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**LEGAL EPISTEMOLOGY IN THE *RESTATEMENT (THIRD)*  
*OF RESTITUTION AND UNJUST ENRICHMENT***

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INTRODUCTION

The publication of the *Restatement (Third) of Restitution and Unjust Enrichment*<sup>1</sup> (*R3RUE*) is an important accomplishment on at least two levels. Its contribution, actual and potential, to the development of the law is beyond question. Carefully crafted over many years, it is a work that will shape our understanding of restitution in the United States and beyond. Equally important is the legal epistemology adopted in *R3RUE*. The strange accident of the advent of American legal realism had a number of effects.<sup>2</sup> In the law of unjust enrichment, even more so than in other fields of private law, it has been associated with the decline of respect in the United States for doctrinal scholarship.<sup>3</sup> However, like most publications in the Restatement project,

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<sup>1</sup> *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (2011).

<sup>2</sup> I call it a strange accident because it would appear that at least some of those who were instrumental in the rise of realism – I refer to O.W. Holmes, Jr. and Karl Llewellyn – would not readily have associated themselves with what the movement became. See Lionel Smith, *Understanding Specific Performance*, in *COMPARATIVE REMEDIES FOR BREACH OF CONTRACT* 221, 222-24 (Nili Cohen & Ewan McKendrick eds., 2005).

<sup>3</sup> John H. Langbein, *The Later History of Restitution*, in *RESTITUTION: PAST, PRESENT AND FUTURE* 57 (W.R. Cornish et al. eds., 1998); Chaim Saiman, *Restitution in America: Why the U.S. Refuses to Join the Global Restitution Party*, 28 *OXFORD J. LEGAL STUD.* 99 (2008). Hanoch Dagan has argued for an understanding of legal realism that is presumptively respectful of doctrine. Hanoch Dagan, *The Realist Conception of Law*, 57 *U.*

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*R3RUE* stands against this rejection of doctrine. It situates itself in the interpretive tradition that has been a hallmark of the development, not only of the common law, but of the civil law as well.

In this text, I have three goals. The first is to explore some of the characteristics of the traditional Western epistemology of private law, in order to understand its default position of respect for elaborated doctrine. This effort, which I will undertake in Part I, will allow me to highlight in Part II the differences between the traditional epistemology and other approaches, including those that arose following the downgrading of doctrine in the United States.

The second goal, which will be the preoccupation of Part III, will be to assess the approach in *R3RUE* to the important topic of constructive trusts. My argument will be that in this field, *R3RUE* is ambivalent. It combines traditional epistemology with, in some respects, the law-skeptical approach that arose in the wake of American legal realism. I will argue that the attempt to draw on these incongruent epistemologies – these different ways of knowing what the law is – leads to tension and inconsistency in the positions taken in *R3RUE*.

The third goal, which I will address in my Conclusion, is to evaluate whether and to what extent this matters. Is there any particular reason why we should adopt a single way of knowing what the law is?

#### I. THE DOCTRINAL VOICE AND THE INTELLECTUAL RESOURCES OF THE LAW

The voice of the Restatement project is the voice of the law as it has been developed. By this, I mean that it is backwards-looking. In formulating the numbered provisions of a Restatement, provisions that are called “black letter” in the language of the American Law Institute, the Reporter primarily looks to past decisions of the courts. The enterprise is a justificatory one: in addition to explanatory comments and illustrations, the Reporter provides notes whose purpose is to show that the black letter of the Restatement reflects the best interpretation of the collected decisions of the courts. The voice, in other words, is the voice of doctrinal law, which is also backwards-looking and justificatory. And the voice of doctrinal law is not that different from the voice

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TORONTO L.J. 607, 652 (2007). It is not part of my argument to say what is “good” and what is “bad” legal realism; I only note, as others have, that the postulates of (at least some versions of) legal realism have led in the United States to a widely held view that taking legal doctrine seriously, as a mode of discourse and as a subject of study, is not fruitful. It is striking to the outsider that while many U.S. law professors have a higher degree in some other discipline, very few have more than a first degree in law. This is atypical in all other academic disciplines in the United States and atypical in law outside the United States. Elsewhere in the common-law world, a Master’s degree is considered a minimal qualification for the academy, while a research doctorate (in the discipline of law) is now typical. A research doctorate is essential in civilian jurisdictions, where (unlike in common-law jurisdictions) law has been a university discipline since the modern university arose in the middle ages.

of a common-law judge who is called upon to resolve a question of law: the judge, too, looks back to the previous case law and explains, in reasons for judgment, how that case law leads to the decision that has been made.

Anyone who works in this doctrinal voice knows that it does not exclude creativity. The most renowned doctrinal jurists, whether judges or professors, are the creative ones. As in many spheres, including the fine arts, creativity can be more impressive exactly because it is constrained in various ways. Doctrinal law is always constrained. One constraint relates to binding authority. Morden J.A. once said, "In the absence of binding authority clearly on point it may reasonably be said that the law *is* what it ought to be,"<sup>4</sup> a statement which was adopted by the Supreme Court of Canada.<sup>5</sup> The Supreme Court of Canada, like other supreme appellate courts, is in the position that no authority is ever binding on it. But this certainly does not mean that prior decisions are irrelevant to the reasoning of the Supreme Court of Canada; it only means that a prior decision cannot prevent, as binding authority can, the careful evaluation of a legal question. In the reasoning of a supreme appellate court, just as in the reasoning of any common-law court, prior court decisions exert normative force. An official decision on a question of law provides a reason, though certainly not necessarily an indefeasible reason, to decide the same question in the same way should it arise again.<sup>6</sup>

These are the constraints under which the courts operate. Their function is to adjudicate disputes. This is why the changes they bring about in the law are secondary phenomena. Law reform by courts cannot be a primary activity. It must be an incident of constrained adjudication.

Legal commentators, of course, can adopt any voice they choose. A legal scholar might look at state of the English law on security over movable property and argue that it needs to be reformed with the adoption of a unified registration system, as in most Canadian and U.S. jurisdictions. This would be an argument for legislative change, for change that could never be achieved by the courts. What does it signify when scholars work in a doctrinal voice, as the Restatements' reporters do? In this voice, one can advocate change to the law, but constrained change, limited by the existing law. There are a number of ways of understanding this. Most obviously, it is a voice that speaks to the courts. If a scholar argues that English law needs a register of security over personal property, he or she is attempting to influence Parliament to change the law. On the other hand, if a scholar makes an argument that the case law supports the possibility of a remedy of disgorgement of profits for certain

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<sup>4</sup> Ontario Sec. Comm'n v. Greymac Credit Corp. (1986), 30 D.L.R. 4th 1, 24 (Can. Ont. C.A.); *see also* Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185, 190 (1968).

