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Justifying Anglo-American Trusts Law

Ying Khai Liew

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JUSTIFYING ANGLO-AMERICAN TRUSTS LAW

YING KHAI LIEW*

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 Article 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 (agreement-based constructive trusts), and ensures that only conclusive choices have long-lasting legal effects (Re Rose constructive trusts and resulting trusts).

* Associate Professor in Law, University of Melbourne. I thank Michael Bryan, Matthew Harding, Lusina Ho, Charles Mitchell, and Ying-Chieh Wu for their generous comments on earlier drafts. I am also grateful to Ken Kiat and Robin Gardner at the MLS Academic Research Service for research assistance. This Article was presented at an online staff seminar at the Melbourne Law School in May 2020 and the Global Seminar on Private Law Theory organized by Lionel Smith in July 2020, and I also thank the participants for their valuable contributions.

TABLE OF CONTENTS

INTRODUCTION	688
I. AUTONOMY-BASED LIBERALISM	692
<i>A. Two Responses to Value Pluralism</i>	692
<i>B. Trusts Law as Autonomy-Enhancing: An Overview</i>	694
II. EXPRESS TRUSTS	697
<i>A. The Role of Express Trusts in Enhancing Autonomy</i>	697
1. <i>Unilateral vs. Bilateral Intention</i>	700
2. <i>Informal Trusts</i>	702
3. <i>The Rule in Saunders v. Vautier</i>	704
4. <i>Irreducible Core Content of Trusts</i>	708
<i>B. Inward-Looking Safeguards</i>	710
<i>C. Outward-Looking Safeguards</i>	714
<i>D. External Limits</i>	717
III. CONSTRUCTIVE TRUSTS.....	718
<i>A. Ground-Clearing</i>	718
1. <i>Remedy?</i>	720
2. <i>Unjust Enrichment?</i>	722
<i>B. The Role of Constructive Trusts in Enhancing</i> <i>Autonomy</i>	726
<i>C. Inward-Looking Safeguards</i>	729
<i>D. Outward-Looking Safeguards</i>	730
<i>E. External Limits</i>	731
IV. RESULTING TRUSTS	732
<i>A. Ground-Clearing</i>	732
<i>B. The Role of Resulting Trusts in Enhancing</i> <i>Autonomy</i>	738
<i>C. Inward-Looking Safeguards</i>	740
<i>D. Outward-Looking Safeguards</i>	741
<i>E. External Limits</i>	742
V. DEFENDING THE JUSTIFICATION	744
<i>A. Ultimate Value(s)</i>	744
<i>B. Ultimate Ends</i>	749

2021] JUSTIFYING ANGLO-AMERICAN TRUSTS LAW	687
VI. REFLECTIONS	751
<i>A. Hierarchy of Trusts</i>	751
<i>B. Trusts Law Within Private Law</i>	755
<i>C. A Question of Degree</i>	757
CONCLUSION	759

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 sidelined.¹ 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.² 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”;³ 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.”⁴ After all, numerous fully functioning civilian jurisdictions do not have trusts law.⁵ On this view, trusts law is simply an optional extra that exists for instrumental purposes, and whose existence as such hardly bears justifying.⁶

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 purpose.⁷ For example, there is a tendency conceptually

¹ MATTHEW HARDING, CHARITY LAW AND THE LIBERAL STATE 2 (2014).

² Thus, for example, many civilian legal systems practice those areas of law but do not recognize the trust.

³ H.L.A. HART, CONCEPT OF LAW 199 (2d ed. 1994).

⁴ RANDY E. BARNETT, THE STRUCTURE OF LIBERTY: JUSTICE AND THE RULE OF LAW 200 (2d ed. 2014).

⁵ See John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 670 (1995) [hereinafter Langbein, *Contractarian Basis*].

⁶ J.E. Penner, *An Untheory of the Law of Trusts, or Some Notes Towards Understanding the Structure of Trusts Law Doctrine*, in 63 CURRENT LEGAL PROBLEMS 653, 666 (George Letsas & Colm O’Cinneide eds., 2010). For a further discussion, see *infra* note 201.

⁷ 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 Article can be explained on the basis that charitable trusts are radically different from private express trusts

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.⁸ Another example can be found in the Restatements of the American Law Institute, where

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:

[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.

KATHRYN CHAN, THE PUBLIC-PRIVATE NATURE OF CHARITY LAW 181 (2016) (emphasis in original).

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 generally HARDING, *supra* note 1). Rather, charitable trusts reflect unique concerns that call for a unique justification. HARDING, *supra* note 1, at 1. 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 1, ch. 3.

On the other hand, the omission of statutory trusts from the scope of this Article 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. *See* Langbein, *Contractarian Basis*, *supra* note 5, at 663.

⁸ *See* RESTATEMENT (THIRD) OF TRS. § 1 cmt. e (AM. L. INST. 2001).

constructive trusts are substantively treated in the Restatement (Third) of Restitution and Unjust Enrichment (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.”⁹ Further examples can be found in scholarly writings that argue that self-declared express trusts are conceptually unlike other express trusts;¹⁰ that constructive trusts are not trusts at all;¹¹ and that resulting trusts are essentially express trusts.¹² Underlying all these examples is one common assumption: that express, constructive, and resulting trusts share little in common with one another.¹³ 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 disconnected but interconnected.¹⁴ 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;¹⁵ and purported express trusts that fail to comply with a formality requirement may yet be enforced as constructive trusts.¹⁶ Most importantly, trusts (of whatever nature) confer significant rights and powers and impose stringent duties.¹⁷ 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.

⁹ *Id.*

¹⁰ See, e.g., Langbein, *Contractarian Basis*, *supra* note 5, at 675.

¹¹ William Swadling, *The Fiction of the Constructive Trust*, in 64 CURRENT LEGAL PROBLEMS 399, 400 (George Letsas et al. eds., 2011) [hereinafter Swadling, *Fiction*]; RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 cmt. b (AM. L. INST. 2010).

¹² William Swadling, *Explaining Resulting Trusts*, 116 L.Q. REV. 72 (2008) [hereinafter Swadling, *Explaining*]; AMY MORRIS HESS ET AL., BOGERT’S THE LAW OF TRUSTS AND TRUSTEES § 454 (2019) [hereinafter HESS ET AL., BOGERT’S TRUSTS] approximates to this position.

¹³ See Swadling, *Fiction*, *supra* note 11, at 399.

¹⁴ See RESTATEMENT (THIRD) OF TRS. § 1 cmt. e (AM. L. INST. 2001).

¹⁵ See *id.* § 7 cmt. b.

¹⁶ *Id.* § 8 cmt. h.

¹⁷ See *id.* § 2.

This Article 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.¹⁸ To begin with, Part I of this Article does two things. First, it presents a (necessarily brief) sketch of how autonomy features within a particular conception of liberalism.¹⁹ 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.²⁰ Parts II–IV 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.²¹ As this Article covers Anglo-American²² trusts law, some doctrinal ground-clearing exercise will precede the autonomy discussion where the trusts laws in these jurisdictions ostensibly differ.²³ In Part V, the proposed justification is strengthened by defending it against two possible counterarguments.²⁴ Part VI reflects on three ways that the analysis may further our understanding of trusts law.²⁵ This Article concludes in the final two paragraphs.

¹⁸ To be sure, this Article 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 this Article 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. This Article 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.

¹⁹ See *infra* Section I.A.

²⁰ See *infra* Section I.B.

²¹ See *infra* Parts II–IV.

²² 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 Article, “American” trusts law is generally taken to be that which is reflected in the R3T and R3RUE. See *supra* notes 8–11 and accompanying text.

²³ See *infra* Section IV.A.

²⁴ See *infra* Part V.

²⁵ See *infra* Part VI.

I. AUTONOMY-BASED LIBERALISM

A. *Two Responses to Value Pluralism*

The liberal tradition of political morality has generated a rich diversity of perspectives.²⁶ Underlying most of these perspectives lies the recognition of value pluralism.²⁷ 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.²⁸ This insight has engendered two main responses from liberals, namely “political” and “comprehensive” liberalism,²⁹ each of which entails a different conception of the role of the state within a liberal polity.³⁰

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.³¹ Dealing with that background fact through the liberal prisms of equality and toleration, political liberalism argues that the state’s proper

²⁶ Jeremy Waldron, *Liberalism, Political and Comprehensive*, in HANDBOOK OF POLITICAL THEORY 89, 91 (Gerald F. Gaus & Chandran Kukathas eds., 2004).

“[L]iberalism” 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 that 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.

Id.

²⁷ JOSEPH RAZ, THE MORALITY OF FREEDOM 133 (1986) [hereinafter RAZ, MORALITY].

²⁸ *Id.*; JOSEPH RAZ, THE PRACTICE OF VALUE 43 (2003); Isaiah Berlin, *Two Concepts of Liberty*, in ISAIAH BERLIN: LIBERTY 216 (Henry Hardy ed., 1969).

²⁹ See generally Waldron, *supra* note 26; 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, the diversity of liberal views may mean that it is more accurate to speak of a *spectrum* of perspectives rather than opposing ones. *The Diversity of Comprehensive Liberalisms*, in HANDBOOK OF POLITICAL THEORY, *supra* note 26, at 89, 91. However, the rough-and-ready distinction serves as important checkpoints along the spectrum, against which trusts law can be compared or contrasted.

³⁰ See Waldron, *supra* note 26, at 91.

³¹ See RAZ, MORALITY, *supra* note 27, at 132–33.

role is one of non-interference or neutrality³²: it must not assert any influence concerning incompatible forms of the morally good life, so that no one particular value is preferred over another.³³ As John Rawls describes it, “[p]olitical liberalism ... aims for a political conception of justice as a freestanding view.”³⁴ 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.³⁵

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.”³⁶ 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.³⁷ 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.³⁸ Certainly, the state must maintain a neutral stance in relation to the different morally good and incompatible forms of life.³⁹ 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”⁴⁰ or “derivative”⁴¹ value: it is “not an independent ... ideal” that is separable from the multitude of

³² See, e.g., Waldron, *supra* note 26, at 92; Gardbaum, *supra* note 29, at 385–86; BRUCE A. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980); JOHN RAWLS, POLITICAL LIBERALISM xix (1993); BRIAN BARRY, JUSTICE AS IMPARTIALITY (1995).

³³ Waldron, *supra* note 26, at 92.

³⁴ RAWLS, *supra* note 32, at 10; see also CHARLES LARMORE, THE MORALS OF MODERNITY 125 (1996); Gardbaum, *supra* note 29, at 386.

³⁵ See RAZ, MORALITY, *supra* note 27, at 130.

³⁶ Waldron, *supra* note 26, at 91.

³⁷ *Id.* at 91.

³⁸ See Gardbaum, *supra* note 29, at 401.

³⁹ *Id.* at 385–86.

⁴⁰ *Id.* at 394.

⁴¹ HARDING, *supra* note 1, at 53.

valuable forms of life available to be chosen.⁴² That is, autonomy facilitates choice; it is not one of the subject matters of that exercise of choice.⁴³ 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,⁴⁴ namely: individual capabilities, an adequate range of options, and independence (freedom from coercion and manipulation).⁴⁵ Indeed, for Raz, states that fail “to provide the conditions of autonomy” for its citizens cause harm to them.⁴⁶ 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 constraints on autonomy generated in and by society.”⁴⁷

B. Trusts Law as Autonomy-Enhancing: An Overview

For the purposes of this Article, 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 this Article’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.⁴⁸ 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 to enter into meaningful legal relations with others.⁴⁹ At best, trusts law has an *enhancing* potential, in that it allows people to form *more complex and sophisticated* legal relations

⁴² RAZ, MORALITY, *supra* note 27, at 395.

⁴³ *Id.*

⁴⁴ *Id.* at 372.

⁴⁵ *Id.* at 372.

⁴⁶ *Id.* at 415–16 (modifying J.S. Mill’s famous “harm principle”).

⁴⁷ Gardbaum, *supra* note 29, at 401.

⁴⁸ See Penner, *supra* note 6, at 671, 674.

⁴⁹ See Langbein, *Contractarian Basis*, *supra* note 5, at 670.

with others.⁵⁰ 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 noninterventionist.⁵¹

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.⁵² 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.⁵³ 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.⁵⁴

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*.⁵⁵ 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.⁵⁶ 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."⁵⁷ So the second line of enquiry

⁵⁰ See *id.* at 643.

⁵¹ See *supra* notes 48–50 and accompanying text.

⁵² See Waldron, *supra* note 26, at 91.

⁵³ See RESTATEMENT (THIRD) OF TRS. § 2 cmts. c, d (AM. L. INST. 2001).

⁵⁴ See *id.* § 2 cmt. b.

⁵⁵ For a further discussion, see *infra* Section II.B.

⁵⁶ RAZ, MORALITY, *supra* note 27, at 391.

⁵⁷ *Id.* 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

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*.⁵⁸ Trusts always involve at least two parties; one cannot simultaneously be the sole trustee and sole beneficiary.⁵⁹ Trusts are therefore always relationships.⁶⁰ 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*.⁶¹ 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.⁶² 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."⁶³ Thus, other considerations lying beyond the scope of autonomy might validly constrain the autonomy-enhancing function of trusts law in appropriate

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 96, 98 (Gregory Klass et al. eds., 2014) (citation omitted).

⁵⁸ For a further discussion, see *infra* Section II.C.

