary further for A to have “taken all the steps that would be required of [A] personally in order to implement the transfer in the intended manner”.¹⁶¹ Of course, where A's intention is manifested in such a way that it can be enforced as an express trust, then that will be the result; but otherwise the law would unduly encroach into A's autonomy if she were forced to hold her property on trust for B in the absence of an enforceable express manifestation of intention and without any other indication of a decisive decision to dispose of her property. Therefore, A will only be taken to have conclusively intended to transfer the property to B where A's (non-express) intention to do so is coupled with actions that are consistent with such an intention. This safeguards A's autonomy.

4.4. Outward-Looking Safeguards

An outward-looking safeguard for agreement-based constructive trusts is found in the requirement for B to have made a promise upon which A had relied. The law would obviously fail to protect B's autonomy as legal title holder if B were compelled to hold the property for A despite not having chosen to do so prior to acquiring the property. The rule that a constructive trust does not arise in relation to informal self-declared trusts also provides an outward-looking safeguard, by ensuring that successors to A's property are not bound to carry out the purported trust, except where an express trust was properly created. Otherwise, to compel a successor to carry out A's informally self-declared trust where the successor was not party to any agreement with A would be an intrusion on the successor's personal autonomy.

In relation to *Re Rose* constructive trusts, certainly it is A's autonomy that is primarily secured because these constructive trusts may arise even though B has no knowledge of the intended transfer.¹⁶² However, they also safeguard B's autonomy through the objective manner in which the substance of A's intention is ascertained. As discussed earlier, A must have acted in an objectively ascertainable way, by doing everything in her power to transfer the property to B. Should B come to learn of A's actions, B would objectively understand A to have conclusively and irrevocably intended to effectuate a transfer of the property to B. *Re Rose* constructive trusts therefore protect B's autonomy by providing B with the freedom to order her life on the basis of

¹⁵⁸ According to § 24(4) and Illustration 18 of that subsection of the R3T, a constructive trust will arise if A becomes incompetent, dies or commits an act of part performance, or if B relies on A's declaration before A repudiates the informal declaration of trust.

¹⁵⁹ See *supra* note 57.

¹⁶⁰ R3T, *supra* note 5, § 16 Comment c. See also *Smith v. Charles Building Services* [2006] EWCA Civ 14, where A signed stock transfer form but did not date it, and handed it to B in the course of business negotiations. No constructive trust arose, because “[b]usinessmen tend to leave dates in such documents blank where they do not intend them to have immediate effect” (at ¶ 69).

¹⁶¹ R3T, *supra* note 5, § 16 Comment c.

¹⁶² Where there is reliance on the part of B, estoppel rules may become relevant.

A's objectively ascertainable intentions. This further facilitates transactional efficacy. Thus, in the context of the transfer of shares in a private company, it has been said that "where a member [gives] a transferee a signed transfer form it [is] rational and businesslike to say that the member had transferred the share to the transferee. Whether the transferee was actually registered in the company's books [is] no longer the transferor's business. The share [is] no longer the transferor's in any meaningful business sense."¹⁶³

4.5. External Limits

It is implicit in the discussion above that the constructive trusts that we have discussed are subject to certain limits, external to the law of constructive trusts, but falling within trusts law. The operation of agreement-based constructive trusts is limited by the formality provisions governing express trusts; *Re Rose* constructive trusts are limited by the rule that equity will not assist a volunteer.¹⁶⁴ These limitations remind us that these constructive trusts do not operate in a vacuum, but within a complex framework that includes other (trusts-related) rules. Moreover, because those limiting rules themselves serve to protect personal autonomy, they also provide a warning that undue expansion of the scope of these constructive trusts would be counterproductive to the aim of enhancing autonomy. As Lord Nottingham said in the well-known case of *Cook v Fountain*:¹⁶⁵

There is one good, general, and infallible rule ...; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this; the law never implies, the Court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the Chancery do once take liberty to construe a trust by implication of law, or to presume a trust, unnecessarily, a way is opened to the Lord Chancellor to construe or presume any man in England out of his estate; and so at last every case in court will become *casus pro amico*.

Finally, the operation of these constructive trusts would also be subject to the external limits discussed above in relation to express trusts. For example, an informal agreement or a purported transfer of property pursuant to an illegal aim would not be enforced.

5. RESULTING TRUSTS

5.1. Ground-Clearing

In Anglo-American law, it is generally recognized that B holds property under a resulting trust for A's benefit in three circumstances: where B is trustee of an express trust set up by A and there is an incomplete disposal of the beneficial interest (failing trusts, or "FT" cases); where A makes a voluntary transfer of property to B (voluntary transfer, or "VT" cases), and where A provides money for the purchase of property vested in B (purchase money, or "PM" cases). But American and English law ostensibly differ on two notable issues.

The first concerns the scope of presumptions. In England, VT and PM cases give rise to a presumption of resulting trust in A's favor, subject to two situations that give rise to a presumption of a gift in B's favor, namely: where A and B are in a specified relationship¹⁶⁶ which

¹⁶³ *Hurst v. Crampton Bros (Coopers) Ltd* [2002] EWHC 1375 (Ch).

¹⁶⁴ England: *Milroy v. Lord* (1862) 4 De GF & J 264; 45 ER 1185; America: *R3T*, *supra* note 5, § 16.

¹⁶⁵ *Cook v. Fountain* (1676) 3 Swan 585, 591–92.

¹⁶⁶ For example, where A is B's father or stands in loco parentis to B (*see, e.g.*: *Hepworth v. Hepworth*

raises the presumption of advancement, and where there is a voluntary transfer of an interest in land.¹⁶⁷ It remains unclear whether FT cases engage any presumptions or give rise to a resulting trust automatically upon the failure of an express trust.¹⁶⁸ In contrast, in America the presumption of resulting trust (except where the presumption of advancement applies) arises in FT¹⁶⁹ and PM¹⁷⁰ cases, but not in VT cases.¹⁷¹

The second concerns the rationale of resulting trusts. In America, resulting trusts respond to negative intention, that is, the fact “that [B] was not, in the circumstances that have occurred, intended to have the beneficial interest”.¹⁷² Conversely, the English position is ambiguous. For example, in *Westdeutsche*, Lord Browne-Wilkinson applied *both* a positive intention analysis—a “resulting trust ... gives effect to [A’s] presumed intention” to create a trust for herself¹⁷³—and a negative intention analysis—“there is a presumption that A did not intend to make a gift to B”¹⁷⁴—as if they were two sides of the same coin. They are demonstrably not: for example, each requires a different type of evidence to affirm or rebut the presumption.

