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Bequests for Purposes: A Unified Theory

Adam J. Hirsch

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Bequests for Purposes: A Unified Theory

Adam J. Hirsch*

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[T]he legal mind has always preferred multiplication to division.

— Grant Gilmore¹

I. Introduction

In the ordinary run of situations, testators leave their property to other persons. Most estates flow from hand to hand, typically enriching members

* © 1999 by Adam J. Hirsch. All rights reserved. Professor of Law, Florida State University. M.A. 1979, J.D. 1982, Ph.D. 1987 Yale University. A substantial portion of this Article was composed under the auspices of the Roger Traynor Summer Research Professorship, endowed at the University of California, Hastings College of the Law. I wish to express my heartfelt gratitude to the Traynor family, whose gift for a purpose allowed me precious free time to contemplate the problem of bequests for purposes. I am also grateful to Rob Atkinson, Steve Bank, Jesse Dukeminier, William McGovern, Jr., and auditors at a faculty colloquium at the University of California, Hastings College of the Law, for helpful comments.

1. GRANT GILMORE, THE DEATH OF CONTRACT 89 (1974).

of a decedent's immediate family. Every so often, however, a testator seeks to follow a different course: She may assign funds within her will for the accomplishment of *purposes or causes*, as opposed to the financial betterment of individuals. When she chooses to do so, how does – and how should – the law respond?

Historically, lawmakers have differentiated the rules applicable to bequests for purposes depending upon the sort of purpose the testator had in mind. Bequests for "charitable" purposes – being objects deemed to subserve the public interest – have occupied one sub-category. These are "favored creatures of the law,"² and courts see to it that they are given effect. At the opposite extreme lie bequests for objects found to *disserve* the public interest, originally known as "superstitious" purposes; courts take a dim view of these, refusing to allow them to be carried out. And these two sets of purposes are not complementary: A third set is sandwiched in between. Found here are bequests for an amalgam of purposes perceived neither to help nor to harm the public – a variety of transaction sufficiently rare at first that it was not blessed with a name, but which one early English advocate felicitously dubbed an "indifferent" purpose.³ Courts in Great Britain have generally rejected bequests falling into this sub-category. In the United States, as we shall see, bequests for indifferent purposes have met with greater tolerance, if not open arms; courts have ratified them but have dictated a number of provisos that fail to apply to charitable bequests.

This trio of doctrinal sub-categories we have lived with for a long time – so long that we have come pretty much to take them for granted. Commentators invariably address purpose bequest doctrine, when they address it at all, from the confines of a given one of its legal compartments – usually the charitable one, which has long garnered the lion's share of attention. The time has come to take a fresh look at the law of purpose bequests from a broader perspective – to step back from its isolated segments in order to reflect upon the subject as a theoretical whole and, more broadly still, to juxtapose the structural features of purpose bequests with those of their more common counterpart, the bequest for a person. This exercise may help us to reevaluate not only the substance of purpose bequest doctrine, but also, and no less importantly, its taxonomy. My overall thesis is that the law of purpose bequests has become unnecessarily and unhelpfully balkanized; and that

2. *Shenandoah Valley Nat'l Bank v. Taylor*, 63 S.E.2d 786, 790 (Va. 1951). For earlier similar statements, see EDITH L. FISCH, *THE CY PRES DOCTRINE IN THE UNITED STATES* 118 & n.10 (1950). These were formerly, in medieval times, known as "pious" bequests, a synonym that lingered in the legal vocabulary. See, e.g., *Beatty v. Kurtz*, 27 U.S. (2 Pet.) 566, 583 (1829) (Story, J.).

3. *Attorney-General v. Whorwood*, 27 Eng. Rep. 1188, 1189 (Ch. 1750) (reporter's summary of counsel's argument).

virtually all of these bequests ought instead to be subsumed within a single doctrinal entity, preferably the one now regulating charitable bequests.

We shall develop this thesis, along with a few corollaries, in three stages. In Part II we begin by exploring the history of purpose bequest doctrine as it assumed its present configuration. In Part III we leap to the plane of public policy. Here we assay the core question of whether bequests for purposes should be allowed at all and, if so, what subsidiary doctrines ought to govern them. Finally, in Part IV, we soar briefly on into more rarefied air, to grasp (or gasp) at the larger implications of it all.

II. Doctrine: Categorical Proliferation

A. The History

The beginnings of the purpose bequest in Great Britain lay in the Christian pursuit of piety. Throughout the middle ages, clergymen entreated their parishioners to bequeath portions of their worldly goods for the greater good of their fellow sinners. Prior to the Reformation, most responded by leaving property to the Church itself, as social entrepôt for the dissemination of charity. With the arrival of Anglicanism, the Church lost this role, and by the sixteenth century it was common for Englishmen to formulate bequests directly for the relief of the poor, for public education, and for other merciful endeavors of their own devising.⁴

Bequests of this sort, though welcome, nonetheless posed a practical difficulty: How could the law go about carrying them out? When a testator left property to a person – or, as earlier, to a religious corporation – the beneficiary (or Bishop) could hold out his palm and accept the funds directly. But when "the only beneficiaries are purposes,"⁵ who did a testator leave the funds to? Perforce, a human intermediary had to be recruited to secure the resources provided by the testator and then to spend them for the desired end. As it happened, the trust (or use) had by the fifteenth century developed into an institution that could perform this function.⁶

4. See MICHAEL CHESTERMAN, CHARITIES, TRUSTS AND SOCIAL WELFARE 11-19 (1979); 3 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 545-46 (5th ed. 1942); 7 *id.* at 370-71; GARETH JONES, HISTORY OF THE LAW OF CHARITY, 1532-1827, at 3-4 (1969); W.K. JORDAN, PHILANTHROPY IN ENGLAND, 1480-1660, at 147, 155-215, 245-322 (1959); 4A AUSTIN W. SCOTT, THE LAW OF TRUSTS § 348.2, at 27-30 (William F. Fratcher ed., 4th ed. 1987 & Supp., Mark L. Ascher ed., 1998). An act of 1532 restricting bequests to chantries also contributed to this secularizing trend. See JONES, *supra*, at 11; JORDAN, *supra*, at 115.