<sup>5</sup> In dismissing the appeal, the Supreme Court of Canada adopted in full the judgment of Morden J.A. *Greymac Trust Co. v. Ontario* (O.S.C.), [1988] 2 S.C.R. 172, 173 (Can.).

<sup>6</sup> Lionel Smith, *The Rationality of Tradition*, in *PROPERTIES OF LAW* 297 (Timothy Endicott et al. eds., 2006).

breaches of contract, the argument speaks to the courts. Whether it succeeds or not is another question, but it is an argument that claims the courts can and indeed should grant this remedy on the basis of the law as it is today.<sup>7</sup>

At a very practical level, therefore, an argument in a doctrinal voice seeks to show that the result it advocates is immediately attainable, without the intervention of the legislature. But the doctrinal voice is not chosen merely because it offers the possibility of quicker results. It is chosen because it allows the speaker to partake in the organic evolution of the common law. This evolution takes place through what Karl Llewellyn called the Grand Style:

It is the general and pervasive manner over the country at large, at any given time, of going about the job, the general outlook, the ways of professional knowhow, the kind of thing [jurists] are sensitive to and strive for, the tone and flavor of the working and of the results . . . The tone and mark consist in an as-of-courseness in the constant questing for better and best law to guide the future, but the better and best law is to be built on and out of what the past can offer; the quest consists in a constant re-examination and reworking of a heritage, that the heritage may yield not only solidity but comfort for the new day and for the morrow.

This is the Grand Style of the Common Law.<sup>8</sup>

The choice of a jurist to operate in a doctrinal voice does not involve a conviction that the law cannot be improved; far from it, for rare indeed is doctrinal work that does not make suggestions as to how the law could be improved by the courts. Nor does it involve a view that somehow privileges case law over legislation in terms of some measure of legitimacy. Nor does it involve a view that the law cannot evolve along with changing social circumstances. It does, I would argue, involve a belief that there is a crucial difference of kind and not just of degree between evolution in the Grand Style and legislative law reform. My claim is that doctrinal work presupposes, explicitly or implicitly, that the law has all the internal resources that it needs to evolve justly and appropriately, according to a particular philosophy of the nature and role of private law.

Before I try to make good on that claim, I would like to draw a distinction between and among kinds of legislation. There are certain legislative interventions that are not in opposition to the Grand Style, but rather can be understood as attempts to participate in it. These, in short, are statutes codifying the common law, some of which were enacted in the nineteenth and twentieth centuries and some of which continue to be enacted.<sup>9</sup> These statutes

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<sup>7</sup> Depending on the state of the case law, and on the attitude of the commentator and of the courts in the relevant jurisdiction to the question of stare decisis, the argument may be one that the commentator believes can only be directed in this form to an appellate level court.

<sup>8</sup> KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 36 (1960).

<sup>9</sup> In the United States we can perhaps take the example of the *Uniform Trust Code*.

may amend the law, but the amendments are of a kind that the courts *could have* brought about. We might imagine, for example, that an enthusiastic state legislature took all of the black letter of R3RUE and turned it into an Unjust Enrichment Code, enacting it as a statute. A statute it would be; but one whose norms had evolved through adjudicative evolution.<sup>10</sup> I distinguish this kind of legislative intervention from the kind that could not possibly have been achieved by the courts: the creation of a no-fault scheme for accidents, the creation of a public registration system for property rights, a bankruptcy code that creates preferences among unsecured debts and institutes a fresh-start policy for debtors.<sup>11</sup>

My claim, now repeated and modified, is that doctrinal work – and codifications that preserve continuity with judge-made law – presupposes, explicitly or implicitly, that the law has all the internal resources that it needs to evolve justly and appropriately, according to a particular philosophy of the nature and role of private law. What philosophy? A philosophy that the nature and role of private law is to consecrate, in a juridical and thus publicly enforceable form, the fundamental elements of interpersonal morality; and to do so in a way that is publicly justified. We are all in this world together; we are all equal in our claims to freedom and to choice; but we have disagreements, we have inequalities of acquired resources, and we have interactions that may be unsatisfactory, and all these things lead to disputes.<sup>12</sup>

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<sup>10</sup> The same classification may be appropriate for the relatively rare kind of legislative intervention which can arise where a legislature takes the view that the common law in its jurisdiction has taken a “wrong turn” and it is more expedient to intervene than to wait until the accidents of litigation allow the courts the opportunity to rectify the matter. See Andrew Burrows, *Some Reflections on Law Reform in England and Canada*, 39 CAN. BUS. L.J. 320, 330-31 (2003).

<sup>11</sup> In drawing this distinction I am fully aware that the types that I distinguish may be ends of a spectrum rather than clear-cut alternatives and, moreover, that the provisions of some statutes may well reveal features of both kinds of legislative intervention. I am also aware that how this distinction might be applied to the civil codes of the civilian tradition would raise a number of difficult issues. Such codes are, in part, codifications of the kind that I describe in the text, but they are also usually intended to bring about a rupture with and replacement of the prior law, in some cases involving quite radical law reform. At the same time, the manner of exegesis and development of a civil code by civilian courts and commentators would, in many cases, remind a common lawyer of the Grand Style; and the special status accorded to a civil code, which is far from being treated as an ordinary statute even if that is its technical constitutional status, tells us that it is informed by a particular set of underlying values that are not necessarily implicated in ordinary legislation. In a famous text, Jean Carbonnier noted that while France has had more than ten political constitutions since the Revolution, her real constitution is the Civil Code. Jean Carbonnier, *Le Code Civil*, in LES LIEUX DE MÉMOIRE 1331, 1345 (Pierre Nora ed., 1997). For the English translation, see REALMS OF MEMORY: RETHINKING THE FRENCH PAST (A. Goldhammer trans., Pierre Nora ed., 1996). These questions are all beyond the modest ambitions of the present text.