It is instructive to begin with the rationale of resulting trusts, as this affects our understanding of the relevant presumptions. There are three good reasons why the negative intention analysis explains, and ought to explain, resulting trusts in English law.¹⁷⁵

The first is that, as a matter of positive law, this view has found much judicial support in the highest courts.¹⁷⁶

Secondly, it avoids muddying the boundary between resulting trusts and express trusts. A resulting trust result can be achieved not only where a presumption of resulting trust is left unrebutted, but also where there is positive evidence that either affirms the presumption of resulting trust, in cases where that presumption operates,¹⁷⁷ or rebuts the presumption of gift.¹⁷⁸ On the positive intention analysis, resulting trusts respond to A’s (presumed or actual) positive

(1870) LR 11 Eq 10; *Shephard v. Cartwright* [1955] AC 431) or where A is B’s husband or fiancé (see e.g.: *Tinker v. Tinker* [1970] P 136; *Silver v. Silver* [1958] 1 WLR 259). See, for a general discussion, Jamie Glister, *Lifetime Wealth Transfers and the Equitable Presumptions of Resulting Trust and Gift*, 103 IOWA L. REV. 1971 (2018).

¹⁶⁷ Law of Property Act, (1925) § 60(3); *Hodgson v. Marks* [1971] Ch 892, at 933; *Lohia v. Lohia* [2001] WTLR 101; *Ali v. Khan* [2002] EWCA Civ 974; *CPS v. Malik* [2003] EWHC 660 (Admin). *But cf.* *National Crime Agency v. Dong* [2017] EWHC 3116 (Ch).

¹⁶⁸ The former view was expressed in *Westdeutsche*, *supra* note 124, at 708; the latter view was expressed in *Re Vandervell’s Trust (No 2)*, *supra* note 87.

¹⁶⁹ R3T, *supra* note 5, § 8 Comment f.

¹⁷⁰ *Id.* at § 9 Comment a.

¹⁷¹ *Id.* at § 9(2).

¹⁷² *Id.* at § 7 Comment a, although this is not entirely free from controversy: see e.g., *Bogert*, *supra* note 8, § 454, where it is asserted that the law infers A intends to create a trust for herself.

¹⁷³ *Westdeutsche*, *supra* note 124, at 708. See also Swadling, *supra* note 8; John Mee, *Presumed Resulting Trusts, Intention and Declaration*, 73 CAMBRIDGE L. J. 86 (2014).

¹⁷⁴ *Westdeutsche*, *supra* note 124, at 708.

¹⁷⁵ For other reasons, see Liew, *supra* note 55, at 4–10.

¹⁷⁶ See, e.g., *Air Jamaica Ltd v. Charlton* (1999) 1 WLR 1399, at 1412; *Lavelle v. Lavelle* [2004] EWCA Civ 223, [13]–[14]; *Twinsectra v. Yardley* (2002) 2 AC 164, [92]; *Patel v. Mirza* (2016) 3 WLR 399, [238]. See also P.J. Millett, *Restitution and Constructive Trusts* 114 L. Q. REV. 399, 401 (1998).

¹⁷⁷ See, e.g., *Hodgson*, *supra* note 167, at 933. There is sometimes an unfortunate tendency to conflate the presumption with the underlying resulting trust itself, such that the non-operation of a presumption is equated to the non-arising of a resulting trust (see, e.g., *Underhill & Hayton*, *supra* note 101, [3.3]: “resulting trusts are imposed in such cases only if there is insufficient evidence to ascertain the transferor’s intention”; *Bogert*, *supra* note 8, § 453: “changes in conveyancing methods render obsolete [VT resulting trusts]”). Because a presumption of resulting trust can be affirmed by positive evidence, as explained in the main text, the presumption of resulting trust is analytically distinguishable from the resulting trust itself.

¹⁷⁸ See, e.g., *Ali*, *supra* note 167, at [24].

intention to create a trust for herself; therefore, if actual evidence of that positive intention is available, it would simultaneously give rise to an express trust and a resulting trust (except where that positive intention cannot be enforced as an express trust, for example due to informality). This is clearly not the way the modern law works, where express and resulting trusts are treated as distinct types of trusts.¹⁷⁹ Conversely, a negative intention analysis properly distinguishes between them: actual (or presumed) evidence that B was not intended to take the beneficial interest in the property gives rise to a resulting trust, while actual (and not presumed) evidence of A's intention to create a trust for herself (or for another party) potentially gives rise to an express trust. The two types of intention may,¹⁸⁰ or may not, overlap, but each type of trust is triggered by a different type of intention.

Thirdly, and most importantly, the negative intention analysis avoids obscuring the autonomy-enhancing features of express trusts. The earlier-mentioned potential overlap between express and resulting trusts that follows from the positive intention analysis suggests that A may reap the benefits of the facilitative device of the express trust without engaging fully and meaningfully with that device, since the simple fact that A has voluntarily transferred property to B or has paid for property that is purchased in B's name may, *without more*, provide A the benefit of a presumed resulting (express) trust. This poses a problem for autonomy-based liberalism because it fails to distinguish between trusts arising as a result of A's successful utilization of the express trust facility and trusts arising in response to an absence of an enforceable intention. Moreover, the overlap between express and resulting trusts significantly reduces the scope of operation and justification of the statutory formality requirements for express trusts, which, as discussed earlier, serve to protect settlor autonomy.

Once we accept the negative intention analysis, the differences in the scope of presumptions are easily explicable: in both America and England, the presumption of resulting trust applies except in categories of cases where the facts indicate that it is highly likely that A would have intended for B to take the beneficial interest in the property. This neatly explains FT cases: A, as settlor of the express trust, is unlikely to have intended to benefit B, who is a *trustee*, with any undisposed beneficial interest under an express trust; hence, the presumption of resulting trust applies.¹⁸¹ It also explains PM cases, where it is no more reasonable to believe that A intended B to take the beneficial ownership than that A wished to retain it; hence, the presumption of resulting trust applies.¹⁸² The presumption of advancement is also explicable on the same basis: the presumption of gift applies where "[B] and [A] have a relationship that makes it probable that the [A] intends to make a gift to [B]."¹⁸³ That presumption can be rebutted by evidence that A did not intend for B to take the beneficial interest in the property.¹⁸⁴

What about VT cases? The apparent divergence between American and English law boils down simply to a difference in view as to whether a voluntary transfer is likely to indicate that A intended for B to take the beneficial interest in the property. In America the law thinks that it does: "changes in conveyancing methods" and "present day social and business customs" support the likelihood that a voluntary transfer of any property is highly likely to be

¹⁷⁹ See, e.g., R3T, *supra* note 5, § 7 Comment a.

¹⁸⁰ In relation to which, see discussion below **Section 7.1**.

¹⁸¹ If any undisposed beneficial interest can be dealt with in accordance with A's express intention, for example a reversionary provision or an intention to abandon any undisposed interest in the property such that it vests in the Crown as bona vacantia, then that intention forms part of the express trust, and the trust does not 'fail' in the first place: R3T, *supra* note 5, § 8 Comment f; *Westdeutsche*, *supra* note 124, at 708.