5. *In re Astor's Settlement Trusts*, [1952] 1 All E. R. 1067, 1071 (Ch.).

6. See CHESTERMAN, *supra* note 4, at 20-22; 4 HOLDSWORTH, *supra* note 4, at 438-39; 5 *id.* at 304-05; JONES, *supra* note 4, at 6-7; 1 SCOTT, *supra* note 4, §§ 1.2-1.6; 4A *id.* § 348.2, at 28. Professor Maitland asserted that the earliest documented example of a trust in Great Britain served to endow a charity. See F.W. MAITLAND, EQUITY 25 (John Brunyate ed., rev. ed.

There still remained the difficulty of verifying that trustees faithfully discharged the responsibilities they assumed. When a settlor created a trust for an individual beneficiary, that same beneficiary could watch over the trustee's activities, bringing suit as necessary to ensure fidelity. In the case of a purpose trust, no equivalent monitor emerged naturally from the structure of the process. Exercising jurisdiction over all trusts, the fledgling Court of Chancery surmounted this difficulty as best it could, entertaining suits by private parties to enforce charitable trusts. Even though they prayed for relief on behalf of a broader constituency of parishioners or society, these petitioners received standing so long as they could claim some indirect interest in the trust's enforcement.⁷ This ad hoc procedure was anything but efficient, however, and in the face of complaints that charitable trusts "have bene and are still like to be most unlawfully . . . converted to the lucre and gayne of some fewe greedy and covetous persons," the Statutes of Charitable Uses introduced the first formal supervisory process for British charities at the dawn of the seventeenth century.⁸ Under these statutes, charity commissions met to investigate breaches of charitable trust, issuing decrees with appeal to the Chancellor, a process superseded in turn by the Attorney General's assertion of power to proceed by information against charitable trustees later in the seventeenth century.⁹

1936) (1909); cf. Shael Herman, *Utilitas Ecclesiae: The Canonical Conception of the Trust*, 70 TUL. L. REV. 2239, 2254-55 (1996). The Statute of Uses of 1535, which temporarily functioned to abolish trusts, did not apply to trusts for charitable purposes. See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 242 (2d ed. 1979). For some examples of charitable uses dating to the fifteenth century, see Stephen W. DeVine, *Ecclesiastical Antecedents to Secular Jurisdiction Over the Feoffment to the Uses to Be Declared in Testamentary Instructions*, 30 AM. J. LEGAL HIST. 295, 308-13 (1986); R.H. Helmholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1505 & n.14 (1979). This Article will not explore contract mechanisms for the accomplishment of purposes postmortem. For a discussion, see Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws* (forthcoming).

7. Petitions came, for example, from chaplains and churchwardens, and from the inhabitants of towns for whose poor a trust provided. See JONES, *supra* note 4, at 7-9; 4A SCOTT, *supra* note 4, § 348.2, at 30. Prior to the development of Chancery jurisdiction over uses, which arose gradually during the fourteenth century, ecclesiastical courts had often undertaken to enforce them, under threat of the *anathema*. See 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 332 (S.F.C. Milsom ed., 2d ed. 1968) (1895); Helmholz, *supra* note 6, at 1504-05, 1508-11. On the jurisdictional transition, see CHESTERMAN, *supra* note 4, at 20; DeVine, *supra* note 6; Helmholz, *supra* note 6, at 1511-13. On the advent of Chancery as a judicial court, a phenomenon substantially tied to the rise of the use, see Stephen W. DeVine, *The Concept of Epieikeia in the Chancellor of England's Enforcement of the Feoffment to Uses Before 1535*, 21 U. BRIT. COLUM. L. REV. 323 (1987); Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 LAW & HIST. REV. 245 (1996).

8. See 39 Eliz. I c. 6 (1597) (Eng.) (quoting preamble), reenacted with amendments in 43 Eliz. I c. 4 (1601) (Eng.).

9. See JONES, *supra* note 4, at 22-56.

Purpose bequest doctrine was marked by its early focus on charity. The Attorney General based his claim to intervene on the "publique interest which concerned his Highness to take care [that charitable uses] might be preserved and performed."¹⁰ So long as all, or virtually all, purpose trusts were found to manifest such a public interest, the Attorney General's exclusive standing to enforce them effectively covered the field. If, however, a case should arise where a purpose trust lay beyond the perceived parameters of charity, the foundation for the Attorney General's mandate would crumble and courts would again have to grapple with the question of how – and whether – to go about carrying the trust into execution.

That a case of this sort might present itself was easy enough to imagine. The Christian mind had long been accustomed to thinking in terms of dualisms – of good and evil, for example¹¹ – and so it comes as no surprise that lawmakers (albeit with ulterior motives) should have conceived of an antithesis to the charitable trust – to wit, a trust for the promotion of heresy. In the course of the Henrician campaign to suppress and loot the English chantries in the mid-sixteenth century, acts of Parliament introduced the concept of superstitious uses – those promoting false religious practices – which were void and forfeit to the Crown.¹² In such an event, the public interest lay in thwarting the bequest, and the Attorney General could intervene by information to seek its suppression.¹³ Case law subsequently expanded on this notion to hold void (but not forfeit) all trusts for purposes against public policy.¹⁴

But did any space lie in between these antipodes? Such a notion may have come less naturally to legal thinkers, and in fact the possibility that a trust for a purpose might be neither charitable nor superstitious did not dawn early on the English courts. Testators tended to follow familiar channels, rendering exploration of the issue unnecessary; and on top of that, commentators in the seventeenth and eighteenth centuries had assumed the definition of charitability to be an expansive one, encompassing all uses serving to enrich

10. *Id.* at 36 n.6 (quoting unpublished court record of 1656). See *Attorney-General v. Whorwood*, 27 Eng. Rep. 1188, 1190 (Ch. 1750); *Attorney-General v. Hewer*, 23 Eng. Rep. 848, 849 (Ch. 1700).

