Title

The marginalization of English equity, the trust relationship, and the fiduciary principle generally by law academics (U.S.), the bench (U.S.), and the organized bar (U.S.)

Text

Few, if any, U.S. law schools still require that their students take the traditional Equity, Trusts, and Agency courses, an unfortunate development whose origins are discussed in §8.25 of *Loring and Rounds: A Trustee's Handbook*. The section is reproduced in its entirety in the appendix immediately below. The trust is ubiquitous in the Anglo-American jurisprudential landscape. It is not just an estate-planning tool. As an instrument of commerce, it performs critical securitizing functions (think the mutual fund) and critical securing functions (think a bond issue secured by entrusted real estate). Creative commercial lawyers since time immemorial have resorted to the trust to facilitate commercial interactions. Contractual rights of investors in SPACs, for example, are now typically secured by entrusted property administered by third parties. Regrettable then that the National Conference of Bar Examiners is on track to remove Trusts as a tested subject on the multi-state bar exam. See https://lnkd.in/gwH-jB_H. This was a predictable consequence of Equity, Trusts, Agency, and the fiduciary principle generally being purged from the American law school *required* curriculum. It is also predictable that we will soon be seeing fewer *elective* Trusts courses, law students already having gotten the word that a grasp of the fundamentals of the trust relationship is no longer considered by the powers-that-be to be worthy of being tested on the bar exam.

Appendix

§8.25 Few American Law Schools Still Require Agency, Trusts, and Equity [from *Loring and Rounds: A Trustee's Handbook* (2022)]

> *The common law of agency has not always attracted the degree of academic interest that's warranted by its ubiquity, as well as its theoretical interest and practical significance*.[1]
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> *In other words, do we still know what a trust is and will we still have trusts as we know them in the twenty-first century?*[2]
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> *Many major law schools have stopped teaching estate planning. Few law students find the field interesting anymore, says [Prof.] Langbein*.[3]

Agency, contracts, torts, property (legal interests), and trusts are facets of the same gem. Each

[1]Deborah A. DeMott, Disloyal Agents, 58 Ala. L. Rev. 1049, 1067 (2007).

[2]Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Anymore*, 62 Alb. L. Rev. 543, 544 (1998).

[3]John J. Fialka, *Why Cleaning Up Tycoon's Estate Went Into Overtime*, Wall St. J., July 9, 2004, at A1.

offers a perspective of the Anglo-American common law, *as broadly defined to include equity's substantive embellishments*.[4] Together, they make up the law's periodic table. Statutes either fill gaps in the common law (*e.g.*, the will and the corporation), modify the common law (*e.g.*, the health care proxy), or embellish the common law (*e.g.*, the tax-qualified employee benefit plan). The Investment Company Act of 1940, for example, was written by lawyers who were clearly well versed in the common law and who presumed that their successors would be as well.[5]

The civil law jurisdictions generally have not developed a trust regime of the type that is the subject of this handbook, a trust being a creature of equity.[6] This occasioned Prof. Maitland to muse on how a "compleat" English lawyer would likely react upon first encountering the Civil Code of Germany: "'This,' he would say, 'seems a very admirable piece of work, worthy in every way of the high reputation of German jurists. But surely it is not a complete statement of German private law. Surely there is a large gap in it. I have looked for the Trust, but I cannot find it; and to omit the Trust is, I should have thought, almost as bad as to omit Contract.'"[7]

The common law trustee who retains a lawyer with no formal instruction in some of these fundamental legal relationships (*e.g.*, the equity-focused relationships of agency and trust) needs to be extra vigilant. If the trustee's imprudent selection of counsel should cause economic harm to the trust, it is the trustee who first and foremost would be on the hook.[8] On the other hand, "if a trustee has selected trust counsel prudently and in good faith, and has relied on plausible advice on a matter within counsel's expertise, the trustee's conduct is significantly probative of prudence."[9]

As noted, the common law legal relationships cannot be viewed in isolation. By way of example, contractual rights, such as incident to a life insurance policy, are property rights that may be the subject of a trust. Likewise, some equitable interests under trusts, such as shares of a mutual fund, are interests in property that may be the subject of a contract or an agency. Even the legal structure of the modern American mutual fund we owe to the trial and error of creative common

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[4]"Equity without common law would have been a castle in the air, an impossibility." Frederic William Maitland, Equity: Also the Forms of Action at Common Law 19 (Cambridge University Press, 1909).