⁵⁹ See RESTATEMENT (THIRD) OF TRS. § 70 (AM. L. INST. 2001).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² See Hanoch Dagan, *Autonomy and Pluralism in Private Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 177, 191 (Andrew Gold et al. eds., 2020) (explaining this notion is rooted in the concept of "relational justice"—that private law is "premised on the right to reciprocal respect for self-determination").

⁶³ HARDING, *supra* note 1, at 52.

situations.⁶⁴ 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.⁶⁵ 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 reveals 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.

II. EXPRESS TRUSTS

A. *The Role of Express Trusts in Enhancing Autonomy*

The express trust is an “amenity”⁶⁶—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.”⁶⁷ 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.⁶⁸

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.⁶⁹ Consider Bernard Rudden’s famous description of an express

⁶⁴ *See id.*

⁶⁵ *See id.*

⁶⁶ HART, *supra* note 3, at 96.

⁶⁷ *Id.* at 27–28.

⁶⁸ *See* RAZ, MORALITY, *supra* note 27, at 373.

⁶⁹ *See id.*; Michael Bryan, *The Inferred Trust: An Unhappy Marriage of Contract and Trust?*, in 69 CURRENT LEGAL PROBLEMS 377, 378 (Piet Eeckhout et al. eds., 2016).

trust as “a gift, projected on the plane of time and so subjected to a management regime.”⁷⁰ 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.⁷¹ Indeed, many other well-rehearsed features of express trusts, for example, that trust assets are “bankruptcy remote,”⁷² that misappropriated trust assets are traceable against third parties,⁷³ and that a comprehensive default regime regulates trustee duties and beneficiary rights,⁷⁴ significantly increase the distinctiveness of express trusts as a facilitative device as compared to other facilities available within the law.⁷⁵

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.”⁷⁶ 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.”⁷⁷

Express trusts go far beyond the simple provision of a passive framework by which property owners “can organise [their] relations with others”⁷⁸: they also provide an extensive set of default

⁷⁰ Bernard Rudden, Book Review, 44 MOD. L. REV. 610 (1981).

⁷¹ See *id.*; Langbein, *Contractarian Basis*, *supra* note 5, at 627–28.

⁷² See Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1, 23 (1996); John H. Langbein, *The Secret Life of the Trust: The Trust as an Instrument of Commerce*, 107 YALE L.J. 165 (1997) [hereinafter Langbein, *Secret Life*].

⁷³ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 59 (AM. L. INST. 2010).

⁷⁴ Langbein, *Contractarian Basis*, *supra* note 5, at 627.

⁷⁵ See Bryan, *supra* note 69, at 378–79.

⁷⁶ SIMON GARDNER, AN INTRODUCTION TO THE LAW OF TRUSTS § 2.2 (3d ed. 2011).

⁷⁷ RAZ, *MORALITY*, *supra* note 27, at 374.

⁷⁸ J.E. Penner, *The (True) Nature of a Beneficiary’s Equitable Proprietary Interest Under a Trust*, 27 CAN. J.L. & JURIS. 473, 494 n.53 (2014).

rules⁷⁹ 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.”⁸⁰ 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.⁸¹ 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.⁸² 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.⁸³

This straightforward analysis might, however, face the charge of being too simplistic. Skeptics might argue that there are

⁷⁹ 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.

⁸⁰ Dagan, *supra* note 62, at 185.

⁸¹ See *id.*; see also Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 630 (2004) (“Langbein’s analysis implies that trust law’s role is to offer a set of standardized terms that minimize transaction costs for the deal between the settlor and the trustee. By invoking the law of trusts, the settlor and the trustee need only record the extent to which their deal deviates from the default governance regime. This view has two important normative implications. First, trust law’s default governance regime, including most critically the fiduciary obligation of the trustee to the beneficiaries, should reflect the terms for which the parties would likely have bargained with low negotiation costs and full information.” (internal citations omitted)); Barry R. Furrow, *Patient Safety and the Fiduciary Hospital: Sharpening Judicial Remedies*, 1 DREXEL L. REV. 439, 444 (2009) (“Trusts are classic situational vulnerabilities, in which the beneficiary is vulnerable to the trustee’s power and prudence.”).

⁸² Sitkoff, *supra* note 81, at 630.

⁸³ For an exploration on the limits of a settlor’s usual freedom to abrogate default rules see John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105 (2004) [hereinafter Langbein, *Mandatory Rules*] (“The law of trusts consists overwhelmingly of default rules that the settlor who creates the trust may alter or negate. There are, however, some mandatory rules, which the settlor is forbidden to vary.”).

features *within* express trusts that point away from an autonomy-based analysis.⁸⁴ To anticipate this charge, the discussion now turns to addressing four grounds upon which a skeptical argument might be built.

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).⁸⁵ However, this conventional approach has come under attack, both in England⁸⁶ and in America⁸⁷ for not sufficiently recognizing the trustee's role in the creation of some express trusts.⁸⁸ 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.⁸⁹ 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”⁹⁰ on the grounds that “[n]o one can be made to accept a trusteeship.”⁹¹ 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.⁹²

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 how their own property

⁸⁴ See, e.g., Man Yip, *The Commercial Context in Trust Law*, 5 CONV. & PROP. L. 347 (2016); GRAHAM VIRGO, *THE PRINCIPLES OF EQUITY AND TRUSTS* 42–44 (2012).

⁸⁵ Langbein, *Contractarian Basis*, *supra* note 5, at 652; see *supra* Section II.A.

⁸⁶ See, e.g., *supra* text accompanying note 84.

⁸⁷ Langbein, *Contractarian Basis*, *supra* note 5, at 627.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 650.

⁹² Yip, *supra* note 84, at 351–52. This proposition finds some support in the Australian High Court case of *Korda v Australian Ex'r Trs (SA) Ltd* (2015) 255 CLR 62, ¶¶ 40, 136 (Austl.).

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.⁹³ On this approach, an express trust is binding only because the parties have “intentionally invoked a convention whose function it is to give grounds ... for another to expect the promised performance.”⁹⁴

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,⁹⁵ 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.⁹⁶ Furthermore, it is trite that express trusts “can be created without notice to or acceptance by any beneficiary or trustee.”⁹⁷ 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.⁹⁸ However, that is a matter of coincidence, and trusts law’s primary focus on

⁹³ See Yip, *supra* note 84, at 351–52.

⁹⁴ CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 16 (2d ed. 2015); see also RAZ, *MORALITY*, *supra* note 27, at 175 (stating that 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”); Dagan, *supra* note 62, at 182 (stating that contract law ensures “the *reliability* of contractual promises for future performance”).

⁹⁵ See *infra* text accompanying notes 198–207.

⁹⁶ See *A v. A* [2007] EWHC (Fam) 99, [42]–[43] (Eng.) (“Once 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. See Langbein, *Contractarian Basis*, *supra* note 5, at 675 n.246.

⁹⁷ RESTATEMENT (THIRD) OF TRS. § 14 (AM. L. INST. 2001). English authorities include *Jones v. Jones* [1874] WN 190 (Eng.); *Harris v. Sharp* (1989) [2003] WTLR 1541 at 1549 (Eng.); *Tate v. Leithead* (1854) Kay 658 at 65; 69 ER 279 (Eng.); *Bill v. Cureton* (1835) 2 MY. & K. 503 at 507 (Eng.); 39 ER 1036; *Standing v. Bowring* (1885) 31 Ch D 282 at 283 (Eng.); *Naas v. Nat’l Westminster Bank* [1940] AC 366 at 375 (Eng.).

⁹⁸ Bryan, *supra* note 69, at 379.

settlor autonomy should not be confused with contract law's general concern with bilateral autonomy.⁹⁹ 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.¹⁰⁰ The different autonomy-enhancing work of express trusts and contracts law are best advanced by keeping separate these devices and their approaches to ascertaining intention.¹⁰¹

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.¹⁰² In line with the R3T, these statutes will be identified in this Article as "Statute of Frauds" and "Wills Acts."¹⁰³ "Statute of Frauds" refers to formality provisions enacted in reference to Section 7 of the (English) Statute of Frauds 1677, which required inter vivos trusts concerning interests in land to be proved in signed writing.¹⁰⁴ "Wills Acts" refers to formality provisions required for a will to be validly executed.¹⁰⁵

Sometimes, however, courts also enforce informally declared trusts, such as secret trusts.¹⁰⁶ In America, it is clear that the lack of compliance with the necessary formality requirements means

⁹⁹ *Id.* at 379.

¹⁰⁰ *Id.* at 379. *Cf.* Yip, *supra* note 84, at 347.

¹⁰¹ Bryan, *supra* note 69, at 1–3.

¹⁰² *See, e.g.*, RESTATEMENT (THIRD) OF TRS. § 2 cmt. a (AM. L. INST. 2001); The Law of Property Act 1925, 15 & 16 Geo. 5 c. 20, § 53(1)(b).

¹⁰³ RESTATEMENT (THIRD) OF TRS. §§ 1, 22 (AM. L. INST. 2001); HESS ET AL., BOGERT'S TRUSTS, *supra* note 12, § 101.

¹⁰⁴ In England, the provision is now found in The Law of Property Act 1925, 15 & 16 Geo. 5 c. 20, § 53(1)(b). 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* RESTATEMENT (THIRD) OF TRS. § 2 cmt. a (AM. L. INST. 2001).

¹⁰⁵ In England, these provisions are found in The Wills Act 1837, 7 Will. 4 & 1 Vict. c. 26, § 9. In America, each state has a respective Wills Act. *See* HESS ET AL., BOGERT'S TRUSTS, *supra* note 12, § 101.

¹⁰⁶ *McCormick v. Grogan* (1869) 4 LR (HL) 82 at 86 (appeal taken from Eng.); *Blackwell v. Blackwell* [1929] AC (HL) 318 at 334 (appeal taken from Eng.); RESTATEMENT (THIRD) OF TRS. § 18 (AM. L. INST. 2001).

that they are not enforced as express trusts, but as constructive trusts that rest on the basis of a different rationale.¹⁰⁷ In England, however, the nature of the trust remains debated.¹⁰⁸ 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;¹⁰⁹ 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.¹¹⁰ On this view, “express” within the phrase “express trust” simply means “declared.”¹¹¹

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.¹¹² Even more importantly, the constructive trust approach is the only approach consistent with the autonomy-enhancing function of express trusts.¹¹³ 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.¹¹⁴

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 unsuccessful exercises of unilateral choice. Only then can express trusts be understood to have a distinct

¹⁰⁷ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 46 cmt. g, 55 cmt. j (AM. L. INST. 2010); HESS ET AL., BOGERT’S TRUSTS, *supra* note 12, §§ 497–501. That rationale is ostensibly the prevention of unjust enrichment, but this is doubted below at Section III.A.2.

¹⁰⁸ See 1 LEWIN ON TRUSTS ¶ 3-080 (Lynton Tucker et al. eds., 20th ed. 2020).

¹⁰⁹ See generally, 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 CONSTRUCTIVE AND RESULTING TRUSTS, *supra*, at 95; William Swadling, *Substance and Procedure in Equity*, 10 J. EQUITY 1 (2016) [hereinafter Swadling, *Substance and Procedure*]; see also Swadling, *Fiction*, *supra* note 11, at 417–18.

¹¹⁰ See Swadling, *Substance and Procedure*, *supra* note 109, at 7–8.

¹¹¹ *Id.* at 6.

¹¹² See YING KHAI LIEW, RATIONALISING CONSTRUCTIVE TRUSTS 38 n.9, 92 nn.131–32 (2017) [hereinafter LIEW, RATIONALISING].

¹¹³ For further support of this view, see *infra* Sections III.A, IV.A.

¹¹⁴ See *infra* Section II.B.

role to play in enhancing personal autonomy.¹¹⁵ To take but one example, in both 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.¹¹⁶ 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.¹¹⁷ 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.¹¹⁸ The non-enforcement of informal self-declared trusts can then properly be understood as an inward-looking safeguard, a point taken up later in the discussion.¹¹⁹

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*.”¹²⁰ 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.¹²¹ While this

¹¹⁵ See *infra* Section II.B.

¹¹⁶ England: *Smith v. Matthews* (1861) 3 De G.F. & J. 139 at 153–55, 45 Eng. Rep. 831 (Eng.); America: RESTATEMENT (THIRD) OF TRS. § 24(4) (AM. L. INST. 2001).

¹¹⁷ Nili Cohen, *The Betrayed(?) Wills of Kafka and Brod*, 27 L. & LIT. 1, 7 (2015) (“This formal position, which gives precedence to the formal legal requirements and to the principles of certainty and stability, could certainly serve as grounds for Kafka’s ambivalence regarding the law. Rather ironically, a situation where a testator’s intention is not fulfilled because of a failure to meet a formal requirement may sometimes be called *Kafkaesque*: this stark gap between the individual’s autonomy and the state’s dictates highlights the law’s inaccessibility to its addressees one of its most problematic aspects; its gates are arbitrarily locked to those who sincerely wish to enter and find within it shelter and refuge.”).

¹¹⁸ See *id.*; see also *infra* Section III.C.

¹¹⁹ See *infra* Section III.C.

¹²⁰ *Saunders v. Vautier* (1841) 4 Beav 115, 49 Eng. Rep. 282 (Eng.).

¹²¹ See *id.*

rule remains applicable in England, most American states have followed the decision of the Massachusetts Supreme Judicial Court in *Claflin v. Claflin*¹²² in holding that the rule in *Saunders* does not apply, and that postponing terms are valid.¹²³

This difference is often presented as a “clash” of perspectives of autonomy.¹²⁴ 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.¹²⁵

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.”¹²⁶ 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.¹²⁷ Thus, autonomy is curbed in English law¹²⁸ and enhanced in American law.¹²⁹

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

¹²² 20 N.E. 454 (Mass. 1889).