<sup>12</sup> Here I say nothing about the way in which content might be given to such a

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If one views private law in this way – in this generic way, as the seeking of a kind of perfection of ethics, or of some part of ethics<sup>13</sup> – one can rightly think that the law has all the internal resources that it needs to evolve justly and appropriately. It does not matter much that in one era contracts were made by an exchange of letters and are now made by the filling in of a web form. It does not matter much whether an injury is caused by an ox-cart or by a motorcycle. It does not matter much whether a calumny is perpetrated by a pamphlet or by an email, nor whether a mistaken payment is made by a bill of exchange or by an electronic funds transfer. We do *not* need legislation to deal with each evolution in social circumstances. The strength, the flexibility, and indeed the timelessness of doctrinal reasoning are all based on the simple fact that its foundations lie not in particular texts but in abstract and eternal norms arising out of our shared humanity.<sup>14</sup>

This, then, is why doctrinal scholarship is and has been viewed as a worthy pursuit by so many scholars – and indeed by the courts – for centuries. This is *not* a claim that the doctrinal scholar never believes in the need for legislation, of the non-codifying kind. Take the case of land registration. In a simple world, people own things, and ownership is protected by the law and by the courts. Ownership is acquired by original acquisition, or by derivative acquisition that depends ultimately on another's original acquisition. The real world long ago became more complicated than this, and different kinds of land registration systems are in force everywhere. I would argue that all of these systems, in different ways and to different extents, are based on a range of legislative value judgments, one of which is of the following kind: *even though*, on the facts of the case, as between the parties *A* and *B*, *A* has a better

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philosophy of law. For one very persuasive account of the kind of philosophy that I seek to describe here, see ERNEST WEINRIB, *THE IDEA OF PRIVATE LAW* (1995).

<sup>13</sup> Sir William Blackstone cited Aristotle in support of this view of the doctrinal study of law: "Aristotle himself has said, speaking of the laws of his own country, that jurisprudence or the knowledge of those laws is the principal and most perfect branch of ethics." 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 27 (Clarendon Press 1765-69). I am grateful to Ernest Weinrib for identifying the fragment cited by Blackstone (Τελεια μάλιστα ἀρετή, διὰ τῆς τελείας ἀρετῆς χρῆσις ἐστὶ) as the sentence that would now be cited as 1129b30-31 (the modern system of citation to "Bekker lines" postdates Blackstone's time). Current translations of Aristotle do not view this passage as dealing with jurisprudence or the study of law, but rather with the virtue of justice. See, e.g., ARISTOTLE, *NICOMACHEAN ETHICS* 69 (Terence Irwin trans., Hackett Publishing Co. 2d ed. 1999) (c. 384 B.C.E.) ("[J]ustice is complete virtue to the highest degree because it is the complete exercise of complete virtue.").

<sup>14</sup> On the vocation of the doctrinal voice as a way of understanding the law, see Mátyás Bódig, *Legal Theory and Legal Doctrinal Scholarship*, 23 *CAN. J. L. & JUR.* 483 (2010), where Bódig argues that legal doctrinal scholarship is a doubly normative discourse, since it participates in the normative discourse of the courts and also seeks to justify that discourse. *Id.* at 498-99. In this respect, he argues, legal doctrinal scholarship is different from the social sciences. *Id.*

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claim to the land than *B*, *nonetheless B* must win, for the better good of everyone in the polity (for example, to ensure that a person buying land need only make inquiries of a certain depth, and no more, as to the soundness of the rights of the seller). It was precisely in order to legislate for such results, contrary to what the common-law result would have been, that such systems were created. The doctrinal scholar does not necessarily think that such legislation is misconceived. He or she might well approve of and advocate it. But his or her support would not be via doctrinal scholarship; it would be via a different enterprise. The important point is that the calculus by which such results are judged to be good stands outside of the native system of the common law.<sup>15</sup> That is why the legislation was needed. We can also say this: the choices that are made in such legislation are political choices, in the sense that reasonable people could disagree about them. They are not the working out of the implications of the fundamental facts of human co-existence. They are implementations of public policy, in the sense of subordinating the interests of one section of the polity – in a generic sense, of course, such that today’s losers may be tomorrow’s winners – with the goal of improving the welfare of all.

However, my claim about doctrinal scholarship implies that the kind of reasoning that might lead one to advocate the creation of a land registration system is different in kind from the doctrinal enterprise. If one thought that the evolution of the pre-existing law could meet the needs that must be met, then one would make an argument directed to the courts.<sup>16</sup> Thus, a doctrinal scholar would advocate the legislative implementation of such a registration system precisely because he or she has concluded that the developmental resources offered by the pre-existing law cannot meet the needs that must be met. For this person, then, the reasoning that leads one to advocate non-codifying legislation is quite different from the reasoning that is applied in doctrinal work, even creative doctrinal work that may advocate incremental change to the law.

Conversely, what this means is that when the doctrinal scholar *is* working in the doctrinal voice, there is a limited number of legitimate moves that he or she can make. Just like the courts, the scholar in the universe of doctrine is constrained by what has gone before, and by the simple fact that developments must arise out of adjudicative processes. Adjudicative processes look backwards to what rights the parties had before their dispute arose, and hence

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<sup>15</sup> This is so in the same way that calculations based on public policy stand outside the normal reasoning processes of common-law adjudication, or at least stand apart from its normal starting point, even though they may come in to change the result. I am aware, of course, that such public policy calculations appear in both case law and doctrine; but not of any satisfactory theory that explains and delineates the respective scopes of the two modes of reasoning within *private* law. As to whether this matters, see the Conclusion.

<sup>16</sup> Or, possibly, advocate legislation of the codifying kind.

those processes are rightly constrained with respect to the considerations of which they may take account.

## II. OTHER VOICES AND OTHER CONSIDERATIONS

Of course, not every legal scholar adopts the kind of philosophy that I have described above: a philosophy that the nature and role of private law is to consecrate, in a juridical and thus publicly enforceable form, the fundamental elements of interpersonal morality. The decline of doctrine in the United States has led to a situation in which the doctrinal voice is not prestigious; it rarely appears in scholarship published in the law reviews considered to command the most status.<sup>17</sup> It is not prestigious, presumably, because it is considered somewhat naïve; the legal realist credo, at least for some, was that the language and institutional practices of the courts had no normative value.<sup>18</sup> If anything, they were a misleading smoke screen; only the brute facts of who won and lost were worth attention. The discrediting of law as an autonomous discipline, worthy of study and understanding in its own right, seems to have been one result.<sup>19</sup> But of course, a list of wins and losses is mere information without being knowledge; to ascribe significance to it requires an intellectual framework of one kind or another. The discipline of law having been counted out of consideration as a meaningful way to understand the law, many alternate frameworks arose.