[5]*See generally* Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473 (2007).

[6]*See generally* Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473 (2007); §8.12.1 of this handbook (civil law alternatives to the trust).

[7]Frederic William Maitland, Maitland Selected Essays 142–143 (H.D. Hazeltine ed., Cambridge Press 1936).

[8]*See generally* §8.32 of this handbook (whether the trustee can escape liability for making a mistake of law if he acted in good faith on advice of counsel).

[9]Restatement (Third) of Trusts §77 cmt. b(2).

law lawyers practicing in the first half of the twentieth century, particularly in Massachusetts.[10] Their media were common law legal relationships, namely the agency, the contract, the trust, and to some extent the statutory corporation.[11] Or take a transfer for the benefit of creditors. Professors Scott and Ascher remind us that "[w]hen a debtor delivers money or other property to a third person with instructions to pay a particular creditor, the relationship that arises may be a contract for the benefit of the creditor, an agency for the debtor, or a trust."[12] The opportunities for flexible and advantageous interplays between law and equity are limitless.[13] In any case, most matters, whether transactional or adversarial, will implicate equity in some way.[14] A course in contracts does not a "compleat" lawyer make.[15]

To avoid a legal misdiagnosis, counsel needs to know the common law as enhanced by equity, not about the common law as enhanced by equity. "One need only consider the term 'corporation' in the … [Investment Company Act of 1940's]… short title, a choice of words guaranteed to confuse lawyers on both sides of the Atlantic who are not well versed in the common law."[16] This is because in the United States, as well as in the United Kingdom, an incorporated mutual fund is actually a trust.[17] That the bench is becoming ever more unfamiliar with core trust doctrine only increases the importance of counsel knowing the common law as enhanced by equity, not knowing

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[10]*See generally* Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473 (2007).

[11]*See generally* Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473 (2007).

[12]5 Scott & Ascher §35.1.9 (Trust for Particular Creditor).

[13]*See, e.g.*, Hendrik G. Milne, *An American Equitable Renaissance?*, STEP Trust Quarterly Review (Dec. 2016), at pg. 20 ("The recent avalanche of American class actions against pension-plan trustees may bring about the re-emergence of forgotten equitable principles in American litigation.").

[14]*See, e.g.*, Charles E. Rounds, Jr., *Proponents of Extracting Slavery Reparations from Private Interests Must Contend with Equity's Maxims*, 42 U. Tol. L. Rev. 673 (2011).

[15]*See generally* Charles E. Rounds, Jr., *The Common Law Is Not Just About Contracts: How Legal Education Has Been Short-Changing Feminism*, 43 U. Rich. L. Rev. 1185 (2009).

[16]*See generally* Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473 (2007).

[17]*See generally* Charles E. Rounds, Jr. & Andreas Dehio, *Publicly-Traded Open End Mutual Funds in Common Law and Civil Law Jurisdictions: A Comparison of Legal Structures*, 3 N.Y.U.J.L. & Bus. 473 (2007).

about it.[18]

Although trust concepts are marbled throughout the common law, Stanford and Harvard in the early 1960s each made an institutional determination that to be a lawyer it was no longer *necessary* that one know the law of Trusts—to pass the bar, perhaps, but not to be a "compleat" lawyer.[19] Since then, most of the other 186 or so ABA-approved law schools have followed suit. Current reform initiatives aimed at "globalizing" the American law school curriculum are only accelerating the process of marginalizing the core fiduciary relationships within the confines of the ivory tower,[20] notwithstanding the fact that the society without "is evolving into one based predominantly on fiduciary relations."[21]