11. Though a central feature of Christian thought, dualistic philosophy traces back to the Greeks. See BERTRAND RUSSELL, *A HISTORY OF WESTERN PHILOSOPHY* 134, 302-03 (1945).

12. See 1 Edw. VI c. 14 (1547) (Eng.) (preamble); see also, 37 Hen. VIII c. 4 (1545) (Eng.) (predecessor statute).

13. See *Attorney-General v. Baxter*, 23 Eng. Rep. 446 (Ch. 1684).

14. See, e.g., *West v. Shuttleworth*, 39 Eng. Rep. 1106, 1111 (M.R. 1835); *Whorwood*, 27 Eng. Rep. at 1190; *Brown v. Burdett*, 21 Ch. D. 667, 673 (V.C. 1882); *Egerton v. Earl Brownlow*, 4 H.L.C. 1, 144 (1853); *M'Caig v. University of Glasgow*, 1907 Sess. Cas. 231 (Scot.); *M'Caig's Trustees v. Kirk-Session of United Free Church*, 1915 Sess. Cas. 426 (Scot.); *Lindsay's Ex'r v. Forsyth*, 1940 Sess. Cas. 568, 572, 575-77 (Scot.); *Thrupp v. Collett*, 53 Eng. Rep. 844, 845 (M.R. 1858).

the public.¹⁵ In such circumstances, courts could and did conceive of superstition as lying adjacent to charity's outer edge.¹⁶

Only in the nineteenth century, beginning in 1804 with the seminal case of *Morice v. Bishop of Durham*,¹⁷ did English courts begin to envision a third tier of purpose trust, fracturing the original categorical dichotomy. In *Morice*, the trust at issue sought to advance "such objects of benevolence and liberality" as the Bishop of Durham should in his discretion select.¹⁸ Surely there was nothing superstitious in that, and no suggestion that this bequest contravened public policy as ever made. The court nonetheless ruled that the Statutes of Charitable Uses applied only to gifts for purposes affirmatively subservient to society, and that the testator in this case intended to countenance expenditures beyond the Statutes' scope.¹⁹ "It is clear liberality and benevolence can find numberless objects, not included in that statute in the largest construction of it," declared Sir William Grant, Master of the Rolls.²⁰ In effect, Grant had fenced off from the range of purpose bequests that might theretofore have been deemed charitable a middle field, though without proceeding to survey its boundaries. What then was to be done with it?

In the instant case, the court (apparently) held the stated purpose void for vagueness: Only a charitable trust that was vague could be cured under the Crown's prerogative.²¹ But Grant added a dictum pertinent to all nonchar-

15. See CHESTERMAN, *supra* note 4, at 25-28; JONES, *supra* note 4, at 120-23.

16. In what appears the first published case to raise the issue, a testator in 1750 left the residue of his estate, including his house, to supply a residence for the senior fellow at University College, Oxford, and to provide funds for entertaining the other fellows there and for distributing cordials, drugs, and moral pamphlets to the poor. See *Attorney-General v. Whorwood*, 27 Eng. Rep. 1188, 1188-89 (Ch. 1750). Counsel for the testator's heirs characterized the bequest as "whimsical . . . not a superstitious or illegal, but an indifferent use; as to feed sparrows," which counsel asserted, on doubtful authority, prior courts had disallowed. *Id.* at 1189. Counsel cited to one case only, the unreported *Attorney-General v. Oakaver* (1736), in which a stipend to provide choristers was held void "as the choristers were never allowed in parochial churches" — hence a purpose impossible to perform. *Id.* at 1189-90. At any rate, the court took no interest in this conceptual novelty and proceeded simply to distinguish charitable from superstitious purposes: "If this is no charitable or public, but a superstitious use, it results [i.e., goes by resulting trust] to the heir at law. . . ." *Id.* at 1190. On rehearing, the terms of the bequest were found to violate the constitution of University College and hence failed for impossibility. See *Attorney-General v. Whorwood*, 28 Eng. Rep. 511, 513 (Ch. 1750). Cases involving bequests for purposes that did not enrich the public at all apparently failed to arise before the nineteenth century. See *infra* note 24.

17. 32 Eng. Rep. 656 (M.R. 1804).

18. See *Morice v. Bishop of Durham*, 32 Eng. Rep. 656, 656 (M.R. 1804), *aff'd*, 32 Eng. Rep. 947 (Ch. 1805).

19. *Id.* at 659.

20. *Id.*

21. *Id.* at 658-59 (Grant, M.R.). "[U]nless the subject and the objects [of a trust] can be ascertained, upon principles, familiar in other cases, it must be decided, that the Court can

itable purpose bequests, be their terms ever so precise. For a valid trust to exist, "[t]here must be somebody, in whose favour the Court can decree performance," Grant announced, "for an uncontrollable power of disposition would be ownership, and not trust."²² With the Attorney General consigned to the sidelines, and with no beneficiary or other supplemental mechanism in reserve to see to the trust's enforcement, its trustee would be free to act without restraint. Though a testator might intend to bind the trustee to fulfil a purpose, that desire could not be carried into execution. As a consequence, like a superstitious use (though for a different reason), the trust failed.