For the last few dark and stormy decades, ever since it irreversibly dismantled its formalist home, legal scholarship has been traipsing from door to door, looking for a methodological refuge. The doors at which it has knocked have included literature, philosophy, economics, political science, and sociology. Most of the residents have turned legal scholarship away with a meager handout and an explanation that they had problems enough of their own. Economics, which suffers few such doubts, invited it in and tried to gobble it up.<sup>20</sup>

As this passage suggests, the most dominant framework in the United States for understanding the law is economic analysis, in one version of which, the function of the law is or should be to maximize economic efficiency in the sense of the allocation of societal resources to those who value them the most (which usually includes a requirement that they have the requisite economic resources to acquire them).

From the perspective of an instrumentalist philosophy of this kind, it is difficult to identify the fundamental distinction, seen by the doctrinal scholar,

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<sup>17</sup> See Chaim Saiman, *Restitution and the Production of Legal Doctrine*, 65 WASH. & LEE L. REV. 993, 1003-06 (2008).

<sup>18</sup> See *id.* at 1003.

<sup>19</sup> See Smith, *supra* note 2, at 224.

<sup>20</sup> Edward L. Rubin, *Law and the Methodology of Law*, 1997 WIS. L. REV. 521, 521 (footnotes omitted).



between the development of the law by the courts and the intervention of legislation. Both processes are governed by a single framework. The applicable intellectual resources – the permissible arguments for assessing the existing law and for suggesting improvements – are the same in both settings. The instrumentalist, therefore, is often baffled by the doctrinal scholar's conviction that arguments about law reform belong in a different conceptual box from arguments about the organic development of the law. For the instrumentalist, one intellectual toolbox governs the whole field; it encompasses not only law-in-the-courts and law reform in the legislature, but usually extends even more broadly to encompass public law along with private law.

### III. *R3RUE*: A DOCTRINAL VOICE, WITH OCCASIONAL DOUBTS

#### A. *The Realist Turn*

All of the Restatements of the American Law Institute (ALI) inscribe themselves firmly in the tradition of doctrinal legal scholarship. The observations I have made up to now are intended to demonstrate that this tradition rests on certain assumptions, whether they are articulated or not. In particular, there is an assumption that the accumulated wisdom of the common law has normative value and that the considered solutions of the past are presumptively valid.<sup>21</sup> If, therefore, someone were to criticize the ALI's Restatement project on the ground that the Restatements do not take account of law-and-economics scholarship, or on the ground that the Restatements do not approach law reform in the way that a legislature would, that person would in my view be missing the whole point of the Restatement enterprise.<sup>22</sup>

And yet, the legal realist movement has left some marks on *R3RUE*. I would like to illustrate this with reference to the constructive trust. In the first round of Restatements, constructive trusts were left out of the *Restatement of Trusts* and included in the *Restatement of Restitution: Quasi Contracts and Constructive Trusts*. The latter work says,

An express trust and a constructive trust are not divisions of the same fundamental concept . . . . A constructive trust . . . is imposed as a remedy to prevent unjust enrichment. . . . An attempt to define a trust in such a way as to include constructive trusts as well as express trusts is futile, since a single definition which would include such distinct ideas would be so general as to be useless.<sup>23</sup>

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<sup>21</sup> See *supra* Part II.

<sup>22</sup> To similar effect, see Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 208-10 (2007), and Andrew Kull, *Restitution and Reform*, 32 S. ILL. U. L.J. 83, 83-85 (2007).

<sup>23</sup> RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS § 160 (1937).

This was the conviction of Austin Scott, the great scholar of the law of trusts who was the Reporter of the first *Restatement of Trusts* and one of the Reporters of this first *Restatement of Restitution*. Of course, I do not propose to classify Scott among the pantheon of the American legal realists; but let us dig a little deeper. The first expression of the idea that the constructive trust is not a trust might have been penned by Roscoe Pound, who certainly was a legal realist, at least at the beginning of his career. In 1920, as Dean of the Harvard Law faculty, he wrote that the constructive trust is “purely a remedial institution.”<sup>24</sup> Scott was a member of the same faculty near the beginning of his long career, and we should remember that it was at that time a very small faculty by modern standards. It is also interesting to notice that Scott was not merely skeptical of the possibility of defining “trust” in a way that included both express and constructive trusts; in fact, he seems to have believed that it was not possible to define any jural concept, whereas most doctrinal writers would consider definitions as essential to their work.<sup>25</sup> In my view, this position relating to constructive trusts – doubtful of the utility of attempts at definition, unpersuaded by the accumulated wisdom of the case law, and uninterested in the disconnect that the position would create with respect to the existing body of doctrine – was indeed a legal realist position.

Moreover, Andrew Kull has described the evolution of some of the drafting of the *Restatement of Trusts* and the *Restatement of Restitution* in a way that supports this argument.<sup>26</sup> Scott was, to put it plainly, taunted by the realist Thurman Arnold in his 1931 review of a draft of the *Restatement of Trusts*. Arnold, who thought that the trust was “a bad piece of indexing,”<sup>27</sup> had adopted Pound’s view of constructive trusts and made fun of what he portrayed as the naïve traditionalism of Scott’s draft. Kull writes,

Gaps in the archives make it impossible to reconstruct the precise chronology of the ALI’s decision, over the course of the next two years, to lop off constructive trust from the *Restatement of Trusts* and fold it into *Restitution and Unjust Enrichment*. But it seems plausible that Austin Scott’s annoyance at Thurman Arnold’s satirical review might have been the last straw and the deciding factor. Certainly we can see that (so far as constructive trusts were concerned) the arch-formalist Scott saw Arnold’s bet and raised him. After the *Restatement of Restitution*, cases of constructive trust would never again be classified (as Arnold had recommended) among the conflicting uses of the “trust device;” instead,

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<sup>24</sup> Roscoe Pound, *The Progress of the Law, 1918-1919: Equity*, 33 HARV. L. REV. 420, 420-21 (1920).

<sup>25</sup> Austin Wakeman Scott, *Constructive Trusts*, 71 L.Q. REV. 39, 39 (1955). Scott cites the passage from Pound mentioned in the previous note. *Id.* at 41.

<sup>26</sup> See Kull, *supra* note 22, at 91-92.