Israel for some time now has been developing her own brand of trust jurisprudence: "It is a small wonder that within the period of little more than 100 years, out of a simple society in a sleepy outpost of the Ottoman Empire, a comprehensive body of trust law was created that offers the eight million people living in Israel today a well-developed system of trust and related laws covering the many needs of a modern, globalized society."[22] As late as 2016, however, Israel's major universities still were not offering any courses on the law of trusts.[23]

In 1964, Professor Warren A. Seavey speculated on why it was that agency was being marginalized in the American law schools:

> Agency has attracted very few writers. There are few law review articles and, aside from the Restatement, no very recent texts. Perhaps for this reason, it has been given diminishing attention in law schools; the time given to it now is far less than its intrinsic importance warrants, since practically all of the world's business involves agents and in most important transactions, an agent on each side. This in turn results in a poor

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[18]*See generally* the 120th Anniversary Special Mid-Year Supplement to the 2019 Edition of this Handbook, specifically Chapter 8, beginning at page 201 (twenty-four recent questionable judicial decisions involving the trust).

[19]*See generally* E. Gordon Gee & Donald W. Jackson, Following the Leader? The Unexamined Consensus in Law School Curricula 6, 14–15, 22–25, 47–48 (1975) (examining the "follow the leader" behavior of law school faculties and comparing core law school curricula in the 1950s, 1960s, and 1970s); William B. Powers, A.B.A., A Study of Contemporary Law School Curricula 12 (1986) (providing a catalog of courses that were typically required in law schools in the 1970s, which does not include discrete courses in the agency and the trust).

[20]*See generally* Charles E. Rounds, Jr., *State Common Law Aspects of the Global Unwindings of the Madoff Ponzi Scheme and the Sub-Prime Mortgage Securitization Debacle: Buttressing the Thesis that Globalizing the American Law School Curriculum at the Expense of Instruction in Core Common Law Doctrine Will Only Further Provincialize It*, 27 Wis. Int'l L.J. 101 (2009).

[21]Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795, 798 (1983).

[22]Alon Kaplan, Trusts & Estate Planning in Israel 287 (2016).

[23]Alon Kaplan, Trusts & Estate Planning in Israel 287 (2016).

understanding of its characteristic features.[24]

As to unjust enrichment as a principle of substantive liability, a topic that is covered in §8.15.78 of this handbook, all that critical doctrine fell through the cracks years ago with the introduction of the traditional Remedies course into the American law school curriculum.[25] The course was a pedagogical contraption of selected elements of the traditional Damages, Equity, and Restitution required courses.[26] Now even Remedies is elective, or no longer offered at all. It is no wonder that unjust enrichment doctrine is generally a mystery to contemporary American lawyers, and to contemporary law professors even more so.[27] "Much of the substantive law of equity—in particular, the law describing equitable interests in property held by another—suffered the same fate."[28]

Even the traditional required Property course has undergone some "shrinkage," although it is unlikely to suffer the same fate as the equity-based core courses.[29] Recall that a trust is a fiduciary relationship with respect to property. "For many decades, Property received six credits in most law schools—typically three in the Fall and three in the Winter semester of the first year. Now, few schools give the course more than four or five credits, and some have cut it to three."[30]

The trust is not just an estate planning vehicle for the rich. The role that the private trust plays in lubricating the American capital markets has come to eclipse in significance the traditional role it has played in facilitating intrafamily wealth transfers.[31] On April 28, 2001, even the Peoples' Republic of China jumped on the global trust bandwagon:[32] "According to Chinese drafters and scholars, the initial impetus for the legislation was the urgent need to promote China's accession to the World Trade Organization and to address China's financial sector by adopting 'an important pillar of the modern financing industry in developed countries,' the trust."[33]

In 2006, the Suffolk University Law School faculty voted 27–20, over the strenuous objections

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[24]Warren A. Seavey, Handbook of the Law of Agency IX (1964).