¹⁸² R3T, *supra* note 5, § 9 Comment a.

¹⁸³ *Id.* at § 9 Comment b. There are other competing rationales, however: see JAMIE GLISTER & JAMES LEE, HANBURY & MARTIN: MODERN EQUITY [11-027] (21st ed. 2018); Jamie Glister, *Is There a Presumption of Advancement?*, 33 SYDNEY L. REV. 39 (2011).

¹⁸⁴ R3T, *supra* note 5, § 9 Comment c.

accompanied by an intention that the recipient should take the beneficial interest in the property.¹⁸⁵ Conversely, English courts have only gone so far as to accept those reasons in relation to conveyances of land,¹⁸⁶ which explains why the presumption of resulting trust does not apply only to voluntary transfers in that context.

The negative intention analysis might trigger a further question: does this analysis necessarily entail that resulting trusts are simply a response to (the event of) unjust enrichment? If so, then unjust enrichment claims would (or ought) ordinarily lead to a trust remedy,¹⁸⁷ as is presently thought to be the case in America (although under the label of constructive trusts),¹⁸⁸ although it is not the case in England.¹⁸⁹ On a proper understanding, the answer to the question must be in the negative. As is the case with express trusts, the ascertainment of A's (lack of) intention is *objectively* determined at the time B acquires the relevant property; and the objectivity of the exercise means that whether A is adjudged to have (lacked) the relevant intention is an exercise to be undertaken against a background of pre-existing (objective) legal rules. One of those background legal rules concerns the law of unjust enrichment. For example, whether A objectively lacks the intention to give B the beneficial interest in the property where A mistakenly transfers property to B is not an answer dictated as a matter of analytical logic.¹⁹⁰ That question poses a distinct and separate question of law best left to a discussion of the aims, justifications, and policies underpinning the law of unjust enrichment.

5.2. The Role of Resulting Trusts in Enhancing Autonomy

Resulting trusts enhance autonomy by ensuring that an owner “does not lose his property unless he himself intentionally [and successfully] gives it away”.¹⁹¹ Thus, in England, a resulting trust has been called “a default trust”,¹⁹² which arises unless A can be shown to have reached a decisive and enforceable decision to dispose of her property. In America, resulting trusts have been described as arising only as “a last resort”,¹⁹³ which similarly indicates that a resulting trust will arise if A does not intend to dispose of her property. In both jurisdictions, resulting trusts act as the last bastion of personal autonomy, returning property to its owner in the absence of a decisive dispositive decision.

In doing so, resulting trusts simultaneously guard property owners against being coerced into relinquishing ownership where they have not decisively chosen to do so and secure their ability to determine for themselves how their property will be dealt with. That is, they facilitate property

¹⁸⁵ *Bogert*, *supra* note 8, § 453.

¹⁸⁶ *See, e.g., Lohia v. Lohia*, *supra* note 167, discussing s 60(3) of the Law of Property Act, (1925): “a voluntary conveyance means what it says; it is not necessary to use additional words to make it effective ... the suspicion with which gifts of land were formerly viewed, which was at least one of the underlying reasons for the presumption, would no longer have been regarded as material”.

¹⁸⁷ *See* ROBERT CHAMBERS, *RESULTING TRUSTS* 108–9 (1997); PETER BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* 100 (rev. ed. 1989).

¹⁸⁸ *See supra* note 118.

¹⁸⁹ While in England there is indeed a growing trend of categorizing trusts responding to unjust enrichment as resulting trusts (*Goff & Jones*, *supra* note 121, at ¶ 38–46 and cases cited therein), unjust enrichment does not give rise to a proprietary trust response as a matter of course.

¹⁹⁰ Thus, for example, Lord Millett has suggested, applying an objective approach to intention, that a mistaken transfer “[does] not affect [A’s] intention that the money should become the property of [B]”: P.J. Millett, *Restitution and Constructive Trusts* 114 L. Q. Rev. 399, 412 (1998). *See also* P.J. Millett, *Review Article: Resulting Trusts*, *RESTITUTION L. REV.* 283, 283, 285 (1998); *Twinsectra*, *supra* note 176, at ¶ 91; *Challinor v. Juliet Bellis & Co* [2015] EWCA Civ 59, ¶¶ 103–104.

¹⁹¹ Gardner, *supra* n 32, at 32. An “owner’s property” is read loosely to include PM cases, where the property which is paid for by A and put in B’s name is considered to be “A’s property”.

¹⁹² *Twinsectra*, *supra* note 176, at ¶¶ 100, 102.

¹⁹³ R3T, *supra* note 5, §§ 7 Comment a, 9 Comment e.

owners' pursuit of "self-chosen goals and relationships"¹⁹⁴ by "allow[ing] [them] to have private authority over [their] resources".¹⁹⁵ Therefore, owners are protected in a multitude of circumstances, for example, where there is actual evidence that A did not intend to give away her property; where A attempts but fails properly to dispose of her property; where there is no evidence as to A's intention concerning the beneficial interest in her property (as where a presumption of resulting trust remains unrebutted); and even where A was in fact *undecided* on the fate of the beneficial interest in the relevant property. A resulting trust arises in A's favor so long as A had not decisively decided to dispose of her property.

The autonomy-enhancing role of resulting trusts is reflected in the fact that they are "reversionary in nature":¹⁹⁶ they provide the mechanical remedy of invariably returning *to A* the beneficial interest that A does not intend B to have. *Returning* the property to A is precisely what is needed to protect A's autonomy where an enforceable decisive decision to dispose of the property is absent. This can be contrasted with express and constructive trusts, which enhance personal autonomy by giving effect *to positive choices*, which is why, unlike resulting trusts, they do not *return* beneficial interests, but compel the beneficial interest under property to be held *according to* the party or parties' positive intentions.

Finally, the law of resulting trusts remains autonomy-enhancing even where the presumption of gift applies. Because the starting points of both the presumption of resulting trust and the presumption of gift are diametrically opposed,¹⁹⁷ it might be tempting to conclude that the former secures autonomy better than the latter. This view is mistaken. If we accept that the presumption of gift corresponds to the likelihood, within a category of case, that A intends to give the beneficial interest to B, then switching from the presumption of resulting trust to a presumption of gift in categories of cases where A is more likely to have had such an intention is a strategy designed precisely to protect A's autonomy.

5.3. Inward-Looking Safeguards

Resulting trusts secure property owners' autonomy in a negative sense: the property is held on resulting trust for A *if* there is no good reason to hold the contrary.¹⁹⁸ Put positively, then, the fact that resulting trusts always yield to A's enforceable, decisive positive manifestations of intention provides an inward-looking safeguard against excessive interference with her personal autonomy.