<sup>27</sup> See Thurman Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800, 813 (1931).

and at a stroke, the constructive trust was no longer part of the law of trusts at all.<sup>28</sup>

Such was the influence of Scott's (or Pound's) idea in the United States that it has become commonplace that a constructive trust is not a trust but "only a remedy."<sup>29</sup> A recent manifestation of this is that in the new edition of Scott's treatise on the law of trusts, just as in the *Restatement of Trusts*, constructive trusts are no longer considered part of the subject matter to be addressed.<sup>30</sup> And, although they are still in the minority, some courts have started to take this idea at face value and have held that if the constructive trust is only a remedy, then the courts have a choice as to who gets it, just as they do in the case of a request for specific performance.<sup>31</sup>

At one level, *R3RUE* accepts the realist claim that a constructive trust is not a real trust. Indeed, we find this statement:

It is commonly repeated that a constructive trust is "not a real trust" since it is "only a remedy." One might go further and explain that the term "constructive trust," used correctly to designate a remedy for unjust enrichment, is only a manner of speaking. Abandoning the metaphor, every 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

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<sup>28</sup> Kull, *supra* note 22, at 91-92.

<sup>29</sup> This view has some purchase in common-law Canada, but very little elsewhere in the common-law world. See, for example, the analysis in ANDREW BURROWS, *THE LAW OF RESTITUTION* 35-40 (1st ed. 1993), now in a summarized form in ANDREW BURROWS, *THE LAW OF RESTITUTION* 193-94 (3d ed. 2011). *But see* William Swadling, *The Fiction of the Constructive Trust*, 64 *CURRENT LEGAL PROBS.* 399, 399-400 (2011).

<sup>30</sup> AUSTIN WAKEMAN SCOTT ET AL., *SCOTT AND ASCHER ON TRUSTS* 33-34 (5th ed. 2006). In describing the reasons for this decision, however, Professor Ascher mentions not only a conceptual concern (which is what I take issue with in the text) but also the purely practical consideration that it was impossible to maintain the treatise with such a wide scope of coverage. *See id.* at 34 n.5. My argument, of course, has no implications for decisions based on such considerations. One could describe a "law of obligations" that included all obligations arising from contract, from wrongdoing, from unjust enrichment, from family relationships, and so on. All of those obligations would have something in common as juristic relationships (though they would not have in common their *source*). Just because one could describe a "law of obligations" that included all obligations however arising, it does not follow that one would need to write a treatise with the same scope.

<sup>31</sup> *See, e.g.,* XL/Datacomp, Inc. v. Wilson (*In re Omegas Grp., Inc.*), 16 F.3d 1443, 1449-50 (6th Cir. 1994). In Canada, see *Bedard v. Schell* (1987), 59 Sask. R. 71, 74 (Can. Sask. Q.B.), and *Kerr v. Baranow*, [2011] 1 S.C.R. 269, paras. 72-73 (Can.). Pound explicitly drew the analogy to specific performance. *See* Pound, *supra* note 24, at 421. On the questionable validity of this analogy, see Lionel Smith, *Common Law and Equity in R3RUE*, 68 *WASH. & LEE L. REV.* 1185, 1199-2000 (2011).

superior equitable claim. The second is a mandatory injunction directing B to surrender X to A or to take equivalent steps.<sup>32</sup>

In my view, this is a situation in which the predominantly doctrinal voice of the *R3RUE* has been overtaken and influenced – consciously or not – by a different methodology. In the rest of this section, I will argue that this realist approach to constructive trusts has some impact on the positions taken in *R3RUE*; but it stands in tension with the *R3RUE*'s stronger commitment to the doctrinal voice, and this creates some difficulties within the project, in relation to the treatment of the constructive trust.

#### B. *The Mistaken Equation of Constructive Trusts with Unjust Enrichment*

One part of Scott's realist turn was the claim that "[a] constructive trust . . . is imposed as a remedy to prevent unjust enrichment."<sup>33</sup> In taking the concept out of the law of trusts, it had to be given a new identity, and that was as part of unjust enrichment. The decision that constructive trusts should be in Restatements of restitution and nowhere else in the Restatement project indicates a strong version of this claim: not only that constructive trusts are imposed as remedies to prevent unjust enrichment but also that the only constructive trusts that exist are ones that are imposed as remedies to prevent unjust enrichment. This was a position enthusiastically adopted by Canadian jurisprudence when the "remedial constructive trust" was first received north of the border;<sup>34</sup> but it was soon realized that this approach was untenable. There are many constructive trusts that are not founded on unjust enrichment.<sup>35</sup> The same is true in the United States. *R3RUE* continues to speak as though the only constructive trusts are trusts to reverse unjust enrichments;<sup>36</sup> and yet *R3RUE* itself actually gives examples of constructive trusts that are not

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<sup>32</sup> RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55 cmt. b (2011). Exactly the same two orders would be made in the case of an express trust under which the beneficiary was entitled to demand the trust property (a bare trust or nominee ship).

<sup>33</sup> Scott, *supra* note 25, at 50. Not only was Scott a member of the Harvard Law faculty when Dean Pound penned his characterization of the constructive trust as a remedy; he had been a student in the faculty under the Deanship of James Barr Ames, who brought into the common law the idea of unjust enrichment as a source of obligations. See Andrew Kull, *James Barr Ames and the Early Modern History of Unjust Enrichment*, 25 OXFORD J. LEGAL STUD. 297, 304 (2005).

<sup>34</sup> See *Pettkus v. Becker*, [1980] 2 S.C.R. 834, 847-49 (Can.).

<sup>35</sup> For Canadian case law, see, for example, *Soulos v. Korkontzilas*, [1997] 2 S.C.R. 217, paras. 12-15 (Can.) (finding a trust over profits from a breach of fiduciary duty, held not to be based on unjust enrichment), and *University of Manitoba v. Sanderson Estate* (1998), 155 D.L.R. 4th 40, para. 58 (Can. B.C. C.A.) (finding trust of property committed under mutual will agreement, held not to be based on unjust enrichment). For analysis, see Robert Chambers, *Constructive Trusts in Canada*, 37 ALTA L. REV. 173 (1999).

<sup>36</sup> This is implicit in the continuing decision that the only treatment of constructive trusts in any Restatement is in the volume on restitution and unjust enrichment. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 54 cmt. a (2011).

founded on unjust enrichment and that bring about not restitution, but the enforcement of promises.<sup>37</sup> In other words, the text itself reveals that the straightforward equation of constructive trust with unjust enrichment is too simplistic and that Pound's understanding of constructive trusts was incorrect.