Subsequent British cases in the main have cleaved to this "beneficiary principle," as it has come to be known. It continues to serve in Great Britain as the modern basis for denying the effectiveness of trusts for noncharitable purposes, often referred to there, appropriately under the conceptual circumstances, as trusts of "imperfect obligation."²³ Still, a number of British courts over the years have taken a contrary view, at least with regard to certain types of purposes,²⁴ though without exploring the mechanism (if any) whereby the

neither reform mal-administration, nor direct a due administration. . . . [and] where the objects are too uncertain to make recommendation . . . the trust is . . . ineffectual." *Morice*, 32 Eng. Rep. at 954-55 (Eldon, L.C., on appeal); see also *id.* at 952-53; JONES, *supra* note 4, at 88-91 (discussing Crown's power to cure uncertain charitable trusts). But commentators have disagreed about the meaning and precise *ratio decidendi* of the opinions in the case, which themselves suffered from a measure of vagueness. See, e.g., George E. Palmer, *The Effect of Indefiniteness on the Validity of Trusts and Powers of Appointment*, 10 UCLA L. REV. 241, 245-46 (1963); L.A. Sheridan, *Trusts for Non-Charitable Purposes*, 17 CONV. & PROP. LAW. (n.s.) 46, 48-49 (1953).

22. *Morice*, 32 Eng. Rep. at 658.

23. This phrase appears in many British secondary sources, see, e.g., J.G. RIDDALL, *THE LAW OF TRUSTS* 175 (4th ed. 1992); ARTHUR UNDERHILL & DAVID J. HAYTON, *LAW RELATING TO TRUSTS AND TRUSTEES* 76 (14th ed. 1987), though it may have originated in an American case, see *infra* note 59. For cases, see *In re Bushnell*, [1975] 1 W.L.R. 1596, 1602 (Ch.) (bequest for advancement of socialized medicine); *In re Shaw*, [1957] 1 All E.R. 745, 758 (Ch.) (bequest for linguistic research), *appeal dismissed per compromise*, [1958] 1 All E.R. 245 (C.A.); *In re Wood*, [1949] 1 All E.R. 1100, 1101 (Ch.) (bequest to make distributions to B.B.C.'s "The Week's Good Cause"); *In re Hummeltenberg*, [1923] 1 Ch. 237, 241-42 (bequest for training of mediums); *In re Astor's Settlement Trusts*, [1952] 1 All E.R. 1067, 1071 (Ch.) (discretionary bequest for "useful" purpose); *In re Endacott*, [1959] 3 All E.R. 562 (C.A.) (discretionary bequest for "benevolent" purpose); *Chichester Diocesan Fund v. Simpson*, 1944 App. Cas. 341 (H.L.) (same); *In re Harpur's Will Trusts* [1962] 1 Ch. 78 (App.) (discretionary bequest for specified purposes); *R. v. District Auditor, ex parte West Yorkshire Metro. County Council*, 1986 R. & V.R. 24 (Q.B. Div'1 Ct.) (same); see also *In re Hopkinson*, [1949] 1 All E.R. 346 (Ch.) (ground of decision unclear); cf. *infra* note 262 and accompanying text. British cases have explicitly rejected the American rule giving effect to bequests for noncharitable purposes. See *infra* note 52.

24. Most of these cases have involved bequests for the care of animals and tombs. See *In re Catherall* (unreported, 1959), quoted in UNDERHILL & HAYTON, *supra* note 23, at 75; *Adnam v. Cole*, 49 Eng. Rep. 862 (M.R. 1843); *In re Dean*, 41 Ch. D. 552 (1889); *In re*

trusts in question are to be enforced.²⁵ At the same time, courts willing to give effect to noncharitable purpose trusts have insisted that the testator confine them to the period set by the Rule Against Perpetuities, a limitation which has never applied to charitable trusts.²⁶ But given the apparent conflict between the cases, British law remains today in a state of conspicuous uncertainty.²⁷

Hooper, 1931 All E.R. 129 (Ch.); *Masters v. Masters*, 24 Eng. Rep. 454 (M.R. 1717) (validity conceded); *Mellick v. President and Guardians of the Asylum*, 37 Eng. Rep. 818 (M.R. 1821) (dicta); *Mitford v. Reynolds*, 60 Eng. Rep. 812 (V.C. 1848); *Mussett v. Bingle*, 1876 W.N. 170 (V.C.); *Pettingall v. Pettingall*, 11 L.J.R. (n.s.) 176 (V.C. 1842) (validity conceded); *Pirbright v. Salwey*, 1896 W.N. 86 (court of decision not noted); *Trimmer v. Danby* 25 L.J.R. (n.s.) 424 (V.C. 1856); see also *In re Thompson*, 1934 Ch. 342 (holding valid bequest for promotion of fox hunting). But see *Dawson v. Small*, 18 L.R.-Eq. 114, 118 (V.C. 1874) (deeming bequest for upkeep of grave to be ineffective); *Hunter v. Bullock*, 14 L.R.-Eq. 45, 48 (V.C. 1872) (same). Other courts have characterized cases giving effect to trusts for noncharitable purposes in Great Britain as "anomalous and exceptional." See *In re Astor's Settlement Trusts*, [1952] 1 All E.R. 1067, 1074 (Ch.); *In re Endacott*, [1959] 3 All E.R. 562, 567-68, 570-71 (C.A.) (adding that the range of purposes given effect by prior rulings "ought not to be extended"); cf. D.C. Potter, *Trusts for Non-Charitable Purposes*, 13 CONV. & PROP. LAW. (n.s.) 418, 423 (1949) (prematurely predicting that exceptions were about to "[sweep] away the rule").