There are two ways in which A's positive intention may provide a contrary reason. Most obviously, an enforceable intention to benefit B would negate the existence of a resulting trust,¹⁹⁹ since A as owner of the property is free expressly to make a gift to B. But A may also manifest a positive intention, enforceable either as an express trust²⁰⁰ (for A or a third party's benefit) or as a

¹⁹⁴ Raz, *Morality*, *supra* note 12, at 370.

¹⁹⁵ Dagan, *supra* note 24, at 8.

¹⁹⁶ R3T, *supra* note 5, § 7 Comment a.

¹⁹⁷ For example, in *Westdeutsche*, *supra* note 124, at 708, Lord Browne-Wilkinson described the presumption of advancement as a "counter-presumption" vis-à-vis the presumption of resulting trust.

¹⁹⁸ As Robert Chambers observes, "[i]t is almost always preferable to give effect to the parties' intentions, but when that is impossible, the resulting trust fulfils the ... function of ensuring that unintended benefits are returned": Robert Chambers, *Is There a Presumption of Resulting Trust?*, in Mitchell, *supra* note 53, at 286. See also *Re Vandervell's Trusts (No 2)*, *supra* note 87, at 319; *Underhill & Hayton*, *supra* note 101, at ¶ 22.13. A similar point is made in Charles Rickett, *The Classification of Trusts*, 18 NEW ZEALAND U. L. REV. 305, 317–18 (1999).

¹⁹⁹ See, e.g., R3T, *supra* note 5, § 9 Comment e; 8(1).

²⁰⁰ *Id.* at § 7 Comment a: "if it is shown that the transferor manifested in proper form an intention that the property or the interest in question is to be held in trust wholly or partially for the transferor's own benefit, the provision creates an express trust or an express-trust interest. Accordingly, ... there is no

contract,²⁰¹ and a resulting trust will not arise. Allowing resulting trusts to override such enforceable positive intentions would have the effect of overriding, rather than protecting, A's autonomy.

5.4. Outward-Looking Safeguards

Extensive as the law's protection of A's autonomy is, it would be excessive to do so at the expense of protecting B's autonomy. Thus, a resulting trust does not arise if there is good reason for B to retain the beneficial interest in the property. This is why, in the typical resulting trust scenario, B is a mere *volunteer*: as trustee (in the FT cases) or recipient of A's property (in the PM and VT cases), B does not normally provide any consideration in return for the acquisition of the interest vested in her. But if B is not a volunteer, for example where B provides "consideration for the transfer as an agreed exchange",²⁰² then a resulting trust will not arise.

Although there are no authorities directly on point, there is no doubt that A's intention is objectively ascertained, in line with the general approach of trusts law. This approach also provides an outward-looking safeguard: if A acts in such a way that indicates to B an objective intention that B should take the beneficial interest in the property, then a resulting trust ought not to arise even though A may have a subjective intention not to benefit B. After all, autonomy is relational, and A's exercise of autonomy ought not to be protected where it would unduly intrude into B's freedom to order her life on the basis of A's objectively ascertainable intentions.

5.5. External Limits

Until relatively recently, the English law of illegality provided a significant external limit on the operation of resulting trusts. Where A put property in B's name to achieve an unlawful purpose, whether A could recover the property under a resulting trust depended on whether it was necessary for A "to plead or rely on the illegality".²⁰³ Essentially, this meant that the outcome would be dictated by whether the presumption of resulting trust or advancement applied: if the former, then A would succeed due to the presumption working in A's favor without A having to rely on any tainted evidence; if the latter, then B would succeed since A would be unable to adduce the tainted evidence to rebut the presumption. This approach, which skewed resulting trust rules in an arbitrary manner, created the risk of curbing the autonomy-protecting function of resulting trusts without careful consideration of the merits of doing so. Since 2017, however, that arbitrary approach has been jettisoned in favor of a more nuanced approach, where the outcome would depend on whether "it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system".²⁰⁴ This brings English

resulting trust."

²⁰¹ This includes transferring property to discharge a prior obligation owed to B, or making a loan such that the parties are in a simple debtor-creditor relationship: see R3T, *supra* note 5, § 9 Comment e; Bennet v. Bennet (1879) 10 Ch D 474. In these cases, A does intend B to take the beneficial interest in the property.

²⁰² R3T, *supra* note 5, § 8 Comment f. The lack of consideration was a key reason why a resulting trust arose in *Prest v. Petrodel Resources Ltd* [2013] UKSC 34, ¶ 49.

²⁰³ *Tinsley v Milligan* (1994) 1 AC 340, at 376.

²⁰⁴ *Patel v. Mirza* [2016] UKSC 42, at ¶ 120: "[i]n assessing whether the public interest would be harmed in that way, it is necessary a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, b) to consider any other relevant public policy on which the denial of the claim may have an impact and c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts."

law in line with most of American law, where a similarly nuanced approach is taken.²⁰⁵ When properly applied, the element of illegality would limit A's autonomy by denying her the benefit of a resulting trust, but only where this outcome is justified, all things considered.

In New York, however, the law has taken a different course. Since 1830,²⁰⁶ resulting trusts no longer arise in PM cases except in limited circumstances. One of the main reasons for this was put thusly in the notes to the New York Revised Statutes of 1830: "[w]hy should a man purchasing lands for his own benefit, take the conveyance in the name of another? Can his motives be other than fraudulent? Or if this secret mode of acquiring title be permitted, is it not to purposes of fraud, that will be abused?"²⁰⁷ The upshot is that A's autonomy is curbed in PM cases, ostensibly due to illegality and public policy concerns.

It is submitted that such an approach is undesirable. Certainly, illegality and public policy ought to trump autonomy concerns where justified; however, the state's commitment to protecting personal autonomy ought to mean that A's autonomy is protected and enhanced *unless* there is some valid reason to hold the contrary. Certainly, a category of case exhibiting similar features which provide a valid contrary reason may justify withholding resulting trusts in cases falling within that category. However, an institutionally cynical view of A's motives in entering into a particular type of transaction surely does not itself provide a valid contrary reason. In the absence of a valid reason for abolishing resulting trusts,²⁰⁸ over-protectionism unjustifiably intrudes into A's autonomy.

6. DEFENDING THE JUSTIFICATION

The discussion so far has sought to demonstrate that trusts law is justified because it enhances personal autonomy in a unique way, with express, (some) constructive, and resulting trusts each having a crucial role to play in doing so. In this section, that justification is defended against two arguments that might be raised against it. The first is that trusts law cannot be justified without identifying the ultimate value (or values) that it allows property owners to engage with. The second is that trusts law cannot be justified in view of the morally reprehensible ends to which express trusts are commonly put in practice.

6.1. Ultimate Value(s)

Some might argue that the availability of trusts law can only *truly* be justified once the ultimate value(s) that it allows engagement with is (or are) identified. Otherwise, the argument goes, why ought the state commit resource to maintaining and developing trusts law, rather than enhancing personal autonomy through some other means (or, indeed, none at all)? After all, the argument

²⁰⁵ See, e.g., R3T, *supra* note 5, §§ 8 Comment i; 9 Comment g.