The equation between constructive trusts and unjust enrichment makes at least three other appearances in *R3RUE*, each of which is arguably problematical. One is in relation to the very important circumstance that the beneficiary of a constructive trust, like the beneficiary of every trust, is not an ordinary creditor in the insolvency of his trustee.<sup>38</sup> This is the holding of a mass of accumulated doctrine, in all common-law jurisdictions, in both cases and commentary. This fact is surely one of the greatest challenges to those who think that the constructive trust is not actually a trust: it is almost universally treated as one, in analysis and consequences, in the insolvency context.<sup>39</sup> The *R3RUE*, despite its apparent realist stance on the nature of constructive trusts, accepts that constructive trust beneficiaries are not mere creditors of their trustee.<sup>40</sup> The Reporter perhaps felt the tension because when he explains the protection of such beneficiaries, he tries to do so without admitting that the constructive trust is a trust. The passage below assumes that *A* has transferred property to *B* as a result of *B*'s fraud:

Priority in this three-way contest may be explained without reference to formal notions of title. Even if *A*'s suit for restitution is formally asserted against *B* as defendant, *A*'s implicit claim – to justify in equitable terms the remedy of constructive trust – is that *B*'s unsecured creditor *C* will be unjustly enriched, at *A*'s expense, if *B*'s debt to *C* is satisfied from assets that *B* obtained from *A* by fraud. The intuitive objection is that a debtor should not be allowed to rob Peter to pay Paul.<sup>41</sup>

The goal here is to describe the result that *A* is protected in *B*'s insolvency and is not a mere unsecured creditor, without using the language of trusts. On the theory that the constructive trust is nothing but an element of the law of unjust enrichment, it should be possible to explain the result wholly in the language of unjust enrichment, “without reference to formal notions of title.”

In my view, this does not work and could never work. The law of unjust enrichment is concerned with defective transfers. It is inherently bilateral. It tells us why a defendant must make restitution – must give back – to the plaintiff some asset or its value that was not properly transferred to the defendant. It deals with a bilateral transfer and gives a bilateral answer. On its own, it can only give a bilateral answer: an enrichment is justified or unjustified; we cannot expect that some are unjustified and some are *really*

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<sup>37</sup> See *id.* § 55 cmt. j & illus. 21-22.

<sup>38</sup> See *id.* § 55.

<sup>39</sup> See *id.*

<sup>40</sup> See *id.* § 55 cmt. a.

<sup>41</sup> *Id.* § 55 cmt. d. Note that in the earlier text of comment d, the Reporter uses the more traditional terminology of equitable interests. See *id.*

unjustified. On the facts of this case, *B* has some property, and his just creditor, *C*, is seeking to execute his claims against that property. Can *A* show that *C* would be unjustly enriched by this? *A*'s claim of unjust enrichment against *B* shows that *B* was unjustly enriched, and that creates an obligation that *B* owes to *A*, to make restitution to *A*. *C* is not implicated in that reasoning. If, despite the unjust enrichment, the property in question belongs to *B*, then *C* has every right to execute against it, regardless of any obligations that *B* may owe to *A*. There is only one way to implicate *C*, and that is to use "formal notions of title." Why would it be robbing Peter to pay Paul? Because the property in question does not actually, does not fully, belong to *B*. Without using such reasoning, *A* has no stronger claim to the property than *C* does. But such reasoning must have a foundation that goes beyond bilateral unjust enrichment reasoning. And *R3RUE* is exactly correct to call it "formal" reasoning; property law is nothing if not formal.

A second outcome of the realist-skeptical approach to constructive trusts, which equates constructive trusts and unjust enrichment, appears in the rule that a constructive trust interest can be cut down and limited to the amount of the plaintiff's loss, but only as against certain competitors: creditors and innocent dependents.<sup>42</sup> The policy reasoning behind this provision is set out by the Reporter, but one can ask whether it fits with the dominant doctrinal voice of the rest of *R3RUE*. Let us assume that a rogue misappropriates \$100 from the plaintiff and uses it to buy lottery tickets. He wins \$1,000,000. The logic of the constructive trust is that the winnings are held in trust for the plaintiff. The position of *R3RUE* is that this is generally correct; if the plaintiff were suing the rogue, this would be the result. But if the rogue is bankrupt, the plaintiff can only recover \$100; the creditors have access to the rest of the \$1,000,000. This is the position taken even after *R3RUE* has concluded that the constructive trust gives priority over creditors of the defendant.<sup>43</sup> Under this limiting rule, the plaintiff only gets a lien. A lien secures an obligation, and so relates to an *amount* of money. A trust is always an entitlement with respect to particular property, or a share thereof; like ownership, it is never quantified by a fixed monetary amount. But presumably because *this* trust is part of unjust enrichment, it is permissible to switch between the logic of monetary obligation and the logic of trust, without the normal constraints that place these in separate conceptual boxes.

By the same rule, if the rogue has died leaving innocent dependents, the plaintiff can recover only \$100 and the dependents enjoy the winnings; if, however, he leaves non-dependent heirs, or dependents who were aware of the fraud, the plaintiff can have the \$1,000,000.<sup>44</sup> These distinctions might be justified, but they cannot in my view be harmonized with the relevant general principles. Such rules would require a (non-codifying) legislative intervention.

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<sup>42</sup> See *id.* § 61.

<sup>43</sup> See *id.* § 55 cmt. d.

<sup>44</sup> See *id.* § 61 cmt. c.

Established equitable doctrines do elaborate protective rules for certain categories of people, most notably the good-faith purchaser of a legal interest who gives value without notice of a pre-existing equitable interest. But the creditor, however innocent, is not in this category, which is exactly why trust beneficiaries have priority over creditors. That is a priority that *R3RUE* is at pains to preserve.<sup>45</sup> And equitable principles do not make a plaintiff's rights vary depending on whether the defendant was dependent on a deceased rogue, or rather has his own means of support. Heirs, like creditors, claim derivatively and subject to the pre-existing rights of others. *R3RUE* seeks to both affirm this principle (in granting priority over creditors and some heirs) and to deny it (in limiting the extent of that priority, in some categories but not others, to the plaintiff's loss).<sup>46</sup> Again, this grows out of the approach that the trust in such cases is only, after all, a remedy for unjust enrichment.