¹²³ *Id.* at 456; RESTATEMENT (THIRD) OF TRS. § 65 (AM. L. INST. 2001) (describing the *Claflin* rule as the “prevalent American view”).

¹²⁴ See generally Richard R. Powell, *Freedom of Alienation—For Whom—The Clash of Theories*, 2 REAL PROP. PROB. & TR. J. 127 (1967).

¹²⁵ Graham Moffatt, *Trusts Law: A Song Without End*, 55 MOD. L. REV. 123, 129 (1992).

¹²⁶ Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1241 (1985).

¹²⁷ See *id.* at 1236–41.

¹²⁸ *Goulding v. James* [1997] 2 All ER 239, 247 (Eng.) (“The [*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 John H. Langbein, *Why the Rule in Saunders v. Vautier Is Wrong*, in EQUITY AND ADMINISTRATION 189, 196 (P.G. Turner ed., 2016) [hereinafter Langbein, *The Rule in Saunders*].

¹²⁹ *Claflin v. Claflin*, 20 N.E. 454, 456 (Mass. 1889) (“[A settlor’s] intentions ought to be carried out unless they contravene some positive rule of law, or are against public policy.”).

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.¹³⁰ 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 is determined by the category of case to which those words and actions most closely approximate.¹³¹ To take one example, in the celebrated English case of *Barclays Bank Ltd v. Quistclose Investments Ltd*,¹³² 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 an intention to create a trust rather than simply to enter into a contract.¹³³

For present purposes, pre-existing categories of recognized property interests¹³⁴ provides another background legal framework against which an individual's exercise of autonomy to create an express trust is measured.¹³⁵ In England, "absolute interest"

¹³⁰ Ying Khai Liew, 'Sham Trusts' and Ascertaining Intentions to Create a Trust, 12 J. EQUITY 237, 245–46 (2018) [hereinafter Liew, *Sham Trusts*].

¹³¹ See *id.* at 239–40. 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.

¹³² [1970] AC 567.

¹³³ *Id.* at 576.

¹³⁴ 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 (2001); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (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 296 (Kenneth Ayotte & Henry E. Smith eds., 2011).

¹³⁵ See *supra* Section I.B.

and “contingent interest” are neighboring categories; no finer intermediate category is recognized.¹³⁶ This is because English law requires “equitable ownership” to include “every component of ownership.”¹³⁷ 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.¹³⁸ Such an interest is acceptable because in American law the notion does not offend “any concept of a minimal core content to beneficiary property.”¹³⁹

These differences are instructive for understanding the rule in *Saunders v. Vautier*.¹⁴⁰ 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 *Clafin*.¹⁴¹ 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.¹⁴² As Paul Matthews writes:

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.¹⁴³

¹³⁶ Paul Matthews, *Why the Rule in Saunders v. Vautier Is Wrong: A Commentary*, in EQUITY AND ADMINISTRATION, *supra* note 128, at 205, at 203, 208–09 [hereinafter Matthews, *Saunders Commentary*].

¹³⁷ Langbein, *The Rule in Saunders*, *supra* note 128, at 191.

¹³⁸ Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES IN L. 355, 360 (2009) [hereinafter Getzler, *Transplantation*]. Or, in the words of Justice Miller in the 1875 U.S. Supreme Court decision of *Nichols v. Eaton*, “[w]e do not see ... that the power of alienation is a necessary incident to a life-estate in real property[.]” 91 U.S. 716, 725 (1875).

¹³⁹ Getzler, *Transplantation*, *supra* note 138, at 375.

¹⁴⁰ See *Saunders v. Vautier* (1841) 4 Beav 115.

¹⁴¹ See *Clafin v. Clafin*, 20 N.E. 454, 455–56 (Mass. 1889).

¹⁴² See Matthews, *Saunders Commentary*, *supra* note 136, at 205.

¹⁴³ *Id.*

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 give full effect to the settlor’s choice.¹⁴⁴ 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,”¹⁴⁵ to which the facilitative rules of the express trust have little to add.¹⁴⁶ 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 issue¹⁴⁷—as autonomy-enhancing.¹⁴⁸

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.¹⁴⁹ 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*.¹⁵⁰ In his words:

[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

¹⁴⁴ See *id.*

¹⁴⁵ Langbein, *Secret Life*, *supra* note 72, at 198 (quoting A.W. SCOTT & W.F. FRATCHER, SCOTT ON TRUSTS § 337.3 (4th ed. 1989)).

¹⁴⁶ See Matthews, *Saunders Commentary*, *supra* note 136, at 205–07.

¹⁴⁷ 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. See Langbein, *The Rule in Saunders*, *supra* note 128, at 202.

¹⁴⁸ See generally *id.*

¹⁴⁹ See Matthews, *Saunders Commentary*, *supra* note 136, at 205.

¹⁵⁰ [1998] Ch 241. In America, the position is unclear. See David Ramos Muñoz, *Can Complex Contracts Effectively Replace Bankruptcy Principles?: Why Interpretation Matters*, 92 AM. BANKR. L.J. 417, 437–38 (2018).

to perform the trusts honestly and in good faith for the benefit of the beneficiaries is the minimum necessary¹⁵¹

On this analysis, any clause that purports to exempt trustees from dishonest or bad faith breaches is of no effect.¹⁵² This has recently led Sir Philip Sales to suggest, extrajudicially, that this rule unduly fetters settlor autonomy.¹⁵³ 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?”¹⁵⁴

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,¹⁵⁵ 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.”¹⁵⁶ 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.¹⁵⁷ The point is, however, that maintaining an irreducible core of a trust is crucial to ensuring that express trusts are able to

¹⁵¹ *Armitage v. Nurse* [1998] Ch 241 at 253 (Eng.).

¹⁵² *See id.* at 253–55.

¹⁵³ *See* Philip Sales, *Exemption Clauses in Trusts*, in *DEFENCES IN EQUITY* 121, 123 (Paul S. Davies et al. eds., 2018).

¹⁵⁴ *Id.* at 125.

¹⁵⁵ David Hayton, *The Irreducible Core Content of Trusteeship*, in *TRENDS IN CONTEMPORARY TRUST LAW*, *supra* note 7, at 47; *see also* Langbein, *Mandatory Rules*, *supra* note 83, at 1121–23. 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 (N.Z.); *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2017] EWHC (Ch) 2426 (Eng.).

¹⁵⁶ *Armitage v. Nurse* [1998] Ch 241 at 253 (Eng.).

¹⁵⁷ *See generally* HANOCH DAGAN & MICHAEL HELLER, *THE CHOICE THEORY OF CONTRACTS* (2017).

retain their unique autonomy-enhancing function.¹⁵⁸ Therefore, the “irreducible core” requirement is itself autonomy-enhancing.¹⁵⁹

B. 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.¹⁶⁰ These ensure that an express trust becomes legally enforceable only where the settlor has “deliberately interacted”¹⁶¹ with the device, indicating a decisive decision to settle her property on trust.¹⁶² This is particularly critical because express trusts can be created unilaterally.¹⁶³ Thus, where the settlor or

¹⁵⁸ 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 153, at 131. 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.

¹⁵⁹ 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”—that settlors may not impose “manifestly value-impairing restrictions on the use or disposition of the trust property ...” Langbein, *Mandatory Rules, supra* note 83, at 1107–09. 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.” *Id.* at 1112. 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, 221–22 (2020). It is no surprise, therefore, that the law neutralizes trust provisions that threaten to erode that structural feature.

¹⁶⁰ See *supra* notes 104–07 and accompanying text.

¹⁶¹ See GARDNER, *supra* note 76, at 30.

¹⁶² See Langbein, *Mandatory Rules, supra* note 83, at 1121.

¹⁶³ See Langbein, *Contractarian Basis, supra* note 5, at 652.

testator fails to indicate a conclusive intention to create a trust, the purported arrangement is not enforceable as an express trust.¹⁶⁴

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.¹⁶⁵ 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.¹⁶⁶ 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.¹⁶⁷ It may well be that the hesitancy to extend the scope of formalities reflects the common assumption that formality requirements unduly fetter settlor autonomy;¹⁶⁸ but this assumption is mistaken, since formalities secure personal autonomy.¹⁶⁹ A strong commitment to autonomy may require the scope of formalities to be revisited and expanded.¹⁷⁰

¹⁶⁴ See *supra* note 131 and accompanying text.

¹⁶⁵ See *supra* notes 102–05 and accompanying text.

¹⁶⁶ See HESS ET AL., BOGERT'S TRUSTS, *supra* note 12, at 1–2.

¹⁶⁷ As Lon L. Fuller writes, formalities secure the desiderata of providing an “evidentiary”, “cautionary”, and “channeling” function. Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800–01 (1941). “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.” *Id.* at 813–14. In the modern day, land does not hold an exclusive stronghold on the logic of requiring the satisfaction of that desiderata.

¹⁶⁸ 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.”).

¹⁶⁹ See Fuller, *supra* note 167, at 801.

¹⁷⁰ See *id.* at 823.

Secondly, settlor autonomy is safeguarded through the requirement of an “external expression of intention”¹⁷¹: “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.”¹⁷² “[T]he devil himself knoweth not the thought of man.”¹⁷³ Requiring intentions to journey from thought to deed ensures settlors meaningfully engage with the express trust device before legal consequences will ensue.¹⁷⁴

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.¹⁷⁵ Thus, unless the settlor “manifests an intention to impose enforceable duties on the transferee”¹⁷⁶ and “intend[s] the words to be imperative ... no trust is created.”¹⁷⁷ 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.”¹⁷⁸ It is the substance of the settlor’s choices that the law objectively ascertains and gives legal effect.¹⁷⁹

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

¹⁷¹ RESTATEMENT (THIRD) OF TRS. § 13 cmt. a (AM. L. INST. 2001).

¹⁷² *Re Vandervell’s Trs.* (No 2) [1974] Ch 269 (CA) at 294 (Eng.). The law does not, however, require that the intention is *communicated* to anyone. *See, e.g.,* RESTATEMENT (THIRD) OF TRS. § 13 cmt. a (AM. L. INST. 2001); *Standing v. Bowring* (1885) 31 Ch D 282 (CA), at 288–89 (Eng.); *Fletcher v. Fletcher* (1844) 67 Eng. Rep. 67; 4 Hare 67 (Eng.); *Cf.* Simon Douglas & Ben McFarlane, *Sham Trusts*, in 9 MODERN STUDIES IN PROPERTY LAW 240, 243 (Heather Conway & Robin Hickey eds., 2017).

¹⁷³ James Barr Ames, *Law and Morals*, in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 435, 435 (1913) (quoting Y. B. 7 Ed. IV, f. 2, pl. 2).

¹⁷⁴ RESTATEMENT (THIRD) OF TRS. § 13 cmts. a–b (AM. L. INST. 2001).

¹⁷⁵ *Id.* § 13 cmt. a.

¹⁷⁶ *Id.* § 13 cmt. d.

¹⁷⁷ *Knight v. Knight* (1840) 49 Eng. Rep. 58, 68; (1840) 3 Beav 148 (Eng.).

¹⁷⁸ RESTATEMENT (THIRD) OF TRS. § 13 cmt. a (AM. L. INST. 2001); *see* Paul v. Constance (1977) 1 WLR 527 at 532–33 (Eng.).

¹⁷⁹ RESTATEMENT (THIRD) OF TRS. § 13 cmt. a (AM. L. INST. 2001).

has argued that self-determination requires private law to secure “people’s right to exit their existing property arrangement.”¹⁸⁰ This is precisely what § 602(a) of the Uniform Trust Code (UTC) provides: “[u]nless the terms of a trust expressly provide that the trust is irrevocable, the settlor may revoke or amend the trust.”¹⁸¹ 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,¹⁸² unduly fetters the autonomy-enhancing function of express trusts.¹⁸³

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.”¹⁸⁴ That freedom provided by the liberal state loses its meaning if the default legal position is that a disposition can be recalled.¹⁸⁵ This is why a donor who chooses 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.¹⁸⁶ This is not to say that the right to exit is never compatible with personal autonomy.¹⁸⁷ 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.”¹⁸⁸ A rule that

¹⁸⁰ Dagan, *supra* note 62, at 178.

¹⁸¹ See D.M. English, *The American Uniform Trust Code*, in *EXTENDING THE BOUNDARIES OF TRUST AND SIMILAR RING-FENCED FUNDS* 313, 353 (David Hayton ed., 2002).

¹⁸² See *In re Astor’s Settlement Trs.* [1952] Ch 534 at 542 (Eng.); *Re Murphy’s Settlements* (1999) 1 WLR 282 at 295 (Eng.).

¹⁸³ See *RESTATEMENT (THIRD) OF TRS.* § 63 cmt. c (AM. L. INST. 2001).

¹⁸⁴ FRIED, *supra* note 94, at 21.

¹⁸⁵ See Kimel, *supra* note 57, at 96.

¹⁸⁶ See, e.g., Cohen, *supra* note 117, at 7.

¹⁸⁷ See Kimel, *supra* note 57, at 101 (“[I]t may be thought that a considerable freedom to change one’s mind is just as essential for the ongoing pursuit of personal autonomy as is the capacity and the willingness to make long-term commitments or to persevere with past choices.”); Langbein, *Contractarian Basis*, *supra* note 5, at 673 (discussing nonprobate wills which allow settlor to use and enjoy property before death).