25. In one early case, the court gave effect to a bequest to build a monument but observed that "I do not suppose that there would be any one who could compel the executors to carry out this bequest . . . but if the residuary legatees or the trustees insist upon [it,] . . . this Court is bound to see it carried out." *Trimmer v. Danby*, 25 L.J.R. (n.s.) 424, 427 (V.C. 1856). Similarly, in two other cases, the court granted standing to residuary legatees to "apply to the Court," in the event that purpose bequests were not properly carried out, in order to terminate the bequests. *Pettingall v. Pettingall*, 11 L.J.R. (n.s.) 176, 177 (V.C. 1842); *In re Thompson*, 1934 Ch. 342, 344. Another puzzled judge found it "difficult to say" who the beneficiary of a purpose bequest was, and hence "I do not see who could ask the Court to enforce it." *In re Dean*, 41 Ch. D. 556, 557 (1889). By contrast, whether a special power of appointment for a noncharitable purpose, which cannot be enforced, is valid under British law is an issue no court has ever faced. A dictum in one opinion asserts that such a power would be effective. See *In re Wooton*, [1968] 1 W.L.R. 681, 688 (Ch.); see also JILL E. MARTIN, HANBURY & MARTIN, *MODERN EQUITY* 377-78 (14th ed. 1993); J.H.C. MORRIS & W. BARTON LEACH, *THE RULE AGAINST PERPETUITIES* 320-21 (2d ed. 1962 & Supp. 1964); L.A. Sheridan, *Power to Appoint for a Non-Charitable Purpose: A Dialogue or Endacott's Ghost*, 13 DEPAUL L. REV. 210, 227-30 (1964). Nevertheless, two of the recent opinions denying effect to trusts for purposes use language that suggests a broader principle of invalidity here. One judge fears the prospect of "large funds devoted to non-charitable purposes which no court . . . can control, or . . . reform," a fear that presumably would extend to powers as well as to trusts. *In re Astor's Settlement Trusts*, [1952] 1 All E.R. 1067, 1071 (Ch.). Endorsing this view, another judge refers generally to the invalidity of a "gift" for a noncharitable purpose. *In re Endacott*, [1959] 3 All E.R. 562, 570 (C.A.). Compare R.M. Eggleston, *Purpose Trusts*, 2 RES JUDICATAE 118, 123-24 (1939) (arguing that powers for purposes fall within purview of beneficiary principle) with O.R. Marshall, *The Failure of the Astor Trust*, 6 CURRENT LEGAL PROBS. 151, 164-65 (1953) (in rebuttal).

26. See MORRIS & LEACH, *supra* note 25, at 185-86, 321-27. For a more detailed doctrinal and historical discussion, see Hirsch, *supra* note 6.

27. "The whole of the cases relating to this question require to be reviewed by the House of Lords before any intelligible principle can be extracted from them." UNDERHILL & HAYTON, *supra* note 23, at 80. For recent doctrinal analyses of the British cases, see *id.* at 75-80; J.B.

In America, as well, a tripartite scheme of purpose trusts gradually took shape, although it came to assume a somewhat different (and clearer) form from its British counterpart. Trusts for charitable purposes were already familiar to Englishmen when they began to settle the New World toward the end of the sixteenth century. Living as they did in an atmosphere thick with religion, the colonists acknowledged charitable trusts from the outset.²⁸ As in Great Britain, the concept of a trust for a purpose that was noncharitable emerged only later – in the first instance, oddly enough, as an accidental byproduct of independence from the mother country.

Following the American Revolution, many states acted to reaffirm the validity of charitable trusts by statute, or even by constitutional mandate, and these were permitted to endure indefinitely.²⁹ In Virginia, however, no such steps had initially been taken. Virginia's reception statute meanwhile had repealed all acts of Parliament previously in force, which included the Statutes of Charitable Uses. When a Virginian subsequently left a bequest for the purpose of educating youths into the Baptist ministry, Chief Justice Marshall ruled that charitable trusts did not exist apart from statutory law – hence, barring passage of an equivalent statute, testators could not create them within the state.³⁰

And so, apparently for the first time, an American court had to contemplate the implications of a purpose trust "were it not a charity."³¹ This case came down in 1819, just fifteen years after the holding in *Morice*. That Marshall viewed the English decision as controlling is clear enough: Elsewhere in his opinion, he cited to *Morice* for its first proposition, namely that the definition of charity was circumscribed by the Statutes of Charitable Uses, in order to establish the Statutes' exclusivity as a source of validating author-

CLARK & J.G. ROSS MARTYN, *THEOBALD ON WILLS* 152-54 (15th ed. 1993); MARTIN, *supra* note 25, at 353-79; L.A. SHERIDAN, KEETON AND SHERIDAN'S *THE LAW OF TRUSTS* 43, 152-58 (12th ed. 1993).

28. EDITH L. FISCH ET AL., *CHARITIES AND CHARITABLE FOUNDATIONS* § 152, at 151 (1974); HOWARD S. MILLER, *THE LEGAL FOUNDATIONS OF AMERICAN PHILANTHROPY, 1776-1844*, at 3-8 (1961); Note, *The Enforcement of Charitable Trusts in America: A History of Evolving Social Attitudes*, 54 VA. L. REV. 436, 440-41 (1968).

29. Note, *supra* note 28, at 441-42. For early American cases allowing charitable trusts to continue in perpetuity, see *Shotwell v. Mott*, 2 Sand. Ch. 46, 54-55 (N.Y. 1844); *Williams v. Williams*, 8 N.Y. 525, 534-35 (1853); *Griffin v. Graham*, 8 N.C. 96, 131-32 (1820), together with the cases cited in LEWIS M. SIMES & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* § 1392, at 242 n.6 (2d ed. 1956 & Supp. 1998).

30. See *Trustees of the Phila. Baptist Ass'n v. Hart's Ex'rs*, 17 U.S. (4 Wheat.) 1, 29-51 (1819). The Supreme Court reversed this decision in 1844, recognizing charitable trusts on the basis of newly uncovered historical evidence of their judicial enforcement prior to, and hence independent of, the Acts of Parliament that some American reception statutes had nullified. See *Vidal v. Girard's Ex'rs*, 43 U.S. (2 How.) 127, 193-97 (1844).