A third outcome of the realist-skeptical approach to constructive trusts appears in the treatment of the principles of tracing.<sup>47</sup> As other authors have noted, if claims to traceable proceeds were understood as based entirely on the logic of unjust enrichment, we would not have the transactional tracing rules that we do have. We would not focus on determining which asset was used to purchase which other asset. We would inquire into *causal* connections, as we generally do in unjust enrichment.<sup>48</sup> Assume that *B* misappropriated \$1,000 from *A* and it can be shown that *B* used this money to pay his back rent; as a result, he was able to keep the \$1,000 (which he earned honestly) that he had earlier stuffed into his mattress. If tracing and constructive trusts were only informed by the logic of unjust enrichment, then we would conclude that the \$1,000 in the mattress is the specific property *B* holds due to his unjust enrichment. *A* would get a constructive trust over that \$1,000. A causal approach would certainly call upon us to reject the "lowest intermediate balance" rule, which only makes sense if we are focusing on transactional (and not causal) links. Indeed, a causal tracing inquiry would probably lead us to a version of the "swollen assets" theory, in which a trust could be established merely by proving that the enrichment must be somewhere among the defendant's assets. *R3RUE* rejects all of this and re-affirms the soundness of the traditional doctrine on tracing, including the lowest intermediate balance rule.<sup>49</sup> Here, the dominant doctrinal voice re-asserts itself, generating still more tension with the realist-skeptical approach to constructive trusts.<sup>50</sup>

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<sup>45</sup> See *id.* § 55 cmt. d.

<sup>46</sup> See *id.* § 61.

<sup>47</sup> See *id.* §§ 58-59.

<sup>48</sup> For a full analysis of this point, see Lionel Smith, *Tracing*, in *MAPPING THE LAW: ESSAYS IN MEMORY OF PETER BIRKS* 119, 135-37 (Andrew Burrows & Lord Rodger of Earlsferry eds., 2006).

<sup>49</sup> See *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 59 cmt. f; see also *id.* § 59 cmt. d (noting that in line with traditional doctrine, *R3RUE* strengthens the ability of plaintiffs to assert constructive trust claims as compared with sections 203 and

C. *Constructive Trusts and the Doctrinal Voice*

Most of the results in *R3RUE* are those that are dictated by the dominant doctrinal view in case law all over the common-law world, and in legal doctrine of the common-law world outside the United States: constructive trusts are a kind of trust, with the various incidents that follow, including the ability to lay claim to traceable proceeds and to withdraw assets from the bankruptcy estate of the trustee. The weight of U.S. doctrinal history, perhaps, led the Reporter to say that a constructive trust is not a trust; but this appears more as a matter of rhetoric and less as a matter of outcomes. It certainly seems difficult to have it both ways: one cannot have legal results that are based on the standard view that a constructive trust is a kind of trust, while insisting that it is nothing of the sort.

What then of Scott's challenge, to provide a definition of "trust" that includes both express and constructive trusts, and yet is not "so general as to be useless"?<sup>51</sup> Here we need only look to traditional definitions in trusts texts.

A trust is an equitable obligation binding a person (called a trustee) to deal with property (called trust property) owned by him as a separate fund, distinct from his own private property, for the benefit of persons (called beneficiaries or, in old cases, *cestui que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.<sup>52</sup>

That definition covers express, resulting, and constructive trusts; and it is far from useless. It identifies the critical element of the trust, which is that it is a relationship between people with respect to property. It is an obligation that, paradoxically, has third-party effects, because equity thought that some obligations – those that related to the benefit of particular property – should be

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210(1) of the *Restatement of Restitution*, which reflected idiosyncratic positions of Scott that were not found in the case law). The Reporter of *R3RUE* notes, however, that this strengthening is offset by the rules in section 61 (discussed above) and also sections 58(3) and 59(3) (protecting non-wrongdoing defendants against some potential consequences of trust claims). *See id.* § 59 cmts. a, d.

<sup>50</sup> In section 58, comment b, the Reporter suggests that the transactional rules are a compromise; he argues that a causal inquiry would be too difficult to apply, and so the transactional tracing rules are applied as a proxy for an inquiry into causation. *See id.* § 58 cmt. b. I can only say that I find this unconvincing. In no other field of law, when causal inquiries are difficult, do we adopt a wholly different method of analysis as a proxy for looking into causation. In particular, why would we continue to use a proxy for a causal inquiry in cases where the causal outcome was known (as in my example in the text)?

<sup>51</sup> Scott, *supra* note 25, at 41.

<sup>52</sup> D. HAYTON ET AL., *UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES* 2 (18th ed. 2010) (footnotes omitted). Swadling offers a brief definition of "express trust": "the idea of one person holding rights for another or for a purpose." *See Swadling, supra* note 29, at 9. A constructive trust for the benefit of a person fits comfortably within this definition, which seems puzzling given his thesis that constructive trusts are not trusts.



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capable of travelling along with that property, even when it was transferred into new hands.<sup>53</sup>

Following the success of Pound's realist-skeptical definition of constructive trusts, U.S. definitions of trust are usually confined to express trusts.<sup>54</sup> Unlike the definition quoted above, they may therefore specify that the relationship must be one based on confidence; it must be fiduciary in nature. This is a hugely important feature of some trusts, but does not need to be treated as definitional. Let us compare this definitional inquiry with the law of obligations. There are contractual obligations and obligations arising by operation of law (from torts and from unjust enrichment, for example). If we defined "obligation" in such a way that it only included obligations arising from consent, we would have a useful definition, but one that left out obligations arising by operation of law. Although such obligations have fundamental differences from contractual obligations, they also share similarities with contractual obligations. All obligations are juridical relationships between persons such that one or more creditors can require one or more debtors to do (or not to do) something. The differences between contractual and extra-contractual obligations relate to their origin and justification, but not to their ongoing nature as juridical relationships. It would be a mistake to ignore their common features as juridical relationships, merely because their origins were different.