¹⁸⁸ Kimel, *supra* note 57, at 102.

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.¹⁸⁹ After all, a trust by default entails *divestment* instead of *retention*, and to reverse that default position would unduly curb settlor autonomy.¹⁹⁰

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.¹⁹¹ As D.M. English explains, that provision reflects “the increasing if not predominant use of the revocable trust in the United States.”¹⁹² 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.¹⁹³ 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.¹⁹⁴

C. 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.¹⁹⁵ However, this does not mean that settlors are given free rein to treat trustees and beneficiaries simply as a means to her desired ends.¹⁹⁶ 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.¹⁹⁷

¹⁸⁹ See Alex M. Johnson, Jr., Note, *Is it Time for Irrevocable Wills?*, 53 U. LOUISVILLE L. REV. 393, 422 (2016) (discussing how irrevocable transfers prevents a change of mind in the future when potentially incompetent).

¹⁹⁰ See *id.* at 398; see also FRIED, *supra* note 94, at 20–21 (“[T]o respect those determinations of the self is to respect their persistence over time.”).

¹⁹¹ RESTATEMENT (THIRD) OF TRS. § 63 rep.’s notes cmts. b–d (AM. L. INST. 2001).

¹⁹² English, *supra* note 181, at 326.

¹⁹³ See *id.*

¹⁹⁴ RESTATEMENT (THIRD) OF TRS. § 63 rep.’s notes cmts. b–d (AM. L. INST. 2001).

¹⁹⁵ *Id.* § 2.

¹⁹⁶ See, e.g., *id.*

¹⁹⁷ See, e.g., *id.* § 35(2) cmt. a.

Most obviously, trustees¹⁹⁸ are free to disclaim trusteeship and beneficiaries¹⁹⁹ are free to disclaim interests under a trust for any reason at all.²⁰⁰ 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.²⁰¹ Even after indicating acceptance at the outset, trustees and beneficiaries are still capable of exercising their right to exit.²⁰² Thus, trustees are free to resign,²⁰³ and beneficiaries are free to release²⁰⁴ (or assign²⁰⁵) 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.²⁰⁶ To allow trustees and beneficiaries to have their cake and eat it would be to sanction undue encroachment into settlor autonomy.²⁰⁷

Another outward-looking safeguard is found in the objective approach towards ascertaining 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.²⁰⁸ In the

¹⁹⁸ See *id.*; Robinson v. Pett (1734) 24 Eng. Rep. 249 at 251; 3 P Wms 249 at 251 (Eng.).

¹⁹⁹ RESTATEMENT (THIRD) OF TRS. § 51 cmt. f (AM. L. INST. 2001); Hardoon v Belilios [1901] AC 118 at 123 (Eng.).

²⁰⁰ See generally Ying Khai Liew & Charles Mitchell, *The Creation of Express Trusts*, 11 J.EQUITY 133 (2017).

²⁰¹ See RESTATEMENT (THIRD) OF TRS. § 35 rep.'s notes cmt. a (AM. L. INST. 2001).

²⁰² *Id.* § 35 cmt. b.

²⁰³ *Id.* § 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. RESTATEMENT (THIRD) OF TRS. § 14 cmt. b (AM. L. INST. 2001); Phillips v. Sch. Bd. for London (1898) 2 QB 447 at 458 (Eng.); *In re Frame* [1939] Ch 700 at 703–04 (Eng.).

²⁰⁴ RESTATEMENT (THIRD) OF TRS. § 51 cmt. f (AM. L. INST. 2001).

²⁰⁵ YING KHAI LIEW, GUEST ON THE LAW OF ASSIGNMENT ch. 3 (3d ed. 2018) [hereinafter LIEW, GUEST].

²⁰⁶ See Tolhurst v. Associated Portland Cement Mfrs. (1900) Ltd. [1902] 2 KB 660 at 668 (Eng.); LIEW, GUEST, *supra* note 205, at ch. 9. Unless, of course, the assignee assents to this. U.C.C. § 2-210 (AM. L. INST. & UNIF. L. COMM'N 2017).

²⁰⁷ See RESTATEMENT (THIRD) OF TRS. §§ 70 cmt. a, 104 cmt. f.

²⁰⁸ See *id.* § 4; Cartwright v. Jackson Cap. Partners, Ltd. P'ship, 478 S.W.3d 596, 626 (Tenn. Ct. App. 2015); *Re Vandervell's Trs.* (No 2) [1974] Ch 269 (CA) at 294 (Eng.); *Twinsectra Ltd. v. Yardley* [2002] 2 AC 164 at 185 (Eng.); *Byrnes v Kendle* (2011) 243 CLR 253, 263 (Austl.).

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.²⁰⁹ The High Court of Australia rejected his contention.²¹⁰ Concerning the objective approach to ascertaining intention, Gummow and Hayne JJ made the following comment:

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.²¹¹

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.²¹² 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.²¹³

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.²¹⁴ Any attempt by settlors to negate this rule will therefore be of no effect.²¹⁵ This provides another outward-looking safeguard, which ensures that

²⁰⁹ *Byrnes*, (2011) 243 CLR at 260.

²¹⁰ *Id.* at 271.

²¹¹ *Id.* at 274.

²¹² RESTATEMENT (THIRD) OF TRS. § 12 cmts. a–b (AM. L. INST. 2001).

²¹³ In the same vein, Fuller 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.” Fuller, *supra* note 167, at 808 (citation omitted).

²¹⁴ See, e.g., RESTATEMENT (THIRD) OF TRS. § 2 cmt. d (AM. L. INST. 2001); *Venables v. Hornby* (Inspector of Taxes) [2002] EWCA (Civ) 1277, [¶ 18] (Eng.).

²¹⁵ This is in line with the fact that beneficial interests under a trust have proprietary effects. See, e.g., Penner, *supra* note 78, at 473; Peter Jaffey, *Explaining the Trust*, 131 L.Q. REV. 377, 385–86 (2015).

settlor's exercise of autonomy does not result in the overriding of bona fide third-party acquirers' interests during the lifetime of the trust without justification.²¹⁶

D. External Limits

Autonomy is not an absolute value, and therefore it must sometimes give way to other normative concerns.²¹⁷ One of the most fundamental limitations is the need for choices to be "morally acceptable"²¹⁸ and made pursuant to "legitimate ends".²¹⁹ Therefore, trusts or trust provisions that are formed for unlawful, criminal, or tortious purposes, or those contrary to public policy, are void.²²⁰ Moreover, express trusts set up solely to deceive others (such as the court or the settlor's creditors) are potentially invalid.²²¹

Another external limit relates to economic concerns. Perpetuity rules may be understood in 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.²²²

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.²²³ The interest that a settlor intends to grant to the beneficiary must be an interest the legal system recognizes.²²⁴ Where there is a

²¹⁶ See Jaffey, *supra* note 215, at 389–91.

²¹⁷ See RAZ, MORALITY, *supra* note 27, at 379–80.

²¹⁸ *Id.* at 378.

²¹⁹ Joseph Raz, *Voluntary Obligations and Normative Powers*, in NORMATIVITY AND NORMS: CRITICAL PERSPECTIVES ON Kelsenian Themes 458 (Stanley L. Paulson & Bonnie Litschewski Paulson eds., 1999).

²²⁰ RESTATEMENT (THIRD) OF TRS. § 29 (AM. L. INST. 2001); UNDERHILL & HAYTON, *supra* note 203, ¶¶ 11.1(1), 7.1(f).

²²¹ In England, by virtue of the sham trusts doctrine, see Liew, *Sham Trusts*, *supra* note 130, at 237; in America, see RESTATEMENT (THIRD) OF TRS. § 29 rep.'s notes cmt. a (AM. L. INST. 2001).

²²² RESTATEMENT (THIRD) OF TRS. § 29 rep.'s notes cl. (b) cmts. g–h (AM. L. INST. 2001); Paul Matthews, *The Comparative Importance of the Rule in Saunders v. Vautier*, 122 L.Q. REV. 266, 277–79 (2006). Matthews doubts the economic rationale of perpetuity rules but recognizes that the economic argument led to the invention of those rules. See *id.*

²²³ See RESTATEMENT (THIRD) OF TRS. § 40 cmt. b (AM. L. INST. 2001).

²²⁴ See *id.*

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.²²⁵ Since express trusts do not operate in a vacuum, choices made by the settlor may not always be given full legal effect.²²⁶

III. CONSTRUCTIVE TRUSTS

A. *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,²²⁷ 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.²²⁸ 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.'"²²⁹ In contrast, English courts have strenuously rejected "remedial" constructive trusts, preferring only to recognize "institutional" ones.²³⁰ The second concerns the basis of constructive

²²⁵ See *id.* § 4 cmt. a.

²²⁶ *Id.* § 40 cmt. d.

²²⁷ 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 RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 43 cmt. d (AM. L. INST. 2010), or to ensure that a fiduciary does not rely on her own breach to retain a profit, see *FHR Eur. Ventures LLP v. Cedar Cap. Partners LLC* [2014] UKSC 45 [11] (Eng.).

²²⁸ See R.M. James, *The Constructive Trust: A Substantive Institution or a Remedial Institution?*, 8 TRENT L.J. 75, 75–78 (1984).

²²⁹ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 cmt. b (AM. L. INST. 2010).

²³⁰ See, e.g., *In re Sharpe* [1980] 1 WLR 219 at 225 (Eng.); *Lonrho P.L.C. v. Fayed* (No. 2) [1992] 1 WLR 1 at 9 (Eng.); *In re Goldcorp Exch. Ltd.* [1995] 1

trusts.²³¹ In America, the prevailing view is that constructive trusts respond to unjust enrichment,²³² and are therefore substantively dealt with in the R3RUE,²³³ and not in the R3T.²³⁴ In contrast, English law does not view constructive trusts as 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.”²³⁵ Moreover, English courts have never “subscribed to the view that all constructive trusts respond to unjust enrichment, [although] they have held that some do.”²³⁶

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

AC 74 at 76, 103–04 (Eng.); *In re Polly Peck Int'l P.L.C.* (No. 2) [1998] 3 All ER 812 at 827, 831 (Eng.); *Sinclair Invs. Ltd. v. Versailles Trade Fin. Ltd.* [2011] EWCA (Civ) 347 [37], [2012] Ch 453 [37] (Eng.); *FHR Eur. Ventures* [2014] UKSC 45 [47], [2015] AC 250 [47] (Eng.); *Angove's Pty. Ltd. v. Bailey* [2016] UKSC 47 [27] (Eng.). On the institutional/remedial distinction, see Ying Khai Liew, *Reanalysing Institutional and Remedial Constructive Trusts*, 74 CAMBRIDGE L.J. 528, 529–32, 544–45 (2016).

²³¹ See James, *supra* note 228, at 78, 80–82.

²³² The extent to which unjust enrichment is said to underlie the law of constructive trusts varies from author to author. For example, HESS ET AL., *BOGERT'S TRUSTS*, *supra* note 12, § 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 Comment e of the Restatement (Third) of Trusts simply asserts that (all?) constructive trusts are imposed “to redress a wrong or to prevent unjust enrichment.” RESTATEMENT (THIRD) OF TRS. § 1 cmt. e (AM. L. INST. 2001).

²³³ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55(1), (2), cmts. b, f (AM. L. INST. 2010).

²³⁴ RESTATEMENT (THIRD) OF TRS. § 1 cmt. e (AM. L. INST. 2001).

²³⁵ ROBERT GOFF & GARETH JONES, *THE LAW OF UNJUST ENRICHMENT* ¶ 38-36 (Charles Mitchell et al. eds., 9th ed. 2016). 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, 667–68, 694–95 (2004); Simon Gardner, *Reliance-Based Constructive Trusts*, in *CONSTRUCTIVE AND RESULTING TRUSTS*, *supra* note 109, at 63; LIEW, *RATIONALISING*, *supra* note 112. The point is that constructive trusts are not understood as susceptible to a single explanation, as is thought to be the case in America.

²³⁶ See GOFF & JONES, *supra* note 235, ¶ 38-36.

law), as opposed to *trusts law*.²³⁷ But careful examination indicates that those differences are in fact often more apparent than real.²³⁸

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.²³⁹ In *Westdeutsche Landesbank Girozentrale v. Islington LBC*, Lord Browne-Wilkinson described an “institutional constructive trust” as a nondiscretionary 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.”²⁴⁰ American constructive trusts do not fall within this conception of “remedial.”²⁴¹ 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.”²⁴² Thus, American constructive trusts do not provide for the kind of discretion envisaged by English courts.²⁴³

²³⁷ See Robert Stevens, *When and Why Does Unjustified Enrichment Justify the Recognition of Proprietary Rights?*, 92 B.U. L. REV. 919, 926 (2012).

²³⁸ See Leonard I. Rotman, *Deconstructing the Constructive Trust*, 37 ALBERTA L. REV. 133, 134–35, 138–41 (1999).

²³⁹ *Muschinski v Dodds* (1985) 160 CLR 583, 594, 613, 615 (Austl.).

²⁴⁰ [1996] AC 669 at 714–15.

²⁴¹ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 cmt. e (AM. L. INST. 2010).