[25]Restatement (Third) of Restitution and Unjust Enrichment §1, Reporter's Note.

[26]Restatement (Third) of Restitution and Unjust Enrichment §1, Reporter's Note.

[27]Restatement (Third) of Restitution and Unjust Enrichment §1, Reporter's Note.

[28]Restatement (Third) of Restitution and Unjust Enrichment §1, Reporter's Note.

[29]*See generally* Dale A. Whitman, *Teaching Property—A Conceptual Approach*, 72 Mo. L. Rev. 1353 (2007).

[30]*See generally* Dale A. Whitman, *Teaching Property—A Conceptual Approach*, 72 Mo. L. Rev. 1353 (2007).

[31]*See* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U.L. Rev., 434, 436 (1998).

[32]Xintuo Fa [Trust Law] (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective Oct. 1, 2001).

[33]Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 Minn. L. Rev. 602, 639–640 (2010).

of the senior author, to downgrade formal instruction in the fiduciary aspects of agency and the fiduciary and property aspects of trusts from required to fully elective status.[34] The Equity course had already been purged from the required curriculum a decade or so before. That the core business of a law school is to turn out agent-fiduciaries carried little weight. So did the assertion that in the real world "missing the trust issue" can do real harm to the interests of real people.[35]

Back in 1908 when the American Bar Association adopted the original Canons of Professional Ethics, instruction in the core equity-based relationships of agency and trust, as well as the core law-based relationships of contract, tort, and property, was mandatory in most if not all the law schools. It most certainly never occurred to those who had been encouraging the bench and bar to endorse and adopt a lawyer code that by the end of the century instruction in the two private fiduciary relationships would no longer be required in most American law schools. Back then lawyer codes presumed a bench and bar that were thoroughly grounded in the common law, as the focus of such codifications was on licensure, the lawyer's relationship with the state. Licensure is still the focus of the typical lawyer code.[36] There has been no appreciable expansion in the scope and coverage of the Canons of Professional Ethics, or its successor codifications.[37] On the other hand, we have seen a considerable pedagogical undermining over time of the common law foundations upon which those regulatory edifices were and are constructed.

For more on the marginalization of the fiduciary in the American legal academy, see Charles E. Rounds, Jr.[38]

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[34]For the various reasons that American law faculties have put forth for not requiring that their students take courses dedicated to the agency and trust relationships, particularly the fiduciary aspects of those relationships, the reader is referred to Charles E. Rounds, Jr., *The Case for a Return to Mandatory Instruction in the Fiduciary Aspects of Agency and Trusts in the American Law School, Together With a Model Fiduciary Relations Course Syllabus*, 18 Regent U. L. Rev. 251 (2005–2006).

[35]*See, e.g.*, The Parish of the Advent v. The Protestant Episcopal Diocese of Mass., 426 Mass. 268, 688 N.E.2d 923 (1997) (the court via an aside suggesting by implication that had the plaintiff, the nonprevailing party, made a "legal claim based on trust or property law," in other words, had its counsel not missed the trust issue, its prospects of prevailing in the litigation would have been at least better than nonexistent).

[36]*See generally* Charles E. Rounds, Jr., *Lawyer Codes Are Just About Licensure, the Lawyer's Relationship with the State: Recalling the Common Law Agency, Contract, Tort, Trust*, and *Property Principles the Regulate the Lawyer-Client Fiduciary Relationship*, 60 Baylor L. Rev. 771 (2008).

[37]*See, e.g.*, *In re* Karavidas, 999 N.E.2d 296, 317 (Ill. 2013) ("Personal misconduct that falls outside the scope of the Rules of Professional Conduct may be the basis for civil liability or other adverse consequences, but will not result in professional discipline.").

[38]*The Case for a Return to Mandatory Instruction in the Fiduciary Aspects of Agency and Trusts in the American Law School, Together with a Model Fiduciary Relations Course Syllabus,* 18 Regent U. L. Rev. 251 (2005–2006).