Trusts are the same. It is fundamental, and important, that they arise in different ways: some by consent, and some by operation of law. But once they come into existence, all trusts, whether express or constructive, have common features. In particular, the juridical nature of the beneficiary's interest is the same. It arises out of an obligation relating to the benefit of property. Sometimes the obligation is based on an agreement or a unilateral declaration; that is an express trust. Sometimes it is an obligation arising by operation of law, as from an unjust enrichment or from an unlawful act; that is a constructive trust. It is because the beneficiary's interest arises out of an obligation of the trustee that it does not behave like an *in rem* interest in property. For example, it does not give the beneficiary a direct claim in tort against one who damages the property. Again, unlike an *in rem* interest, it is defeasible by a good faith purchaser of a legal interest for value without notice. But a creditor of the trustee is not one who fits that definition, which is why the beneficiary's interest prevails against such a creditor. These things are true in all trusts, whether express or constructive.<sup>55</sup>

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<sup>53</sup> Lionel Smith, *Transfers*, in BREACH OF TRUST 109, 112-13 (Peter Birks & A. Pretto eds., 2002); Lionel Smith, *Philosophical Foundations of Proprietary Remedies*, in PHILOSOPHICAL FOUNDATIONS OF UNJUST ENRICHMENT 281, 298 (Robert Chambers et al. eds., 2009).

<sup>54</sup> See *supra* Part III.A.

<sup>55</sup> I do not here make a full argument aimed at showing that a constructive trust can rightly be considered a kind of trust. However, let us note the following features in common

The generally dominant doctrinal voice of *R3RUE* gives way, in the area of constructive trusts, to the rhetoric of legal realism. But the principles that are restated are generally true to the tradition of the common law's centuries of doctrine.

#### CONCLUSION

The Grand Style of the common law is plain to see in all of the Restatements, and certainly in *R3RUE*. This is a cause for celebration for those who believe that the doctrinal voice has something to contribute to the vitality, the evolution, the relevance, and the justness of our law.

But *R3RUE*, I have argued, has multiple voices. Sometimes, particularly as it seems to me in relation to constructive trusts, it speaks in a legal realist voice, which finds doctrine unpersuasive and naïve, if not positively misleading.

Whether this is or is not a cause for concern is probably more a matter of identity than of rational argument. Here I permit myself a lengthy quotation from Sir Isaiah Berlin, not only for the depth of his insight but also for the sheer beauty of his prose:

There is a line among the fragments of the Greek poet Archilochus which says: "The fox knows many things, but the hedgehog knows one big thing."<sup>56</sup> Scholars have differed about the correct interpretation of these dark words, which may mean no more than that the fox, for all his cunning, is defeated by the hedgehog's one defence. But, taken figuratively, the words can be made to yield a sense in which they mark one of the deepest differences which divide writers and thinkers, and, it may be, human beings in general. For there exists a great chasm between

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between constructive trusts and express trusts. In both cases, (1) the beneficiary's interest in the trust property arises out of an obligation with respect to the benefit of the property; (2) the ability of that interest to persist against transferees is limited by the defence of good-faith purchase of a legal interest for value without notice of the pre-existing equitable interest (a status which creditors of the trustee do not have); (3) the obligational foundation of that interest can explain why it extends to all property acquired with the original trust property, whether as a fruit or revenue, or as an exchange product; (4) because of that obligational foundation, a transfer of the beneficiary's interest does not follow the rules governing the transfers of interests in the underlying trust property, but rather is treated according to the rules for the assignment of claims (and, unlike a bare possibility of specific performance, the beneficial interest under a constructive trust can clearly be assigned, *see, e.g.,* *Sinclair Investments (U.K.) Ltd. v. Versailles Trade Fin. Ltd.*, [2011] EWCA (Civ) 347, [23] (Eng.) (noting without comment the pre-litigation assignment to the plaintiff of all claims including constructive trust claims)); (5) the supervisory machinery of the court applies, a point which may be confirmed by legislation, *see, e.g.,* *Province of Ontario Trustee Act*, R.S.O. 1990, c. T.23, § 1 (Can.) ("'trust' . . . includes implied and constructive trusts"); *Trustee Act of 1925*, 1925, 14 & 15 Geo. 5, c. 19, § 68(17) (Eng.) ("[T]he expressions 'trust' and 'trustee' extend to implied and constructive trusts. . .").

<sup>56</sup> Diehl, *Frag.* 103.

those, on one side, who relate everything to a single central vision, one system, less or more coherent or articulate, in terms of which they understand, think and feel – a single, universal, organizing principle in terms of which alone all that they are and say has significance – and, on the other side, those who pursue many ends, often unrelated and even contradictory, connected, if at all, only in some *de facto* way, for some psychological or physiological cause, related by no moral or aesthetic principle. These last lead lives, perform acts and entertain ideas that are centrifugal rather than centripetal; their thought is scattered or diffused, moving on many levels, seizing upon the essence of a vast variety of experiences and objects for what they are in themselves, without, consciously or unconsciously, seeking to fit them into, or exclude them from, any one unchanging, all-embracing, sometimes self-contradictory and incomplete, at times fanatical, unitary inner vision. The first kind of intellectual and artistic personality belongs to the hedgehogs, the second to the foxes; and without insisting on a rigid classification, we may, without too much fear of contradiction, say that, in this sense, Dante belongs to the first category, Shakespeare to the second; Plato, Lucretius, Pascal, Hegel, Dostoevsky, Nietzsche, Ibsen, Proust are, in varying degrees, hedgehogs; Herodotus, Aristotle, Montaigne, Erasmus, Molière, Goethe, Pushkin, Balzac, Joyce are foxes.<sup>57</sup>

At this point I only want to observe that Berlin's thesis in the remainder of his essay is that Leo Tolstoy was by nature a fox, but one who thought it was right, it was better, to be a hedgehog with a single overarching vision for all that mattered in life. The moving conclusion of the essay, in which Berlin describes the intellectual agonies suffered by Tolstoy in trying to be something that he was not, is unforgettable.

We cannot be what we are not. Those who are hedgehogs, who believe that there is one right way to understand the world or the law, can never accept multiple co-existing ways of knowing what counts as good law. And they may suffer, in quite the opposite way to Tolstoy, if they seek to be pluralists against their own temperament. The foxes of the world, who think it is natural that there are many ways to understand what is important and what is right, can never understand the hedgehog's preoccupation with the perfect system or the one right answer.

Let me conclude by repeating that *R3RUE* unfolds in a largely doctrinal voice, mixing in from time to time elements of American Legal Realism. The hedgehogs of the world will not like this ad hoc pluralism. The foxes will be untroubled.

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<sup>57</sup> ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX: AN ESSAY ON TOLSTOY'S VIEW OF HISTORY* 1-2 (1953). Among the hedgehogs we also find Ronald Dworkin: RONALD DWORIN, *JUSTICE FOR HEDGEHOGS* (2011). Among the foxes we find the late Brian Simpson: A.W. BRIAN SIMPSON, *REFLECTIONS ON THE CONCEPT OF LAW* 125 (2011).