²⁴² *Id.*

²⁴³ See Andrew Kull, *The Metaphorical Constructive Trust*, 18 TRS. & TRUSTEES 945, 953–54 (2012). It might be thought that the word “may” in section 55(1) of the Restatement (Third) of Restitution and Unjust Enrichment suggests the potential for the exercise of discretion. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55(1) (AM. L. INST. 2010). That subsection provides:

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:

[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.²⁴⁴

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.²⁴⁵

Consider, for example, the case of *Re Duke of Marlborough*.²⁴⁶ 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 reconvey the equity of redemption back to the Duchess.²⁴⁷ The Duke died before he could reconvey, and the court held that the Duchess, and not the Duke’s creditors, could lay claim to the equity of redemption.²⁴⁸

If 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[.]

Id. (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.

²⁴⁴ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 cmt. b (AM. L. INST. 2010).

²⁴⁵ Roscoe Pound, *The Progress of the Law, 1918–1919: Equity*, 33 HARV. L. REV. 420, 420–23 (1920).

²⁴⁶ *In re Duke of Marlborough* [1894] 2 Ch 133, a case that the U.S. Supreme Court has found occasion to approve. See *Smithsonian Inst. v. Meech*, 169 U.S. 398, 411 (1897).

²⁴⁷ *In re Duke of Marlborough* [1894] 2 Ch 133.

²⁴⁸ *Id.*

The only way to explain this outcome is that the Duchess was a beneficiary under a real (constructive)²⁴⁹ trust that arose from the moment the Duke obtained legal title to the house.²⁵⁰ 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.²⁵¹ 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.²⁵²

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.²⁵³ 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.²⁵⁴

2. *Unjust Enrichment?*

Secondly, in some instances, including those that are substantively discussed in this Article, "unjust enrichment" fails to suffice as an *explanation* or rationale for why constructive trusts arise.²⁵⁵ As Lusina Ho explains, by treating the diverse range of situations²⁵⁶

²⁴⁹ Because the arrangement was made informally, it could not have been enforced as an express trust: see discussion above at Section II.A.2.

²⁵⁰ See *in re Duke of Marlborough* [1894] 2 Ch 133.

²⁵¹ See, for example, the facts of *Pain v Pain* [2006] QSC 335 (Austl.).

²⁵² Terence Etherton, *Constructive Trusts: A New Model for Equity and Unjust Enrichment*, 67 CAMBRIDGE L.J. 265, 266–68, 283–84 (2008).

²⁵³ See Rotman, *supra* note 238, at 139 & n.35.

²⁵⁴ John L. Dewar, *The Development of the Remedial Trust*, 60 CAN. BAR REV. 265, 265, 267–68 (1982).

²⁵⁵ See 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 209, 211 (Charles Mitchell & William Swadling eds., 2013).

²⁵⁶ See *generally id.* For example, enrichment arising from impaired or qualified intent, wrongdoing, ownership in real estate of unmarried cohabitants, informal oral trusts, and secret testamentary trusts.

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.”²⁵⁷ In other words, “unjust enrichment,” presented as a rationale, is sometimes question-begging.²⁵⁸

Take for example what English law calls “the rule in *Re Rose*,”²⁵⁹ a substantially similar rule of which is found in § 16 Comment c R3T.²⁶⁰ 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.”²⁶¹ 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.”²⁶² 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,²⁶³ the rationale lies in a consideration of A’s actions—that A “had arrived at a definite, considered

²⁵⁷ *Id.* at 211.

²⁵⁸ “[T]his begs the question whether the relevant property is beneficially owned by the insolvent recipient[.]” *Id.* at 215. Indeed, tellingly, section 7 comment d of the Restatement (Third) of Trusts 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.” RESTATEMENT (THIRD) OF TRS. § 7 cmt. d (AM. L. INST. 2001) (emphasis added).

²⁵⁹ The rule is in fact reflected in the two coincidentally named cases of *In re Rose*, [1949] 1 Ch 78 (Eng.) and *In re Rose*, *Rose v. IRC* [1952] 1 Ch 499 (Eng.).

²⁶⁰ RESTATEMENT (THIRD) OF TRS. § 16 cmt. c (AM. L. INST. 2001).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ In *Milroy v. Lord*, (1862) 4 De G.F. & J. 264 at 274 (Eng.), 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 *In re Rose*. See *Mascall v. Mascall* [1985] 50 P & CR 119, at 126 (Eng.).

intention to create a trust either immediately or soon thereafter.”²⁶⁴ This is the *reason* why A’s successors in interest would be unjustly enriched if permitted to keep the property.²⁶⁵

Take secret trusts as another example.²⁶⁶ The R3T suggests that the reason why they give rise to constructive trusts²⁶⁷ is that the testator’s “testate or intestate successor would be unjustly enriched if permitted to retain the property.”²⁶⁸ 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[.]”²⁶⁹ As in England,²⁷⁰ 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.²⁷¹ 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 include²⁷² 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;²⁷³ purchases at a

²⁶⁴ RESTATEMENT (THIRD) OF TRS. § 16 cmt. c (AM. L. INST. 2001).

²⁶⁵ *Id.*

²⁶⁶ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46 cmt. g (AM. L. INST. 2010).

²⁶⁷ Secret trusts are enforced as constructive trusts. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46 (AM. L. INST. 2010); RESTATEMENT (THIRD) OF TRS. § 18 (AM. L. INST. 2001). They are therefore exempted from any formality requirement due to section 8 of the Statute of Frauds of 1677. See HESS ET AL., BOGERT’S TRUSTS, *supra* note 12, § 67.

²⁶⁸ RESTATEMENT (THIRD) OF TRS. § 18 cmt. a (AM. L. INST. 2001).

²⁶⁹ RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 46 cmt. g (AM. L. INST. 2010).

²⁷⁰ See LIEW, RATIONALISING, *supra* note 112, at ch. 4.

²⁷¹ Wrongdoing, in the form of repudiation, is not in fact required. Cf. HESS ET AL., BOGERT’S TRUSTS, *supra* note 12, § 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.

²⁷² All these are further discussed in LIEW, RATIONALISING, *supra* note 112.

²⁷³ England: Rochefoucauld v. Boustead [1897] 1 Ch 196 at 196, 205–06; America: HESS ET AL., BOGERT’S TRUSTS, *supra* note 12, §§ 495–97.

judicial sale or auction where one party (A) allows another (B) to purchase the property in reliance on B's promise to hold the property (wholly or partly) on trust;²⁷⁴ 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.²⁷⁵

The point of the examples cited above is not to deny that unjust enrichment may well provide a sound²⁷⁶ explanation where constructive trusts secure restitution in circumstances where the relevant triggering event—the discrete source of rights—is unjust enrichment.²⁷⁷ Such constructive trusts project rights *backwards*: being “restitutionary in pattern,”²⁷⁸ they return or restore an interest to a property owner.²⁷⁹ 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.²⁸⁰ But these are not the only type of constructive trusts;²⁸¹ others, including those discussed above, have the effect of projecting rights *forwards*, that is, conferring beneficial interests to those intended to benefit.²⁸² Given its inherent restitutionary logic, unjust enrichment is unable to provide a sufficient explanation for forward-projecting constructive trusts.²⁸³ Once we are prepared to look

²⁷⁴ England: *Pallant v. Morgan* [1953] Ch 43 at 43; America: HESS ET AL., *BOGERT'S TRUSTS*, *supra* note 12, § 471.

²⁷⁵ England: *Dufour v. Pereira* (1769) Dick 419 at 420–21; 21 ER 332; America: HESS ET AL., *BOGERT'S TRUSTS*, *supra* note 12, § 499.

²⁷⁶ Albeit partial. *See* HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* (2004).

²⁷⁷ 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.” RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2010). 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 235, ¶ 1-21.

²⁷⁸ GOFF & JONES, *supra* note 235, ¶ 38-46.

²⁷⁹ *See* GOFF & JONES, *supra* note 235, ¶ 38-46.

²⁸⁰ *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 55 (AM. L. INST. 2010).

²⁸¹ 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. *See* Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 WASH. & LEE L. REV. 993, 1023–24 (2008).

²⁸² *See infra* Section III.B.

²⁸³ *See* D.W.M. Waters, *The Constructive Trust in Evolution: Substantive and Remedial*, 10 TRS. & ESTS. J. 334, 336 n.7 (1991).

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.²⁸⁴

B. 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.”²⁸⁵ This complements the autonomy-enhancing role of express trusts, which gives effect to a property owner’s *unilateral* engagement with the trust facility.²⁸⁶

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 enforced as an express trust.²⁸⁷ 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.²⁸⁸ 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.²⁸⁹ This justifies protecting the relational aspect of A’s autonomy through the constructive trust.²⁹⁰ The element of reliance here is “not as an independent

²⁸⁴ See *infra* Section III.B.

²⁸⁵ Dagan, *supra* note 62, at 182 (emphasis added).

²⁸⁶ See George P. Costigan, Jr., *The Classification of Trusts as Express, Resulting, and Constructive*, 27 HARV. L. REV. 437, 437–38 (1914).

²⁸⁷ See HESS ET AL., BOGERT’S TRUSTS, *supra* note 12, § 471.

²⁸⁸ See *supra* Section II.A.

²⁸⁹ See Fuller, *supra* note 167, at 811.

²⁹⁰ *Id.*

or competing basis of liability but as a ground supplementing and reinforcing the principle of private autonomy”²⁹¹ 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.²⁹²

From B’s point of view, when B acquires the property in question,²⁹³ B becomes its legal owner and for that reason is empowered with the legal power to exclude all others from interfering with the property.²⁹⁴ 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.²⁹⁵ 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.²⁹⁶ 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.²⁹⁷

Next, consider *Re Rose* constructive trusts.²⁹⁸ These give content to the idea that autonomy is determined as a matter of

²⁹¹ *Id.* Hence, the outcome does not depend on the extent of detrimental reliance A incurs, as it does in the context of estoppel. For the English body of law, see LIEW, RATIONALISING, *supra* note 112, at ch. 6. For the American body of law, see RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 27 cmt. c (AM. L. INST. 2010)).

²⁹² See Fuller, *supra* note 167, at 811–12.

²⁹³ 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.

²⁹⁴ David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 WASH. U. J.L. & POL’Y 39, 40 (2000).

²⁹⁵ See Fuller, *supra* note 167, at 807.

²⁹⁶ See *id.* at 810–12.

²⁹⁷ Lorenzo Maniscalco, *Common Intentions and Constructive Trusts: Unorthodoxy in Trusts of Land*, CONV. & PROP. LAW. 124, 128 (2020).

²⁹⁸ Abigail Doggett, *Explaining Re Rose: The Search Goes On?*, 62 CAMBRIDGE L.J. 241, 264 (2003). Note that the terminology of “*Re Rose* constructive trusts”, where employed in the context of the present discussion, is taken to include the American version of the rule. See *supra* text accompanying notes 260–64.

substance and not form.²⁹⁹ Where A does everything in her power necessary to transfer property to B, A “arrive[s] at a definite, considered intention”³⁰⁰ 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.³⁰¹

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.³⁰² 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.³⁰³ 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.³⁰⁴ 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.³⁰⁵ 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.³⁰⁶ *Re Rose* constructive trusts ensure that the substance of A’s choices is respected.³⁰⁷

²⁹⁹ *Corin v Patton* (1990) 169 CLR 540, 558 (Austl.). 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.’” *Id.*

³⁰⁰ RESTATEMENT (THIRD) OF TRS. § 16 cmt. c (AM. L. INST. 2001).

³⁰¹ *Id.*

³⁰² See Langbein, *Mandatory Rules*, *supra* note 83, at 1120–21; RESTATEMENT (THIRD) OF TRS. § 16 cmt. c (AM. L. INST. 2001).

³⁰³ See GARDNER, *supra* note 76, at 30.

³⁰⁴ See *Re Rose*, *Rose v. IRC* [1952] 1 Ch 499 at 500 (Eng.).

³⁰⁵ Thus, in *Milroy v. Lord* (1862) 4 De G.F. & J. 264 at 274 (Eng.), 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 *Re Rose* [1952] 1 Ch at 508–09.

³⁰⁶ See *Re Rose* [1952] 1 Ch at 512–13.

³⁰⁷ See Doggett, *supra* note 298, at 264.

C. 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.³⁰⁸ However, if B is party to the informal agreement, having made a relevant promise upon which A relies in the requisite way, then an agreement-based constructive trust is justified because it strikes a balance between both A's and B's autonomy.³⁰⁹ This explains why, where A informally declares herself trustee for another, no balancing act is called for, and therefore, without more,³¹⁰ the need to protect settlor autonomy prescribes that a constructive trust will not arise to compel A to carry out the informally declared trust.³¹¹

Re Rose constructive trusts, on the other hand, provide two inward-looking safeguards.³¹² 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"³¹³ 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.³¹⁴

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."³¹⁵ Of course, where A's intention is manifested in such a way that

³⁰⁸ See *supra* note 57 and accompanying text.

³⁰⁹ RESTATEMENT (THIRD) OF TRS. § 24(3)–(4) (AM. L. INST. 2001).

³¹⁰ According to section 24(4) and illustration 18 of that subsection of the Restatement (Third) of Trusts, 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.

³¹¹ Penner, *supra* note 78, at 496.

³¹² RESTATEMENT (THIRD) OF TRS. § 16 cmt. c (AM. L. INST. 2001).

³¹³ *Id.* For an example, see *Smith v. Charles Bldg. Serv. Ltd* [2006] EWCA (Civ) 14 [4]–[5] (Eng.), 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." *Smith v. Charles Bldg. Serv. Ltd* [2005] EWHC (Ch) 654 ([69] (Eng.)).