31. *Hart's Executors*, 17 U.S. (4 Wheat.) at 29.

ity.³² In so many words, he then proceeded to apply the beneficiary principle encapsulated in Grant's dictum; absent the enforcement remedies provided by legislation, there were "[no] persons designated who might take beneficially."³³ As a consequence, the purpose trust failed.³⁴ Trusts for purposes affirmatively contrary to public policy also eventually came before American courts and were held void on that alternative basis, rounding out the trio.³⁵

But, whatever Marshall's stature, his early embrace of the beneficiary principle did not lay the issue of noncharitable purpose trusts to rest. On the matter of their effectiveness, American courts in the nineteenth century aired all manner of opinions. The dominant theme of the period was confusion.³⁶ Many courts proceeded to strike down trusts for purposes deemed noncharitable for want of beneficiaries, sometimes quoting *Morice* directly.³⁷ Other

32. See *id.* at 45-46. The respect due in the New Republic to post-1776 English common law and equity decisions was a matter of some controversy. In a string of opinions, however, Justice Marshall had already indicated his willingness to look to contemporary English cases for authority. See JOSEPH H. SMITH, *CASES AND MATERIALS ON THE DEVELOPMENT OF LEGAL INSTITUTIONS* 495-98 (1965).

33. *Hart's Executors*, 17 U.S. (4 Wheat.) at 29. Marshall failed to cite to *Morice*, or to any other authority, at this precise juncture. *Id.*

34. See *id.* at 29, 51.

35. Trusts against public policy were already accounted for in common law doctrine, and the earliest reported cases in America never remarked that the trusts at issues raised any novel legal questions. See, e.g., *Ford v. Ford's Ex'r*, 16 S.W. 451, 452-53 (Ky. 1891) (dicta); *In re Scott's Will*, 93 N.W. 109, 109 (Minn. 1903); *In re Killen's Will*, 209 N.Y.S. 206, 208 (Sur. Ct. 1925); *In re Hill's Estate*, 204 P. 1055, 1056 (Wash.), *aff'd en banc*, 207 P. 689 (Wash. 1922).

36. For an admission of uncertainty about the proper doctrine to apply in such a case, see *Sherman v. Baker*, 40 A. 11, 12 (R.I. 1898) ("But however this may be . . ."); see also *Moran v. Moran*, 73 N.W. 617, 622 (Iowa 1897) (observing that noncharitable purpose bequests lacked "a name or a legal classification," but arguing that they should not fail on that account). For a survey of early case law in one state, see David C. Wolfe, *Honorary Trust in Pennsylvania*, 42 DICK. L. REV. 161 (1938).

37. See, e.g., *Festorazzi v. St. Joseph's Catholic Church*, 18 So. 394, 396 (Ala. 1894); *In re Koppikus' Estate*, 81 P. 732, 733 (Cal. Ct. App. 1905); *Spaulding v. Lackey*, 173 N.E. 110, 112 (Ill. 1930) (citing to *Morice*); *Dashiell v. Attorney General*, 5 H. & J. 392, 399-400 (Md. 1822) (citing to *Morice*); *Gilman v. McArdle*, 2 N.E. 464, 468 (N.Y. 1885) (dicta); *Levy v. Levy*, 33 N.Y. 97, 101-05 (1865) (citing to *Morice*); *Fosdick v. Town of Hempstead*, 26 N.E. 801, 803 (N.Y. 1891); *Tilden v. Green*, 28 N.E. 880, 881-82, 888 (N.Y. 1891); *Holland v. Alcock*, 16 N.E. 305, 306 (N.Y. 1888); *Gallego's Ex'rs v. Attorney General*, 31 Va. (3 Leigh) 450, 462 (1832); *McHugh v. McCole*, 72 N.W. 631, 633-36 (Wis. 1897). This was almost invariably the outcome of cases involving bequests for indefinite noncharitable purposes — usually limited to "worthy" or "benevolent" purposes chosen by a delegate named in the will. These cases more precisely fit the facts of *Morice*, and courts referred to either or both of the rationales articulated in that case. See *In re Ralston's Estate*, 37 P.2d 76, 78 (Cal. 1934) (void for uncertainty); *In re Sutro's Estate*, 102 P. 920, 922-23 (Cal. 1909) (same); *Bristol v. Bristol*, 5 A. 687, 691 (Conn. 1885) (void because "vague and indefinite"); *Adye v. Smith*, 44 Conn. 60,

courts ruled that where a testator did not intend to create a binding trust, but only an optional power on the part of the donee of the power to perform the specified purpose or not, with a gift over in default of its exercise, the bequest was good. If the purpose was not meant to be enforceable, then the absence of an enforcement mechanism became inconsequential; all that was needed was a means to enforce the gift over in default, and under the traditional doctrine of powers a petition by the alternative taker – being, at last, a person – could perform that function.³⁸ And in still other jurisdictions, courts gave effect to trusts for noncharitable purposes and simply ignored the rule of *Morice*.³⁹ As to the process of enforcement, courts offered vague assurances

67-68, 70-71 (1876) (void because "indefinite" and lack of beneficiary, citing to *Morice*); Taylor v. Keep, 2 Ill. App. 368, 384 (1878) (void for "uncertainty," citing to *Morice*); Nichols v. Allen, 130 Mass. 211, 212, 221 (1881) (void because "too indefinite," citing to *Morice*); Chamberlain v. Stearns, 111 Mass. 267, 269 (1873) (void for "uncertainty," citing to *Morice*); Hegeman's Ex'rs v. Roome, 62 A. 392, 393 (N.J. Ch. 1905) (void because "vague and indefinite"); Hyde's Ex'rs v. Hyde, 53 A. 593, 594 (N.J. Ch. 1902) (void without discussion); Livesey v. Jones, 35 A. 1064, 1064 (N.J. Ch. 1896) (void because "too general and indefinite"), *aff'd sub nom.* Chadwick v. Livesey, 41 A. 1115 (N.J. 1897) (per curiam); Norris v. Thomson's Ex'rs, 19 N.J. Eq. 307, 313-14 (Ch. 1868) (void because "too indefinite," citing to *Morice*), *aff'd*, 20 N.J. Eq. 489 (1869). *But see infra* note 39.