²⁰⁶ The New York Revised Statutes of 1830, § 52, now consolidated in the New York Consolidated Laws, Estates, Powers & Trusts Law § 7-1.3(a).

²⁰⁷ See *Bogert*, *supra* note 8, § 467.

²⁰⁸ Indian law provides an example of what might provide a valid reason. Indian customary law contains the device of the "benami", which is a traditional "system of acquiring and holding property and even of carrying on business in names other than those of the real owners" (*Gur Narayan v. Sheolal Singh*, (1918) AIR 5 PC 140, ¶ 9). Functionally, "benami" transactions are indistinguishable from resulting trusts: as the Privy Council held (*Gur Narayan*, *supra* note 208, ¶¶ 9–10), the benami would be recognized as a resulting trust. Resulting trusts were made available in India by virtue of §§ 81 and 82 in the Indian Trusts Act 1882. However, the high usage of "benami" transactions significantly contributed to the Indian black money problem. This led to the abolishment both of the 'benami' transaction and of resulting trusts in India (§ 7 of the Benami Transactions (Prohibition) Act, 1988).

continues, the liberal state is required only to ensure that the range of options available to individuals is *adequate*, rather than *maximized*; therefore, what really justifies the freedom to engage with the trust?

Let me attempt an answer—a tentative one, but one informed by the discussion in this paper. The search for an ultimate value or values is futile, not because there are none, but because of the plethora of values which trusts law allows engagement with; and that, therefore, the true value of trusts law—that is, its justification—lies in its facilitation and enhancement of individuals’ autonomy to engage with one or more ultimate value of their choosing.

It is first useful to observe that attempts to justify trusts law by way of one or more ultimate values are unable to account for trusts law *comprehensively*. Consider the following four justifications, gleaned from the literature: first, that trusts are essentially “contractarian”—“a deal, a bargain about how the trust assets are to be managed and distributed”;²⁰⁹ second, that trusts are “a derivative form of property” that “extends property’s coordination function”;²¹⁰ third, that trusts “[allow] those who could not, or would not, be owners to have access to the ownership institution”, that is, those to whom “ownership [is] either categorically unavailable or ... substantially costly”;²¹¹ fourth, that the trusts are characterized by the norm of fiduciary stewardship of assets.²¹² Each of these might provide a part-justification, but in each case it is easy to see how trusts law enables individuals to do much more than those justifications allow for.²¹³ Thus, the “contractarian” view cannot account for self-declarations of trust; the “property coordination” justification cannot account for cases where the trustee is one of the primary beneficiaries and is able personally to benefit from the trust property; the “ownership” justification cannot account for bare trusts where the beneficiary was the initial owner of the trust property; and the “fiduciary” explanation cannot account for cases where ouster or exemption clauses effectively preclude all or most of a trustee’s fiduciary duties. Moreover, these justifications only purport to explain express trusts; they say nothing about constructive and resulting trusts.

One response to the lack of success in identifying trusts law’s ultimate value may be to search harder; but perhaps there is no one ultimate value or set of values that provides a justification for trusts law.²¹⁴ A hint in this direction can be seen in the express trust’s immense

²⁰⁹ Langbein, *supra* note 6, at 627.

²¹⁰ MING-WAI LAU, *THE ECONOMIC STRUCTURE OF TRUSTS LAW* 181 (2011). That coordination function consists of exclusion and governance strategies, which Lau argues are embodied in the trust because it offers “governance-based exclusion” (at 164), that is, duties imposed on the trustee to exclude her from the benefits of the trust property (at 150).

²¹¹ Avihay Dorfman, *On Trust and Transubstantiation: Mitigating the Excesses of Ownership*, in *THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 350 (Andrew S. Gold and Paul B. Miller eds., 2014).

²¹² Charles Mitchell, *Stewardship of Property and Liability to Account*, 78 *CONV. & PROP. LAW.* 215 (2014).

²¹³ It must be emphasized that this is not a criticism levied against those authors, who do not claim that their justifications are all-encompassing. The point is simply that the major justifications that have been propounded are not *capable* of being all-encompassing.

²¹⁴ *Cf.* NICHOLAS MCBRIDE, *THE HUMANITY OF PRIVATE LAW: PART I: EXPLANATION* (2018), where express trusts are said to have the aim of “enhancing the RP-flourishing of those who create them” (at 175). “RP” indicates a particular vision of human flourishing found in modern Western liberal societies, one that McBride unpacks in Chapter 3. Crucially for present purposes, McBride argues that varying “forms” of the good life are not mutually incompatible, as liberals often assume, but that each form represents “*part of a bigger picture*”—that of the RP (at 108–14). The RP is therefore presented as a “meta-ultimate value” of sorts. There is scope to question whether McBride’s argument withstands scrutiny on its own terms (*see, e.g.*, Joaquín Reyes, *The Humanity of Private Law. Part I: Explanation*, 10 *JURIS.* 597 (2019); Yan Kai Zhou, *Book Review*, *MOD. L. REV.* (2020) (advanced access: <https://doi.org/10.1111/1468-2230.12519>)). But, even if we accept its validity, the RP is too wide and non-specific as a value-level justification for express trusts. Property owners can utilize express trusts to

flexibility, which allows it to be tailored to suit a multitude of purposes, thereby allowing settlors to engage with any among the plethora of ultimate values. For example, a complex trust of a long duration would engage the “fiduciary” and “property coordination” features of trusts; a trust arising out of a contractual relationship would be susceptible to the “contractarian” analysis; and a trust set up for infants or vulnerable individuals may be explained on the basis of access to the ownership institution. Each trust is different because property owners are free to use the express trust device to achieve that which they desire, depending on the circumstances.

If this is right, then we might say that trusts law is justified not because it allows engagement with any particular ultimate value (or a defined set of values), but because it allows engagement with any or any combination of ultimate values in ways that cannot be replicated (or replicated as readily) using other facilitative devices such as contracts, wills, and property. That is to say, without trusts law, the law would provide property owners with (in Razian terms) an *inadequate* range of options, because the multitude of aims that trusts law allows property owners to achieve could not otherwise be so pervasively and easily realized. Therefore, trusts law’s justification lies in the fact that it significantly enhances property owners’ autonomy.