³¹⁴ RESTATEMENT (THIRD) OF TRS. § 16 cmt. c (AM. L. INST. 2001).

³¹⁵ *Id.*

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.³¹⁶ 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.³¹⁷ This safeguards A's autonomy.³¹⁸

D. 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.³¹⁹ 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.³²⁰ 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.³²¹ 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.³²²

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.³²³ However, they also safeguard B's autonomy

³¹⁶ See *Re Rose*, *Rose v. IRC* [1952] 1 Ch 499, at 510–11 (Eng.).

³¹⁷ RESTATEMENT (THIRD) OF TRS. § 16 cmt. c (AM. L. INST. 2001).

³¹⁸ *Id.*

³¹⁹ See *id.*; see also *supra* note 62 and accompanying text (discussing outward-looking safeguards).

³²⁰ See Langbein, *Contractarian Basis*, *supra* note 5, at 627, 632 (noting how constructive trusts are imposed coercively in contrast with the typically consensual relationship of the express trust).

³²¹ RESTATEMENT (THIRD) OF TRS. § 24 cmt. (3)–(4) (AM. L. INST. 2001).

³²² See David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1699 (2009) (“[N]o one can be made to accept a trusteeship.”) (internal quotation omitted).

³²³ Where there is reliance on the part of B, estoppel rules may become relevant.

through the objective manner in which the substance of A's intention is ascertained.³²⁴ As discussed earlier, A must have acted in an objectively ascertainable way, by doing everything in her power to transfer the property to B.³²⁵ 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.³²⁶ *Re Rose* constructive trusts therefore protect B's autonomy by providing B with the freedom to order her life on the basis of A's objectively ascertainable intentions.³²⁷ This further facilitates transactional efficacy.³²⁸ 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.³²⁹

E. 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.³³⁰ 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.³³¹ 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.³³² 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

³²⁴ See *Re Rose*, *Rose v. IRC* [1952] 1 Ch 499 at 512 (Eng.).

³²⁵ *Id.* at 500.

³²⁶ RESTATEMENT (THIRD) OF TRS. § 16 cmt. c (AM. L. INST. 2001).

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Hurst v. Crompton Bros. (Coopers) Ltd.* [2002] EWHC (Ch) 1375 (Eng.).

³³⁰ See *supra* text accompanying notes 319–29.

³³¹ England: *Milroy v. Lord* (1862) 4 De G.F. & J. 264; 45 ER 1185; America: RESTATEMENT (THIRD) OF TRS. § 16 cmt. c (AM. L. INST. 2001).

³³² See, e.g., RESTATEMENT (THIRD) OF TRS. § 16 cmt. c (AM. L. INST. 2001).

counterproductive to the aim of enhancing autonomy.³³³ As Lord Nottingham said in the well-known case of *Cook v Fountain*:

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*.³³⁴

Finally, the operation of these constructive trusts would also be subject to the external limits discussed above in relation to express trusts.³³⁵ For example, an informal agreement or a purported transfer of property pursuant to an illegal aim would not be enforced.³³⁶

IV. RESULTING TRUSTS

A. 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).³³⁷ But American and English law ostensibly differ on two notable issues.³³⁸

³³³ Langbein, *Mandatory Rules*, *supra* note 83, at 1120–21 (noting that mandatory rules of trust formalities are intent effectuating).

³³⁴ (1676) 3 Swan. 585 at 591–92 (Eng.).

³³⁵ See *supra* text accompanying notes 217–26.

³³⁶ *Id.*

³³⁷ See John Mee, *The Past, Present, and Future of Resulting Trusts*, in 70 CURRENT LEGAL PROBLEMS 189, 189 (2017).

³³⁸ Jamie Glistler, *Lifetime Wealth Transfers and the Equitable Presumptions of Resulting Trust and Gift*, 103 IOWA L. REV. 1971, 1974–78 (2018).

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 relationship³³⁹ which raises the presumption of advancement, and where there is a voluntary transfer of an interest in land.³⁴⁰ It remains unclear whether FT cases engage any presumptions or give rise to a resulting trust automatically upon the failure of an express trust.³⁴¹ In contrast, in America the presumption of resulting trust (except where the presumption of advancement applies) arises in FT³⁴² and PM³⁴³ cases, but not in VT cases.³⁴⁴

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."³⁴⁵ Conversely, the English position is ambiguous.³⁴⁶ 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 herself³⁴⁷—and a negative intention analysis—"there is a presumption that A did not intend to make a gift to B"³⁴⁸—as if they were two sides of the same coin. They are demonstrably not: for

³³⁹ For example, where A is B's father or stands in loco parentis to B, see, for example, *Hepworth v. Hepworth* (1870) LR 11 Eq. 10 (Eng.); *Shephard v. Cartwright* [1955] AC 431 (Eng.), or where A is B's husband or fiancé, see, for example, *Tinker v. Tinker* [1970] 1 All ER 540 (Eng.); *Silver v. Silver* [1958] 1 WLR 259 (Eng.). See, for a general discussion, Glister, *supra* note 338.

³⁴⁰ Law of Property Act 1925, 15 & 16 Geo. 5 c. 20, § 60(3); *Hodgson v. Marks* [1971] Ch 892 at 933 (Eng.); *Lohia v. Lohia* [2001] WTLR (Civ) 101 (Eng.); *Ali v. Khan* [2002] EWCA (Civ) 974 (Eng.); *Crown Prosecution Service v. Malik* [2003] EWHC (Admin) 660. *But cf.* *National Crime Agency v. Dong* [2017] EWHC (Ch) 3116 (Eng.).

³⁴¹ The former view was expressed in *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 at 708 (Eng.); the latter view was expressed in *In re Vandervell's Trusts (No. 2)* [1974] 1 Ch 269 (CA).

³⁴² RESTATEMENT (THIRD) OF TRS. § 8 cmt. f (AM. L. INST. 2001).

³⁴³ *Id.* § 9 cmt. a.

³⁴⁴ *Id.* § 9(2).

³⁴⁵ *Id.* § 7 cmt. a. However, this is not entirely free from controversy. See generally HESS ET AL., *BOGERT'S TRUSTS*, *supra* note 12, § 454, where it is asserted that the law infers A intends to create a trust for herself.

³⁴⁶ *Westdeutsche Landesbank Girozentrale* [1996] AC at 708.

³⁴⁷ *Id.*; see also Swadling, *Explaining*, *supra* note 12; John Mee, *Presumed Resulting Trusts, Intention and Declaration*, 73 CAMBRIDGE L.J. 86, 90 (2014).

³⁴⁸ *Westdeutsche Landesbank Girozentrale* [1996] AC at 708.

example, each requires a different type of evidence to affirm, or rebut, the presumption.³⁴⁹

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.³⁵⁰

The first is that, as a matter of positive law, this view has found much judicial support in the highest courts.³⁵¹

Secondly, it avoids muddying the boundary between resulting trusts and express trusts.³⁵² 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,³⁵³ or rebuts the presumption of gift.³⁵⁴ On the positive intention analysis, resulting trusts respond to A's (presumed or actual) positive 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).³⁵⁵

³⁴⁹ See *Hodgson v. Marks* [1971] Ch 892 at 896–97 (Eng.) (discussing what evidence of notice is needed to establish positive intent to create trust being more than mere gifting words that confer beneficial interest).

³⁵⁰ For other reasons, see LIEW, *RATIONALISING*, *supra* note 112, at 4–10.

³⁵¹ See, e.g., *Air Jamaica Ltd. v. Charlton* [1999] 1 WLR 1399 at 1412 (Eng.); *Lavelle v. Lavelle* [2004] EWCA (Civ) 223 [13]–[14] (Eng.) (on appeal taken from HC); *Twinsectra v. Yardley* [2002] 2 AC 164 [92] (Eng.); *Patel v. Mirza* (2016) 3 WLR 399 [238] (Eng.); see also P.J. Millett, *Restitution and Constructive Trusts*, 114 L. Q. REV. 399, 401 (1998) [hereinafter Millett, *Restitution*].

³⁵² Millett, *Restitution*, *supra* note 351, at 400–03.

³⁵³ See, e.g., *Hodgson v. Marks*, [1971] Ch 892 at 933 (Eng.). 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 203, ¶ 3.3 (“resulting trusts are imposed in such cases only if there is insufficient evidence to ascertain the transferor’s intention.”); HESS ET AL., *BOGERT’S TRUSTS*, *supra* note 12, § 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.

³⁵⁴ See, e.g., *Ali v. Khan* [2002] EWCA (Civ) 974 [24] (Eng.).

³⁵⁵ See Millett, *Restitution*, *supra* note 351, at 401–02.

This is clearly not the way the modern law works, as express and resulting trusts are treated as distinct types of trusts.³⁵⁶ 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.³⁵⁷ The two types of intention may,³⁵⁸ or may not, overlap, but each type of trust is triggered by a different type of intention.³⁵⁹

Thirdly, and most importantly, the negative intention analysis avoids obscuring the autonomy-enhancing features of express trusts.³⁶⁰ 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.³⁶¹ 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.³⁶² 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.³⁶³

Once we accept the negative intention analysis, the differences in the scope of presumptions are easily explicable: in both

³⁵⁶ See, e.g., RESTATEMENT (THIRD) OF TRS. § 7 cmt. a (AM. L. INST. 2001).

³⁵⁷ See *id.* § 1 cmt. e.

³⁵⁸ In relation to which, see *infra* Section VI.A.

³⁵⁹ See RESTATEMENT (THIRD) OF TRS. § 7 cmt. a (AM. L. INST. 2001).

³⁶⁰ See Langbein, *Mandatory Rules*, *supra* note 83, at 1120–21.

³⁶¹ *Id.*; see RESTATEMENT (THIRD) OF TRS. §§ 7–8 (AM. L. INST. 2001); *supra* note 256 and accompanying text.

³⁶² See Langbein, *Mandatory Rules*, *supra* note 83, at 1120–21; RESTATEMENT (THIRD) OF TRS. §§ 7–8 (AM. L. INST. 2001); *supra* notes 67–68 and accompanying text.

³⁶³ See Langbein, *Mandatory Rules*, *supra* note 83, at 1120–21; RESTATEMENT (THIRD) OF TRS. §§ 7–8 (AM. L. INST. 2001).

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.³⁶⁴ 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.³⁶⁵ 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.³⁶⁶ 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].”³⁶⁷ That presumption can be rebutted by evidence that A did not intend for B to take the beneficial interest in the property.³⁶⁸

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.³⁶⁹ 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 accompanied by an intention that the recipient should take the beneficial interest in the property.³⁷⁰ Conversely, English courts have only gone so far as to accept those reasons in relation

³⁶⁴ RESTATEMENT (THIRD) OF TRS. § 8 cmt. f (AM. L. INST. 2001).

³⁶⁵ 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. *See id.*; *see also* *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 at 708 (Eng.).

³⁶⁶ RESTATEMENT (THIRD) OF TRS. § 9 cmt. a (AM. L. INST. 2001).

³⁶⁷ *Id.* § 9 cmt. 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, 39–40 (2011).

³⁶⁸ RESTATEMENT (THIRD) OF TRS. § 9 cmt. c (AM. L. INST. 2001).

³⁶⁹ *See* Glister, *supra* note 338, at 401–02.

³⁷⁰ HESS ET AL., BOGERT’S TRUSTS, *supra* note 12, § 453.

to conveyances of land,³⁷¹ 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 to) ordinarily lead to a trust remedy,³⁷² as is presently thought to be the case in America (although under the label of constructive trusts).³⁷³ This is not the case in England.³⁷⁴ On a proper understanding, the answer to the question must be in the negative.³⁷⁵ 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.³⁷⁶ One of those background legal rules concerns the law of unjust enrichment.³⁷⁷ 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.³⁷⁸ That question

³⁷¹ See, e.g., *Lohia v. Lohia* [2001] WTLR 101, [22] (Eng.) (discussing § 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.”)).

³⁷² See ROBERT CHAMBERS, *RESULTING TRUSTS* 108–09 (1997); PETER BIRKS, *AN INTRODUCTION TO THE LAW OF RESTITUTION* 100 (rev. ed. 1989).

³⁷³ See HESS ET AL., *BOGERT'S TRUSTS*, *supra* note 12, § 453.

³⁷⁴ While in England there is indeed a growing trend of categorizing trusts responding to unjust enrichment as resulting trusts, GOFF & JONES, *supra* note 235, ¶ 38-46 and cases cited therein, unjust enrichment does not give rise to a proprietary trust response as a matter of course.

³⁷⁵ See P.J. Millett, *Review Article: Resulting Trusts*, 6 *RESTITUTION L. REV.* 283, 285 (1998) [hereinafter Millett, *Resulting Trusts*] (reviewing CHAMBERS, *supra* note 372) (discussing other ways that resulting trusts arise that are different from an instance of unjust enrichment).

³⁷⁶ Compare RESTATEMENT (THIRD) OF TRS. § 9 cmt. c (AM. L. INST. 2001), with *id.* § 7 cmt. a.

³⁷⁷ See Millett, *Resulting Trusts*, *supra* note 375, at 285.