38. This suggestion first appeared as a dictum in *Tilden*:

But it is said that the Tilden Trust [devoted to a purpose] . . . is discretionary wholly, and depends for its execution upon the will of the trustees . . . and the power to endow the Tilden Trust is likened to a power of appointment. Powers of appointment are so common in testamentary dispositions of property that no citation of authority is necessary to show their validity. . . . But there is no similarity between the suggested bequest and the will before us. . . . [I]n the will before us there is no alternative purpose. There is a single scheme. . . .

Tilden v. Green, 28 N.E. 880, 886 (N.Y. 1891). But in another early case, where the testator referred to sums that "may be employed" for the construction of a monument, the provision was construed as creating a power that apparently would have been valid, but for its violation of the Rule Against Perpetuities. *See Hartson v. Elden*, 26 A. 561, 562 (N.J. Ch. 1893); *see also* Whiting v. Bertram, 199 N.E. 367, 367-68 (Ohio Ct. App. 1935) (finding that direction to executors to hold sum "in trust" for care and decoration of graves would have been deemed void had trust been intended, but construing provision as intended to create power, though no further disposition could be made for want of appellate jurisdiction over powers); *cf. supra* note 25.

39. *See Angus v. Noble*, 46 A. 278, 282 (Conn. 1900) (trust for upkeep of graves); *Wilmes v. Tiernay*, 174 N.W. 271, 272-73 (Iowa 1919) (trust for masses); *Moran v. Moran*, 73 N.W. 617, 622 (Iowa 1897) (same); *Willett v. Willett*, 247 S.W. 739, 740 (Ky. 1923) (citing state statute giving effect to all bequests for "charitable or humane purpose[s]"); *Lounsbury v. Trustees of Square Lake Burial Ass'n*, 129 N.W. 36, 38 (Mich. 1910) (trust for construction of cemetery vault and fence), *aff'd*, 137 N.W. 513 (Mich. 1912); *In re Gorey's Will*, 170 N.Y.S. 635, 636 (Sur. Ct. 1918) (bequest for masses and construction of tombstone held valid as trust); *Wrenshall's Estate*, 72 Pa. Super. 258, 259-62 (1919) (trust for maintaining cemetery lot and providing for horse); *see also* *Bainbridge's Appeal*, 97 Pa. 482, 486 (1881) (assuming valid without analysis bequest for construction of monument to deceased); *Stoffel's Estate*, 145 A. 70, 71 (Pa. 1929) (same), discussed in 2 SCOTT, *supra* note 4, § 124, at 244-45; *Sherman v.*

that they themselves would undertake this responsibility.⁴⁰ But, as in Great Britain, courts continued in any event to strike down trusts for noncharitable purpose if their intended duration exceeded the period of the Rule Against Perpetuities.⁴¹

B. The (Re)statement

These matters stood, however unsettled, when in 1935 the *Restatement of Trusts* appeared. This resource, largely the brainchild of Professor Austin Scott,⁴² accepted – though not without modification – Britain's tripartite

Baker, 40 A. 11, 12 (R.I. 1898) (dicta). In some early cases, bequests for monuments and masses were held valid as an aspect or equivalent of funeral expenses. See *In re Koppikus' Estate*, 81 P. 732, 733 (Cal. Ct. App. 1905); *Ford v. Ford's Ex'r*, 16 S.W. 451, 452 (Ky. 1891); *In re Backes' Will*, 30 N.Y.S. 394, 395 (Sur. Ct. 1894); *In re Boardman*, 20 N.Y.S. 60, 61 (Sur. Ct. 1891); *Holland v. Smyth*, 47 N.Y. Sup. Ct. 372, 373 (1886); *Emans v. Hickman*, 19 N.Y. Sup. Ct. 425, 427 (1877); *McIlvain v. Hockaday*, 81 S.W. 54, 55 (Tex. Civ. App. 1904, writ ref'd); see also cases cited *infra* notes 182, 274. In at least one early case, a court gave effect to an indefinite noncharitable bequest. See *In re Dulles' Estate*, 67 A. 49, 50 (Pa. 1907) (trust for "charitable and benevolent purpose" in trustee's discretion); see also *Smith v. Pond*, 111 A. 154, 155 (N.J. 1920) (trust for "benevolent purposes"; held valid under 1905 statute expressly authorizing such trusts); *Allred v. Beggs*, 84 S.W.2d 223, 229 (Tex. 1935) (bequest for "worthy objects"; denying attorney general's motion to intervene and holding valid executor's distributive decisions as falling within specified category of "worthy" purposes; heirs, however, were not joined as parties and had not challenged bequest). Both Scott's treatise and the Reporter's Notes to the *Restatement* misread *Allred* as denying effect to the bequest at issue. See RESTATEMENT (SECOND) OF TRUSTS, app. § 123, at 191 (1959) (Reporter's Notes); 4A SCOTT, *supra* note 4, § 398.1, at 457 n.20.

40. See *Wilmes v. Tiernay*, 174 N.W. 271, 272-73 (Iowa 1919); *Moran v. Moran*, 73 N.W. 617, 621 (Iowa 1897); *In re Dulles' Estate*, 67 A. 49, 50 (Pa. 1907). For a later opinion to the same effect, see *Devereux's Estate*, 48 Pa. D. & C. 491, 498-500 (Orphans' Ct. 1943), *appeal quashed*, 46 A.2d 168 (Pa. 1946). See also *Sherman v. Baker*, 40 A. 11, 12 (R.I. 1898) (suggesting in dicta that "an heir at law . . . has a sufficient interest to see that the will is carried out").