This conclusion brings to mind JE Penner’s important paper “Untheory of the Law of Trusts”.²¹⁵ In that paper, Penner suggests that there is no theory of trusts law. By “theory” he means that which, through debates or disagreements, aims to reveal “core principles, which can be elaborated in different contexts to justify the particular rules of law”,²¹⁶ those core principles of which also “reveal the moral or economic or other ‘commitments’” of an area of law.²¹⁷ One of the main reasons he gives for his “untheory” view is that trusts law is “essentially facilitative”: it “is not here to tell us what morality requires us to do or not do”.²¹⁸ Therefore:²¹⁹

Understood as a legal device of this kind, it should not be surprising that one almost never encounters legal disagreement as to its core rules or principles, for as an artificial, facilitative construct of this kind, to dispute the core rules or principles would be to dispute the existence of the device itself. It is nothing but its core rules and principles.²²⁰

The argument in this paper finds much common ground with Penner: both argue that trusts law is not organized around ultimate values that it allows property owners to achieve, but operates at the “second-order”,²²¹ “derivative”²²² level, facilitating property owners’ autonomy to engage with whatever ultimate value or values they so desire. But there is one significant point of departure. The argument in this paper presents the enhancement of personal autonomy as the justification—the “theory”—of trusts law. And it seems clear that it *is* capable of being understood as such, contrary to Penner’s argument, because it *can* shed light on the moral commitments of trusts law, and that there *can* be deep and meaningful debates and disagreements about it. The clearest example relates to constructive and resulting trusts. Do they evince a commitment to facilitating personal autonomy, as argued in this paper, or does their

achieve one or a number of values as desired, according to the circumstances, and this important feature of express trusts is best brought out by recognizing that the enhancement of personal autonomy lies at the heart of express trusts, rather than by reference to an all-encompassing meta-ultimate value.

²¹⁵ Penner, *supra* note 3.

²¹⁶ *Id.* at 655.

²¹⁷ *Id.* at 656.

²¹⁸ *Id.* at 665.

²¹⁹ *Id.* at 666.

²²⁰ Elsewhere, Penner suggests that the “core principles” of trusts law—for example, that beneficiaries have beneficial interests that bind third parties, that trustees must keep property separate and must account to beneficiaries, and that trusts are not contracts—are themselves “the central organising rules”: Penner, *supra* note 3, at 664–65.

²²¹ See *supra* note 17.

²²² See *supra* note 18.

“theory” lie somewhere else, a view towards which Penner himself might perhaps be inclined?²²³ Therein lies a “theoretical” disagreement, properly so-called. But, even in relation to express trusts, with which Penner is exclusively concerned in his paper, the enhancement of personal autonomy can supply the underlying “theory”. Thus, although it may not be disputed that the express trust is facilitative in nature, there are outstanding questions over (for example) the *extent* to which it enhances autonomy differently from other areas of private law, the extent to which it ought to do so, and the limits and necessary safeguards of settlor autonomy. The answers to these questions will influence how we understand existing rules and how courts develop the law. And the answers to these questions can only be found and refined through debates and disagreements about the *theory* of express trusts.

6.2. Ultimate Ends

It is a well-rehearsed criticism levied against the express trust that it allows property owners to achieve morally contentious aims such as tax avoidance and assets protection—the shielding of assets against those who may have a legitimate claim against them, for example, creditors, ex-spouses, and the like. In view of this criticism, it might be argued that the justification propounded in this paper—the enhancement of personal autonomy—is the very thing that makes express trusts unjustified. The argument is that this leads to an “autonomy overkill” of sorts, since it sanctions the utilization of the express trust device to achieve those morally contentious ultimate ends.

Those concerns may well be valid. However, I suggest that those ultimate ends do not make *trusts law* unjustified; or, to put the same point differently, it is unnecessary for a justification of *trusts law* to take into account the ends towards which express trusts may be put in practice. This is because, as a facilitative body of law, express trusts are ill-suited to deal with the question of ultimate ends. This point can be made by observing the difficulty the law would face in developing internal trusts law rules or approaches to address those undesirable ultimate ends without eroding the autonomy that the express trust provides to others who wish to utilize them for other non-controversial aims.²²⁴

Consider three ways in which trusts law might offer internal solutions to the tax avoidance and asset protection problems: first, by requiring a compulsory trusts register; second, by rendering invalid trusts that avoid (as opposed to evade) tax or that are set up primarily for asset protection purposes; third, by allowing only state-regulated institutions or licensed individuals to act as trustees. Although these efforts may well reduce the instances of tax avoidance or asset

²²³ For example, Penner has written of *Rochevoucauld*, *supra* note 145, one of the agreement-based constructive trusts cases, that the trust arises because B (rather than A) as “settlor of the trust” had effected a self-declaration of trust (J.E. PENNER, *THE LAW OF TRUSTS* ¶ 6.12 (10th ed. 2016)), contrary to the analysis in this paper. He has also suggested, contrary to the analysis in this paper, that constructive trusts may allow the law to “impose the result most justified in the circumstances—in some cases the constructive trust should be a bare trust for A ... in others it should ... [carry] out A’s intention” (Penner, *supra* note 223, at ¶ 6.11).

²²⁴ Bennett and Hofri-Winogradow seem to argue the same, where they write that “[t]rusts should exist, but external legal regimes should step in to prevent their subversion, by way of a rule-based closing of loopholes or a general anti-subversion standard. It might be said that this is preferable to a closed list of permitted trust types, because none of the autonomy provided by the trust is thereby taken away” (see Mark Bennett & Adam Hofri-Winogradow, *Against Subversion: A Contribution to the Normative Theory of Trust Law*, OXFORD J. LEGAL STUD. (forthcoming). References are to draft at 37–38, <https://ssrn.com/abstract=3579955>). But earlier in their paper, they criticize existing *trust law* theory for not attempting to justify the subversive use of trusts (See Parts 3 and 4); and in their concluding section they suggest that “trust law should ... be developed ... to control [subversion]” (last page). These latter points are inconsistent with the former.

protection, they have an overreaching effect. Thus, a trust register might curb a property owner's autonomy to informally enlist another to achieve her goals; vetting trusts according to their purposes risks invalidating trusts where a morally contentious (but not illegal) aim is simply an unintended side effect of a settlor's primary purpose, not to mention the difficulties courts would face in ascertaining settlors' (subjective) intentions; and regulating trustees would drastically confine the use of express trusts only to those who have substantial wealth and can afford to engage those approved trustees.

In short, it would be self-defeating *for trusts law* to provide solutions, because it risks eroding settlors' autonomy that express trusts set out to facilitate in the first place. A better approach, which is generally speaking the law's present strategy, is to recognize properly established trusts as valid and enforceable, but to leave the heavy lifting to other areas of law such as tax law, insolvency law, family law, and so on. *Those* areas of law are better able to provide a targeted response without eroding the autonomy provided for by trusts law.

Of course, the argument is not that trusts law should be made available *at any cost*. For example, if there is empirical evidence that express trusts are overwhelmingly used to sanction illegal (as opposed to morally opprobrious) acts, or if the empirical evidence indicates that the costs of creating targeted regulatory measures are unduly burdensome, then there might be an argument for doing away with trusts law. However, the fact that trusts law plays the crucial role of enhancing personal autonomy in a unique way sets a very high threshold for such drastic action—one which Anglo-American law has not (and may never) come close to breaching.