³⁷⁸ Thus, for example, Lord Millett has suggested, applying an objective approach to intention, that a mistaken transfer “[does] not affect [A’s] intention

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.³⁷⁹

B. 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.”³⁸⁰ Thus, in England, a resulting trust has been called “a default trust,”³⁸¹ 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,”³⁸² which similarly indicates that a resulting trust will arise if A does not intend to dispose of her property.³⁸³ 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.³⁸⁴

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.³⁸⁵ That is, they facilitate property owners’ pursuit of “self-chosen goals and relationships,”³⁸⁶ by “allow[ing] [them] to have private authority over [their] resources.”³⁸⁷ 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;

that the money should become the property of [B].” Millett, *Restitution*, *supra* note 351, at 412; *see also* Millett, *Resulting Trusts*, *supra* note 375, at 283, 285; *Twinsectra v. Yardley* [2002] 2 AC 164 [91] (Eng.); *Challinor v. Juliet Bellis & Co.* [2015] EWCA (Civ 59) [103]–[04] (Eng.).

³⁷⁹ *See* Millett, *Resulting Trusts*, *supra* note 375, at 285.

³⁸⁰ GARDNER, *supra* note 76, at 32 (stating how 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”).

³⁸¹ *Twinsectra*, [2002] 2 AC [100], [102].

³⁸² RESTATEMENT (THIRD) OF TRS. §§ 7 cmt. a, 9 cmt. e (AM. L. INST. 2001).

³⁸³ *See id.* § 7 cmt. a.

³⁸⁴ *Id.* § 9 cmt. e.

³⁸⁵ *See id.* § 8 cmt. a (discussing how when transfer through resulting trust fails, ownership is retained).

³⁸⁶ RAZ, MORALITY, *supra* note 27, at 370.

³⁸⁷ Dagan, *supra* note 62, at 178.

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.³⁸⁸ A resulting trust arises in A's favor so long as A had not decisively decided to dispose of her property.³⁸⁹

The autonomy-enhancing role of resulting trusts is reflected in the fact that they are "reversionary in nature"³⁹⁰: they provide the mechanical remedy of invariably returning *to A* the beneficial interest that A does not intend B to have.³⁹¹ *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.³⁹² 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's, or parties', positive intentions.³⁹³

Finally, the law of resulting trusts remains autonomy-enhancing even where the presumption of gift applies.³⁹⁴ Because the starting points of both the presumption of resulting trust and the presumption of gift are diametrically opposed,³⁹⁵ 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

³⁸⁸ See RESTATEMENT (THIRD) OF TRS. § 8 cmts. c(1), h (AM. L. INST. 2001).

³⁸⁹ See *cf. id.* § 8 cmt. f (discussing when presumption of resulting trust can be overcome showing decisive action by transferor (A)).

³⁹⁰ *Id.* § 7 cmt. a.

³⁹¹ See *id.*

³⁹² See Millett, *Resulting Trusts*, *supra* note 375, at 401.

³⁹³ RESTATEMENT (THIRD) OF TRS. § 7 cmts. a, d (AM. L. INST. 2001).

³⁹⁴ See *id.* § 9 cmt. c.

³⁹⁵ For example, in *Westdeutsche Landesbank Girozentrale v. Islington LBC* [1996] AC 669 at 708 (Eng.), Lord Browne-Wilkinson described the presumption of advancement as a "counter-presumption" vis-à-vis the presumption of resulting trust.

had such an intention is a strategy designed precisely to protect A's autonomy.³⁹⁶

C. 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.³⁹⁷ 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.³⁹⁸

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,³⁹⁹ 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 trust⁴⁰⁰ (for A or a third party's benefit) or as a contract,⁴⁰¹ and a resulting trust will not arise.⁴⁰² Allowing resulting

³⁹⁶ See Dagan, *supra* note 62, at 182.

³⁹⁷ 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 CONSTRUCTIVE AND RESULTING TRUSTS, *supra* note 109, at 286; see also *Re Vandervell's Trs.* (No 2) [1974] Ch 269 [319] (Eng.); UNDERHILL & HAYTON, *supra* note 203, ¶ 22.13. A similar point is made in Charles Rickett, *The Classification of Trusts*, 18 N.Z. U. L. REV. 305, 317–18 (1999).

³⁹⁸ See Rickett, *supra* note 397, at 318–19.

³⁹⁹ See e.g., RESTATEMENT (THIRD) OF TRS. § 9 cmt. e (AM. L. INST. 2001); see also *id.* § 8, illus. 1.

⁴⁰⁰ *Id.* § 7 cmt. a:

[I]f 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 resulting trust.

Id.

⁴⁰¹ 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 *id.* § 9 cmt. e; *Bennet v. Bennet* (1879) 10 Ch D 474 at 474, 480–81 (Eng.). In these circumstances, A does intend B to take the beneficial interest in the property.

⁴⁰² *Bennet*, (1879) 10 Ch D at 480–81.

trusts to override such enforceable positive intentions would have the effect of overriding, rather than protecting, A's autonomy.⁴⁰³

D. 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.⁴⁰⁴ Thus, a resulting trust does not arise if there is good reason for B to retain the beneficial interest in the property.⁴⁰⁵ 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.⁴⁰⁶ But if B is not a volunteer, for example where B provides "consideration for the transfer as an agreed exchange,"⁴⁰⁷ then a resulting trust will not arise.⁴⁰⁸

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.⁴⁰⁹ 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.⁴¹⁰ After all, autonomy is relational, and A's exercise

⁴⁰³ Compare *id.* at 480 (stating that the mother voluntarily accepted the obligations associated with her choice), with Dagan, *supra* note 62, at 177–78 (discussing private law's (property & contract) core of enhancing protection of individuals' choice of how to allocate, or benefit from, resources).

⁴⁰⁴ See HESS ET AL., *BOGERT'S TRUSTS*, *supra* note 12, § 453 (discussing how transferor's reservation of interest at transferee's (or trustee's) expense is not in line with modern society and notions).

⁴⁰⁵ Cf., RESTATEMENT (THIRD) OF TRS. § 7 cmt. a (AM. L. INST. 2001) (discussing the necessity of transferee ("b") to have no remaining beneficial interest in property in order to form resulting trust).

⁴⁰⁶ See Millett, *Restitution*, *supra* note 351, at 414.

⁴⁰⁷ RESTATEMENT (THIRD) OF TRS. § 8 cmt. f (AM. L. INST. 2001). The lack of consideration was a key reason why a resulting trust arose in *Prest v. Petrodel Resources Ltd.* [2013] UKSC 34 [49] (Eng.).

⁴⁰⁸ RESTATEMENT (THIRD) OF TRS. § 8 cmt. f (AM. L. INST. 2001).

⁴⁰⁹ Rickett, *supra* note 397, at 311.

⁴¹⁰ See *id.* at 318 (discussing benefits from analyzing the objective intent of the parties).

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.⁴¹¹

E. External Limits

Until relatively recently, the English law of illegality provided a significant external limit on the operation of resulting trusts.⁴¹² 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."⁴¹³ 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.⁴¹⁴ 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.⁴¹⁵ 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."⁴¹⁶ This brings English law in line with most of American law, where a

⁴¹¹ See Dagan, *supra* note 62, at 190–91.

⁴¹² See *Tinsley v. Milligan* [1944] 1 AC (HL) 340 at 375 (Eng.).

⁴¹³ *Id.* at 340.

⁴¹⁴ See *id.* at 344.

⁴¹⁵ See *id.* at 345–46.

⁴¹⁶ *Patel v. Mirza* [2016] UKSC 42 at [120]:

In 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.

Id.

similarly nuanced approach is taken.⁴¹⁷ 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.⁴¹⁸

In New York, however, the law has taken a different course. Since 1830, resulting trusts no longer arise in PM cases except in limited circumstances.⁴¹⁹ 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?"⁴²⁰ The upshot is that A's autonomy is curbed in PM cases, ostensibly due to illegality and public policy concerns.⁴²¹

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.⁴²² 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.⁴²³ 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.⁴²⁴ In the absence of a valid reason for abolishing resulting trusts,⁴²⁵ over-protectionism unjustifiably intrudes into A's autonomy.

⁴¹⁷ See, e.g., RESTATEMENT (THIRD) OF TRS. §§ 8 cmt. i, 9 cmt. g (AM. LAW INST. 2001).

⁴¹⁸ See *id.*

⁴¹⁹ The New York Revised Statutes of 1830, § 52, now consolidated in the New York Consolidated Laws, Estates, Powers & Trusts Law § 7-1.3(a).

⁴²⁰ See HESS ET AL., BOGERT'S TRUSTS, *supra* note 12, § 467.

⁴²¹ See HARDING, *supra* note 1, at 52.

⁴²² See *id.* at 64.

⁴²³ See *id.*

⁴²⁴ See Bryan, *supra* note 69, at 383.

⁴²⁵ 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,

V. 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.⁴²⁶ 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.⁴²⁷

A. *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.⁴²⁸ Otherwise, the argument goes, why ought the state commit resources to maintaining and developing trusts law, rather than enhancing personal autonomy through some other means (or, indeed, none at all)?⁴²⁹ After all, the argument 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?⁴³⁰

(1918) 5 AIR 140 (India). Functionally, “benami” transactions are indistinguishable from resulting trusts: as the Privy Council held, the benami would be recognized as a resulting trust. *Id.* at 145. 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. Benami Transactions Prohibition Act, § 7 (1988).

⁴²⁶ See *infra* Section V.A.

⁴²⁷ See *infra* Section V.B.

⁴²⁸ Cf. DAGAN & HELLER, *supra* note 157, at 1–2, 5.

⁴²⁹ Cf. *id.* at 6 (“[C]hoice theory shows why a state committed to human freedom must actively enable people’s relationships by shaping distinct contract types.”).

⁴³⁰ Cf. *id.* (“[C]hoice theory shows that liberal states are affirmatively obligated to ensure an *adequate* range of contract types.”) (emphasis added).

Let me attempt an answer—a tentative one, but one informed by the discussion in this Article. 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, 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”;⁴³¹ second, that trusts are “a derivative form of property” that “extends property’s coordination function”;⁴³² 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”;⁴³³ fourth, that the trusts are characterized by the norm of fiduciary stewardship of assets.⁴³⁴ 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.⁴³⁵ 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

⁴³¹ Langbein, *Contractarian Basis*, *supra* note 5, at 627.

⁴³² 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,” that is, duties imposed on the trustee to exclude her from the benefits of the trust property. *Id.* at 164.

⁴³³ Avihay Dorfman, *On Trust and Transubstantiation: Mitigating the Excesses of Ownership*, in *THE PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 350 (Andrew S. Gold & Paul B. Miller eds., 2014).

⁴³⁴ Charles Mitchell, *Stewardship of Property and Liability to Account*, 78 *CONV. & PROP. LAW.* 215 (2014).

⁴³⁵ 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.

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.⁴³⁶ Moreover, these justifications only purport to explain express trusts; they say nothing about constructive and resulting trusts.⁴³⁷

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.⁴³⁸ A hint in this direction can be seen in the express trust’s immense 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.⁴³⁹ 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.⁴⁴⁰ Each trust is different because property owners

⁴³⁶ See Langbein, *Contractarian Basis*, *supra* note 5, at 658.

⁴³⁷ See *id.* at 641.

⁴³⁸ Cf. NICHOLAS MCBRIDE, *THE HUMANITY OF PRIVATE LAW: PART I: EXPLANATION* 175 (2018) (where express trusts are said to have the aim of “enhancing the RP-flourishing of those who create them”). “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. *Id.* 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> [<https://perma.cc/S6DZ-5W38>]). 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 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.

⁴³⁹ See GARDNER, *supra* note 76.

⁴⁴⁰ See Langbein, *Contractarian Basis*, *supra* note 5, at 625; Dorfman, *supra* note 433.

are free to use the express trust device to achieve that which they desire, depending on the circumstances.⁴⁴¹

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.⁴⁴² 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.⁴⁴³ Therefore, trusts law's justification lies in the fact that it significantly enhances property owners' autonomy.⁴⁴⁴

This conclusion brings to mind JE Penner's important paper "Untheory of the Law of Trusts."⁴⁴⁵ In that paper, Penner suggests that there is no theory of trusts law.⁴⁴⁶ 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,"⁴⁴⁷ those core principles of which also "reveal the moral or economic or other 'commitments'" of an area of law.⁴⁴⁸ 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."⁴⁴⁹ Therefore:

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.⁴⁵⁰

⁴⁴¹ See GARDNER, *supra* note 76.

⁴⁴² See RAZ, MORALITY, *supra* note 27, at 373.

⁴⁴³ See *id.* at 413.

⁴⁴⁴ See Penner, *supra* note 6, at 657.

⁴⁴⁵ See *id.* at 653.

⁴⁴⁶ See *id.* at 654.

⁴⁴⁷ *Id.* at 655.

⁴⁴⁸ *Id.* at 656.

⁴⁴⁹ *Id.* at 665.

⁴⁵⁰ *Id.* at 666. Elsewhere, Penner suggests that the "core principles" of trusts law—for example, that beneficiaries have beneficial interests that bind

The argument in this Article 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,”⁴⁵¹ “derivative”⁴⁵² level, facilitating property owners’ autonomy to engage with whatever ultimate value or values they so desire.⁴⁵³ But there is one significant point of departure. The argument in this Article 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.⁴⁵⁴ The clearest example relates to constructive and resulting trusts.⁴⁵⁵ Do they evince a commitment to facilitating personal autonomy, as argued in this Article, or does their “theory” lie somewhere else, a view towards which Penner himself might perhaps be inclined?⁴⁵⁶ Therein lies a “theoretical” disagreement, properly so-called.⁴⁵⁷ 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.”⁴⁵⁸ 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

third parties, that trustees must keep property separate and must account to beneficiaries, and that trusts are not contracts—are themselves “the central organizing rules.” *Id.* at 664–65.