7. REFLECTIONS

The conclusion that trusts law enhances personal autonomy in a unique way helps to advance our understanding of the law in a number of important respects, three of which are reflected upon in this section.

7.1. Hierarchy of Trusts

It is implicit in the earlier discussion that there is value in identifying whether a trust is an express, constructive, or resulting trust. This taxonomical approach towards trusts law, while sometimes derided as a “bewildering ... preoccupation”,²²⁵ is of fundamental importance in view of the autonomy-enhancing function of trusts law: the type of trust enforced reflects the particular autonomy-based *reason* for the trust, which justifies its enforcement. As *Bogert* reminds us, “it will be helpful if the history and theory of each is kept clearly in mind and the same name is applied to the same concept or transaction throughout”.²²⁶

The point can be taken further by asking: what is the appropriate hierarchy of trusts? The need to determine the hierarchy of trusts obviously arises only where there is a choice to be made. Take the simple case where, after securing B's agreement to hold A's shares on trust for A, A properly declares a trust to that effect and transfers the shares to B. The trust might be categorized as an express trust, since no formality requirements are necessary because the property is not land; but it might also be categorized as a constructive or resulting trust, the former on the basis of A's reliance on B's promise, and the latter on the basis that this is a VT case and A does not intend for B to take the beneficial interest. Instinctively, one would say that this is an express trust:²²⁷ but, the precise reason for this warrants explanation. From an

²²⁵ Paul Finn, *Common Law Divergences*, 37 MELBOURNE U. L. REV. 509, 513 n.24 (2013).

²²⁶ *Bogert*, *supra* note 8, § 451.

²²⁷ This is confirmed, for example, in § 9 Comment c R3T: “[w]here one person pays the purchase price and directs that the property be transferred to a natural object of the payor's bounty, the rule of this

autonomy point of view, the answer is straightforward: an express trust categorization indicates that A, as a property owner, has the freedom to and successfully utilizes the trust device in dealing unilaterally with *her own property*. A property owner's autonomy finds its greatest meaning when the law recognizes that she is free to do so even without first securing a counterparty (B)'s agreement (which is required for an agreement-based constructive trust); and the commitment to enhancing personal autonomy entails that any positive indication of intention is directly recognized as the source of the trust, rather than simply giving recognition to what A did not intend (i.e. negative intention, to which resulting trusts respond).

What about the relative hierarchy between constructive and resulting trusts? For example, suppose A and B reach an informal agreement that B will hold A's land on trust for A: the trust cannot be an express trust due to the informality of the agreement, but there are the elements of promise and reliance necessary for a constructive trust, and a negative intention necessary for a resulting trust. It might be thought that the categorization in this case does not matter because both trusts are precluded from the statutory formality requirements by s 8 of the Statute of Frauds; but this is mistaken from an autonomy point of view. The fact that B made a promise upon which A relied ought to be recognized as the reason for which the arrangement is enforced, since this gives due regard to A's and B's freedom to engage one another on the path to realizing their respective goals. A resulting trust analysis, conversely, would underemphasize the law's commitment to enhancing autonomy, since merely giving effect to A's negative intention would under-represent and overlook the parties' positive exercise of autonomy.

Does this hierarchy also apply where an informal agreement provides that B will hold land on trust *for C*? Here, a difference in categorization may lead to a different outcome: a constructive trust is capable of compelling B to hold for C, while the effect of a resulting trust is simply the return of the land to A. The position taken in the R3T²²⁸ is that, unless A has become incompetent or has died, the appropriate response is to return the property to A²²⁹ because "[i]t prevents unjust enrichment and yet gives force to the statute of frauds by not enforcing a trust that fails to satisfy the statutory requirement". In England, these reasons are also often cited for the view that the property ought to be returned to A,²³⁰ although a relatively recent Court of Appeal case has gone the other way and held that a constructive trust arises in C's favor.²³¹ Some American states have even taken the statute of frauds argument further, holding that no trust arises and B may retain the property free from any trust.²³²

It is clear, however, that a constructive trust outcome is not prevented by the black letter of the statute of frauds: "the Statute also allows trusts to be implied which indicates that the legislatures did not intend to provide that all relief on real property trust theories must be dependent on the existence of written evidence. The Statute expressly permits constructive trusts to be proved by oral evidence."²³³ From an autonomy perspective, the reason for this is that the purpose of formalities is to protect settlors' unilateral exercise of autonomy to create trusts; they do not prevent property owners enlisting others (even informally) in order to achieve their goals. Once the statute of frauds concern is overcome, it becomes clear that a constructive trust for C's benefit is the appropriate outcome. As we have seen, trusts law is committed to enhancing autonomy by giving legal effect to decisive decisions. Provided that B's promise to

subsection does not apply if the payor properly manifests an intention to create an express trust for one or more third parties. A resulting trust does not arise in favor of the payor, nor can the transferee keep the property free of trust, for there is instead an express trust for the third person."

²²⁸ R3T, *supra* note 5, § 24(3). *See also* comment h.

²²⁹ The R3T categorizes such a trust as a "constructive trust", but the argument made in the main text applies equally to the question of whether B ought to hold the property for A's or C's benefit.

²³⁰ *See* discussion in Liew, *supra* note 55, at 73–74.

²³¹ *De Bruyne v. De Bruyne* [2010] EWCA Civ 519.

²³² *Bogert, supra* note 8, § 495.

²³³ *Bogert, supra* note 8, § 497.

hold on trust for C is clearly expressed, A's reliance on B's promise indicates the requisite decisive decision to divest herself of the property in C's favor. Enhancing A's personal autonomy in the circumstances therefore requires that A's decision is fully respected; doing any less detracts from the commitment to enhancing A's autonomy. The desire to reverse any so-called unjust enrichment, even if a valid aim, does not take precedence over the protection of A's autonomy provided for by constructive trusts in these circumstances.

7.2. Trusts Law within Private Law

In the introductory section of this paper it was noted that, at least on one view, trusts law is an "optional extra" within a legal system: it does not provide a minimum form of protection for persons, property, or promises. In the light of the autonomy-enhancing justification of trusts law, it is useful now to revisit that point: is trusts law really a *necessary* component of private law?

In the first place, the discussion in this paper indicates that this question is posed too widely. Resting alongside the facilitative devices of contracts, wills, and property rules is not trusts law as such, but more specifically *express trusts*. To compare those devices with constructive and resulting trusts is to compare apples with oranges, because constructive and resulting trusts are not devices intended to be utilized *by individuals* to secure their desired goals or ends; rather, they are devices used *by the state* (that is, courts) to secure the personal autonomy of its citizens. Certainly, nothing prevents enlightened individuals from intentionally tailoring their actions in such a way to "ensure" a constructive or resulting trust outcome. However, it remains a fact that they do not function to protect property owners' autonomy to set up a facilitative trust device. Therefore, the aims and functions of constructive and resulting trusts cannot be replicated or reduced to any single or a combination of other facilitative devices available in the law. Crucially, this indicates that it is *necessary* for any liberal state committed to enhancing personal autonomy to have devices similar to agreement-based constructive trusts, *Re Rose* constructive trusts, and resulting trusts in order to protect property owners' relational autonomy and to allow them to take decisive decisions for themselves concerning their own property.

What about express trusts? Dagan, in writing about private law generally, argues that private law is justified in vesting on individuals normative powers "because they are ... *crucial* to their self-determination".²³⁴ He applies this statement to property and contracts law, suggesting that "they are particularly valuable conventions" that "any humanist polity must enact".²³⁵ The same, of course, cannot be said of express trusts: many civilian jurisdictions do not recognize any form of trusts law, but it cannot be denied that they are a "humanist polity".

However, as we have seen, from an autonomy perspective the facility of the express trust is not justified on the basis of the uniqueness of its rules and outcomes, that is, on the ground that they cannot fully be replicated by other facilitative devices (although this much is true), but on the basis that it provides additional options for owners to deal with their property. After all, the liberal state's duty is to facilitate the conditions of autonomy, one of which is the provision of an adequate range of options; it is not to take a partial view as between different morally good and incompatible rules and outcomes. If this is correct, then the availability of express trusts indicates that the criterion for justifying private law does not lie in how *crucial* to self-determination a particular rule or area of law is. Rather, private law is justified if the options it provides enhance autonomy by securing the conditions of autonomy (including the provision of an adequate range of options), and if, when the available options are engaged, the rules (governing the rights, duties, powers, remedies, etc.) reflect a "reciprocal respect for self-determination".²³⁶

²³⁴ Dagan, *supra* note 24, at 5 (emphasis added).

²³⁵ *Id.* at 5.

²³⁶ Dagan, *supra* note 24, at 6.

From a wider perspective, then, the fact that trusts law exists is significant evidence that private law is not satisfied merely with securing personal independence in a negative, minimal, or disengaged sense; rather, it is committed proactively to enhancing the scope for individuals to self-determine as part-authors of their own lives. Private law does not leave interpersonal interactions between private individuals to the forces of nature, but actively facilitates their flourishing.²³⁷

7.3. A Question of Degree

It is well-known that modern trusts law was historically a product of English law. Indeed, the trust was famously lauded by F.W. Maitland as being “the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence”.²³⁸ It is unsurprising, therefore, that trusts law has made its way into the legal systems of jurisdictions which have adopted (either wholly or partly) the common law system. But, the influence of trusts law goes further: an increasing number of civilian legal systems are making available the express trust through statutory activism,²³⁹ including those that might not be described as reflecting a liberal ethos (at least in the Western sense).²⁴⁰ If we take a step back and look at the state of trusts law *globally*, it is observable that the applicable trusts law rules differ from jurisdiction to jurisdiction. Some of those differences are significant: for example, certain (mostly civilian) jurisdictions do not recognize constructive or resulting trusts,²⁴¹ regulate the class of individuals allowed to act as trustees, or require registration of certain trusts on a public register in order for trusts to be enforceable against third parties. Other differences are relatively more subtle: for example, jurisdictions may differ as to the recognition of non-charitable purpose trusts or bare trusts. Given these differences, it might be asked whether the argument in this paper—that trusts law enhances autonomy—is also capable of explaining trusts law more globally.

It seems clear that the answer is in the affirmative. So long as any legal system makes available express trusts (of whatever form), it actively facilitates property owners’ exercise of autonomy by allowing them additional options as to how they deal with their own property, and to that extent its trusts law is autonomy-enhancing. But it is also important to remember that the extent to which personal autonomy is enhanced is inherently a question *of degree*, and therefore the differences that exist in relation to specific trusts law rules reflect the different *extents* to which these jurisdictions are committed to enhancing personal autonomy, all things considered.

Regardless of those differences, once it is explicitly recognized that trusts law is inherently autonomy-enhancing, then this provides each jurisdiction with a structured approach for engaging in debates and discussions concerning the development of their laws. Rather than dealing with each trust law rule (or each group of rules) solely on its (or their) own terms, a more holistic approach can be taken: it would first be necessary to determine the extent or degree to which the state is committed to enhancing personal autonomy, before assessing trust law rules in the light of the answer to that question.

²³⁷ See Hanoch Dagan, *The Challenges of Private Law: A Research Agenda for an Autonomy-Based Private Law*, in *PRIVATE LAW IN THE 21ST CENTURY* (Kit Barker et al. eds, 2017).

²³⁸ F.W. MAITLAND, *SELECTED ESSAYS* 129 (1936).

²³⁹ On this topic, see generally: MAURIZIO LUPOI, *TRUSTS: A COMPARATIVE STUDY* (2000); *THE INTERNATIONAL TRUST* (David Hayton ed., 2011); *RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW* (Lionel Smith ed., 2012); *TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS* (Lusina Ho & Rebecca Lee eds., 2013).

²⁴⁰ A stark example is the provision of trusts law in China PRC: see the Chinese Trust Law 2001.

²⁴¹ See Ying-Chieh Wu, *Constructive Trusts in the Civil Law Tradition*, 12 *J. OF EQUITY* 319 (2018).

8. CONCLUSION

In conclusion, trusts law can be justified on the basis that it is *comprehensively* autonomy-enhancing. Its *availability* demonstrates that the state is committed to securing and enhancing personal autonomy via different perspectives: through the provision of a facility for property owners to unilaterally deal with their own property (express trusts), through allowing individuals the freedom to enlist others in their pursuit of their goals (agreement-based constructive trusts), and through ensuring that only conclusive choices have long-lasting legal effects (*Re Rose* constructive trusts and resulting trusts). The *enforcement* of trusts law rules represents a justified form of coercion: “if the government has a duty to promote the autonomy of people the harm principle allows it to use coercion both in order to stop people from actions which would diminish people’s autonomy and in order to force them to take actions which are required to improve peoples’ options and opportunities”.²⁴² That coercion is confined only to situations that justifiably call for it: thus, trusts law contains specific rules that act as inward-looking and outward-looking safeguards, ensuring legal consequences flow only where they are called for.

In the same way that autonomy is not the ultimate value within a liberal political morality but interacts intricately with other liberal values, so does trusts law not operate within a vacuum but against a background of various legal and non-legal norms and rules. Therefore, concerns external to trusts law may legitimately impose limits on the autonomy-enhancing function of trusts law. However, those limits ought properly to be justified in order to prevent them from unduly encroaching into the autonomy of individuals.

²⁴² Raz, *Morality*, *supra* note 12, at 416.