⁴⁵¹ See RESTATEMENT (THIRD) OF TRS. § 1 cmt. b (AM. L. INST. 2001).

⁴⁵² See *id.* § 7 cmt. d.

⁴⁵³ See RAZ, MORALITY, *supra* note 27, at 373.

⁴⁵⁴ See Penner, *supra* note 6, at 656.

⁴⁵⁵ See *id.* at 666.

⁴⁵⁶ For example, Penner has written of *Rochefoucauld*, one of the agreement-based constructive trusts cases, that the trust arises because *B* (rather than *A*) as “settlor of the trust” had affected a self-declaration of trust, contrary to the analysis in this Article. J.E. PENNER, THE LAW OF TRUSTS ¶ 6.12 (10th ed. 2016). He has also suggested, contrary to the analysis in this Article, 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.” *Id.*

⁴⁵⁷ See *id.*

⁴⁵⁸ See *id.*

the limits and necessary safeguards of settlor autonomy.⁴⁵⁹ 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.

B. 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.⁴⁶⁰ In view of this criticism, it might be argued that the justification propounded in this Article—the enhancement of personal autonomy—is the very thing that makes express trusts unjustified.⁴⁶¹ 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.⁴⁶²

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.⁴⁶³

⁴⁵⁹ See RAZ, *MORALITY*, *supra* note 27, at 373.

⁴⁶⁰ See HARDING, *supra* note 1, at 74.

⁴⁶¹ See Mark Bennett & Adam Hofri-Winogradow, *Against Subversion: A Contribution to the Normative Theory of Trust Law* 4 (Hebrew University of Jerusalem Legal Studies Research Paper Series No. 20-25), <https://ssrn.com/abstract=3579955> [<https://perma.cc/3DK7-UCAB>].

⁴⁶² See Penner, *supra* note 6, at 655.

⁴⁶³ Bennett and Hofri-Winogradow seem to argue the same, where they write that:

Trusts should exist, but external legal regimes should step in to prevent their subversion, by way of a rule-based closing of

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 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.⁴⁶⁴ 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.⁴⁶⁵ *Those* areas of law are better

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 Bennett & Hofri-Winogradow, *supra* note 461, at 37–38. But earlier in their paper, they criticize existing *trust law* theory for not attempting to justify the subversive use of trusts. See *id.* at 4. In their concluding section they suggest that “trust law should ... be developed ... to control [subversion].” *Id.* at 40. These latter points are inconsistent with the former.

⁴⁶⁴ See RAZ, MORALITY, *supra* note 27, at 373.

⁴⁶⁵ See, e.g., United States v. Hopkins, 509 F. App'x 765, 767 (10th Cir. 2013) (discussing conviction for tax evasion involving the use of trusts); *Abusive tax shelters, trusts, conservation easements make IRS' 2019 "Dirty Dozen" list of tax scams to avoid*, IRS, <https://www.irs.gov/businesses/small-businesses-self-employed/abusive-trust-tax-evasion-schemes-talking-points> [https://perma.cc/6QSZ-CRDD].

able to provide a targeted response without eroding the autonomy provided for by trusts law.⁴⁶⁶

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.⁴⁶⁷ 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.⁴⁶⁸

VI. 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.

A. *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.⁴⁶⁹ This taxonomical approach towards trusts law, while sometimes derided as a “bewildering ... preoccupation,”⁴⁷⁰ is of

⁴⁶⁶ But see Bennett & Hofri-Winogradow, *supra* note 461, at 40 (“[T]rust law should not be developed to facilitate the subversion use, but to control it.”).

⁴⁶⁷ See Cass R. Sunstein, *Empirically Informed Regulation*, 78 U. CHI. L. REV. 1349, 1389 (2011) (“To be empirically informed, regulations should be revisited and reviewed retrospectively, to ensure that they are promoting their intended functions, and are not producing excessive costs or unintended adverse side effects.”).

⁴⁶⁸ See *id.*; see also John H. Langbein, *Trust Law As Regulatory Law: The Unum/Provident Scandal and Judicial Review of Benefit Denials Under ERISA*, 101 NW. U. L. REV. 1315, 1342 (2007) (“[T]he purpose of trust law is to give maximum effect to the wishes of the transferor—that is, to private autonomy.”).

⁴⁶⁹ See *supra* Section I.B.

⁴⁷⁰ Paul Finn, *Common Law Divergences*, 37 MELB. U. L. REV. 509, 513 n.24 (2013).

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.⁴⁷¹ 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.”⁴⁷²

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.⁴⁷³ Instinctively, one would say that this is an express trust⁴⁷⁴: but, the precise reason for this warrants explanation. From an 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*.⁴⁷⁵ 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

⁴⁷¹ RAZ, *MORALITY*, *supra* note 27, at 375.

⁴⁷² HESS ET AL., *BOGERT’S TRUSTS*, *supra* note 12, § 451.

⁴⁷³ *Id.*

⁴⁷⁴ This is confirmed, for example, in The Restatement (Third) of Trusts:

Where 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 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.

RESTATEMENT (THIRD) OF TRS. § 9 cmt. c (AM. L. INST. 2001).

⁴⁷⁵ See *id.*; see also HESS ET AL., *BOGERT’S TRUSTS*, *supra* note 12, §§ 41, 43.

of intention is directly recognized as the source of the trust, rather than simply giving recognition to what A did not intend (that is, negative intention, to which resulting trusts respond).⁴⁷⁶

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.⁴⁷⁷ It might be thought that the categorization in this case does not matter because both trusts are precluded from the statutory formality requirements by section 8 of the Statute of Frauds; but this is mistaken from an autonomy point of view.⁴⁷⁸ 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.⁴⁷⁹ 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.⁴⁸⁰

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.⁴⁸¹ The position taken in the R3T⁴⁸² is that, unless A has become incompetent or has died, the appropriate response is to return the

⁴⁷⁶ See *supra* Section III.B (discussing agreement-based constructive trusts); *supra* note 355 and accompanying text (discussing positive intention and resulting trusts); *supra* notes 360–63 and accompanying text (discussing positive and negative intention analysis and autonomy).

⁴⁷⁷ See RESTATEMENT (THIRD) OF TRS. §§ 2 cmt. e, 7 cmt. d (AM. L. INST. 2001).

⁴⁷⁸ See *id.* § 7 cmt. d; see also *supra* text accompanying notes 473–74.

⁴⁷⁹ See *supra* text accompanying notes 287–92.

⁴⁸⁰ See *supra* text accompanying notes 345–63.

⁴⁸¹ RESTATEMENT (THIRD) OF TRS. § 24(3) cmt. h (AM. L. INST. 2001); see *supra* notes 278–80 and accompanying text.

⁴⁸² *Id.*

property to A,⁴⁸³ 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.”⁴⁸⁴ In England, these reasons are also often cited for the view that the property ought to be returned to A,⁴⁸⁵ although a relatively recent Court of Appeal case has gone the other way and held that a constructive trust arises in C’s favor.⁴⁸⁶ 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.⁴⁸⁷

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.”⁴⁸⁸ 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.⁴⁸⁹ Once the statute of frauds concern is overcome, it becomes clear that a constructive trust for C’s benefit is the appropriate outcome.⁴⁹⁰ As we have seen, trusts law is committed to enhancing autonomy by giving legal effect to decisive decisions.⁴⁹¹ Provided that B’s promise to 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.⁴⁹² Enhancing A’s personal autonomy in the circumstances, therefore, requires that A’s decision is fully

⁴⁸³ The Restatement (Third) of Trusts 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. *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ See discussion in LIEW, RATIONALISING, *supra* note 112, at 73–74.

⁴⁸⁶ *De Bruyne v. De Bruyne* [2010] EWCA (Civ) 519 (Eng.).

⁴⁸⁷ HESS ET AL., BOGERT’S TRUSTS, *supra* note 12, § 495.

⁴⁸⁸ *Id.* § 497.

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ See *supra* Section I.B.

⁴⁹² See *supra* text accompanying notes 289–92.

respected; doing any less detracts from the commitment to enhancing A's autonomy.⁴⁹³ 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.⁴⁹⁴

B. Trusts Law Within Private Law

In the introductory section of this Article 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.⁴⁹⁵ 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 Article indicates that this question is posed too widely.⁴⁹⁶ Resting alongside the facilitative devices of contracts, wills, and property rules is not trusts law as such, but more specifically *express trusts*.⁴⁹⁷ 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.⁴⁹⁸ Certainly, nothing prevents enlightened individuals from intentionally tailoring their actions in such a way to "ensure" a constructive or resulting trust outcome.⁴⁹⁹ However, it remains a fact that they do not function to protect property owners' autonomy to set up a facilitative trust device.⁵⁰⁰ Therefore, the aims and functions of constructive and resulting trusts cannot be replicated or reduced to any single or combination of other facilitative devices available in the law.⁵⁰¹ Crucially, this indicates that it is *necessary* for any liberal state committed to

⁴⁹³ See *supra* Section I.B.

⁴⁹⁴ See HESS ET AL., BOGERT'S TRUSTS, *supra* note 12, § 495.

⁴⁹⁵ See *supra* note 6 and accompanying text.

⁴⁹⁶ See *supra* note 18 and accompanying text.

⁴⁹⁷ See *id.*

⁴⁹⁸ See *supra* text accompanying notes 50–52.

⁴⁹⁹ See *id.*

⁵⁰⁰ See Penner, *supra* note 6, at 267.

⁵⁰¹ RESTATEMENT (THIRD) OF TRS. § 1 (AM. L. INST. 2001).

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.⁵⁰²

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."⁵⁰³ He applies this statement to property and contracts law, suggesting that "they are particularly valuable conventions" that "any humanist polity must enact."⁵⁰⁴ 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."⁵⁰⁵

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.⁵⁰⁶ 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.⁵⁰⁷ 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.⁵⁰⁸ 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."⁵⁰⁹

⁵⁰² *See id.*; Dagan, *supra* note 62, at 181.

⁵⁰³ Dagan, *supra* note 62, at 180 (emphasis added).

⁵⁰⁴ *Id.*

⁵⁰⁵ *Id.*

⁵⁰⁶ RAZ, MORALITY, *supra* note 27, at 369.

⁵⁰⁷ *See id.*

⁵⁰⁸ Dagan, *supra* note 62, at 180.

⁵⁰⁹ *Id.* 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.⁵¹⁰

C. A Question of Degree

It is well-known that modern trusts law was historically a product of English law.⁵¹¹ 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.”⁵¹² 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.⁵¹³ But, the influence of trusts law goes further: an increasing number of civilian legal systems are making available the express trust through statutory activism,⁵¹⁴ including those that might not be described as reflecting a liberal ethos (at least in the Western sense).⁵¹⁵ 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.⁵¹⁶ Some of those differences are significant:

⁵¹⁰ See Hanoch Dagan, *The Challenges of Private Law: A Research Agenda for an Autonomy-Based Private Law*, in PRIVATE LAW IN THE 21ST CENTURY 67 (Kit Barker et al. eds., 2017).

⁵¹¹ See Finn, *supra* note 470, at 509.

⁵¹² FREDERIC W. MAITLAND, *The Unincorporate Body*, in THE COLLECTED PAPERS OF FREDERIC W. MAITLAND 272 (H.A.L. Fisher ed., 1911).

⁵¹³ See *generally* MAURIZIO LUPOLI, TRUSTS: A COMPARATIVE STUDY (2000).

⁵¹⁴ On this topic, see *generally id.*; THE INTERNATIONAL TRUST (David Hayton 3d ed., 2011); RE-IMAGINING THE TRUST: TRUSTS IN CIVIL LAW (Lionel Smith ed., 2012) [hereinafter RE-IMAGINING THE TRUST]; TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS (Lusina Ho & Rebecca Lee eds., 2013).

⁵¹⁵ A stark example is the provision of trusts law in China PRC: see the Chinese Trust Law 2001.

⁵¹⁶ See RE-IMAGINING THE TRUST, *supra* note 514, at 1.

for example, certain (mostly civilian) jurisdictions do not recognize constructive or resulting trusts,⁵¹⁷ 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.⁵¹⁸ Other differences are relatively more subtle: for example, jurisdictions may differ as to the recognition of noncharitable purpose trusts or bare trusts.⁵¹⁹ Given these differences, it might be asked whether the argument in this Article—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.⁵²⁰ 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.⁵²¹

Regardless of those differences, once it is explicitly recognized that trusts law is inherently autonomy-enhancing,⁵²² 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.

⁵¹⁷ See generally Ying-Chieh Wu, *Constructive Trusts in the Civil Law Tradition*, 12 J. EQUITY 319 (2018).

⁵¹⁸ See RE-IMAGINING THE TRUST, *supra* note 514, at 2.

⁵¹⁹ See *id.*

⁵²⁰ See *supra* Section II.A.

⁵²¹ See RAZ, MORALITY, *supra* note 27, at 373.

⁵²² See Garbbaum, *supra* note 29, at 401.

CONCLUSION

In conclusion, trusts law can be justified on the basis that it is *comprehensively* autonomy-enhancing.⁵²³ 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).⁵²⁴ 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.”⁵²⁵ 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.⁵²⁶ 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.

⁵²³ *Id.*

⁵²⁴ See *supra* note 259 and accompanying text.

⁵²⁵ RAZ, MORALITY, *supra* note 27, at 416.

⁵²⁶ See *id.* at 370.