41. For cases prior to 1935, when the *Restatement of Trusts* was published, see *Union Trust Co. v. Rossi*, 22 S.W.2d 370, 372 (Ark. 1929); *Hampton v. Dill*, 188 N.E. 419, 422 (Ill. 1933); *McCartney v. Jacobs*, 123 N.E. 557, 588-59 (Ill. 1919); *Mason v. Bloomington Library Ass'n*, 86 N.E. 1044, 1046 (Ill. 1908); *Thorpe v. Lund*, 116 N.E. 946, 949-50 (Mass. 1917); *Leonard v. Haworth*, 51 N.E. 7, 8 (Mass. 1898); *Lounsbury v. Trustees of Square Lake Burial Ass'n*, 129 N.W. 36, 37 (Mich. 1910), *aff'd*, 137 N.W. 513 (Mich. 1912); *Tichenor v. Mechanics & Metals Nat'l Bank*, 125 A. 323, 324 (N.J. Ch. 1924); *Morristown Trust Co. v. Mayor & Bd. of Aldermen*, 91 A. 736, 737 (N.J. Ch. 1913); *Hilliard v. Parker*, 74 A. 447, 448 (N.J. Ch. 1909); *Detwiller v. Hartman*, 37 N.J. Eq. 347, 353-54 (Ch. 1883); *Driscoll v. Hewlett*, 91 N.E. 784, 784 (N.Y. 1910) (dicta); *In re Waldron*, 109 N.Y.S. 681, 684 (Sur. Ct. 1907); *Meehan v. Hurley*, 150 A. 819, 820 (R.I. 1930); *Shippee v. Industrial Trust Co.*, 110 A. 410, 411 (R.I. 1920); *Kelly v. Nichols*, 21 A. 906, 907-08 (R.I. 1891); *Smith v. Heyward*, 105 S.E. 275, 279-80 (S.C. 1920); *McIlvain v. Hockaday*, 81 S.W. 54, 55 (Tex. Civ. App. 1904, writ ref'd).

42. Scott served as Reporter for the *Restatement of Trusts*, and his famous treatise on trusts was born out of his desire to justify the rules promulgated therein. The two projects were so closely tied that the section numbers he assigned to the treatise corresponded with those of the *Restatement*. See 1 SCOTT, *supra* note 4, xxvii-xxx.

scheme of purpose trusts. Trusts for charitable purposes were valid under the *Restatement*, enforceable by the Attorney General, and effective in perpetuity.⁴³ They were defined, restrictively if imprecisely, as trusts for those "purposes the accomplishment of which is beneficial to the community."⁴⁴ Conversely, bequests for purposes that a court finds conducive to "illegal" or "immoral" acts, or that a court otherwise deems "detrimental to the community" or "capricious," were to fail and pass by resulting trust to alternative beneficiaries.⁴⁵

In these aspects, the *Restatement's* treatment of purpose trusts was perfectly orthodox. Its treatment of trusts falling into the middle tier of non-charitability was another story. "Where property is transferred to a person upon an intended trust for a specific non-charitable purpose . . . the transferee is not under a duty . . . to apply the property to the designated purpose, since there is no beneficiary to enforce the intended trust,"⁴⁶ the Restators began; with "no beneficiary to enforce it, it is not a trust."⁴⁷ Thus far, their language might have flowed from the pen of Sir William Grant. Then came the departure: "but the transferee has power to apply the property to the designated purpose,"⁴⁸ the Restators continued; at the transferee's option, "[h]e can either apply the property to the designated purpose or surrender it to the . . . estate."⁴⁹ Such an "intended trust is sometimes called an 'honorary trust'," although the Restators added "it is more accurate to state that the trustee has power than . . . that he holds upon trust, whether honorary or otherwise."⁵⁰ Finally, as in

43. See RESTATEMENT OF TRUSTS §§ 124 cmt. e, 348, 364-65, 391 (1935); RESTATEMENT (SECOND) OF TRUSTS §§ 124 cmt. e, 348, 364-65, 391 (1959).

44. RESTATEMENT OF TRUSTS § 368(f) (1935). The section adds a nonexclusive list of illustrations: trusts for the relief of poverty, for the advancement of education, for the advancement of religion, for the promotion of health, and for governmental purposes. See *id.* § 368(a)-(e). The definition found in the *Restatement* is modelled after the British Statutes of Charitable Uses. See *id.* § 368 cmt. a. The *Restatement (Second)* repeats the definition without amendment. See RESTATEMENT (SECOND) OF TRUSTS § 368 (1959).

45. RESTATEMENT OF TRUSTS §§ 62 & cmts. a, n, & o, 124 cmt. g, 374 cmt. l, 377 & cmts. a-c, 418(c) & cmt. b (1935); RESTATEMENT (SECOND) OF TRUSTS §§ 62 & cmts. a, v, & w, 124 cmt. g, 374 cmt. m, 377 & cmts. a-c, 418(c) & cmt. b (1959).

46. RESTATEMENT OF TRUSTS § 124 cmt. a (1935).

47. *Id.* § 124 cmt. c.

48. *Id.* § 124.

49. *Id.* § 124 cmt. b.

50. RESTATEMENT OF TRUSTS § 124 cmt. c (1935); see also *id.* §§ 374 cmt. h (discussion limited to trusts for upkeep of tombs), 418 & cmts. (duplicating section 124 in connection with resulting trust principles). These provisions were carried forward without significant revision into RESTATEMENT (SECOND) OF TRUSTS §§ 124, 374 cmt. h, 418 (1959). The *Restatement (Second)* differs from the original in one substantive respect only: Under the first *Restatement*, the honorary trust principle applied only to bequests for definite noncharitable purposes. Bequests for indefinite noncharitable purposes, to be selected by the trustee, were void. See

states that had previously acknowledged trusts for noncharitable purposes, the Restators cabined in the duration of this construct, restricting honorary trusts to the period allowed by the Rule Against Perpetuities.⁵¹

Whence was born the modern American – but not British⁵² – orthodoxy: When a testator seeks to create a trust for a purpose, one that neither advances nor offends the community interest, the intended trust is instead treated as a power, which the intended trustee may carry out if she so chooses; otherwise, the residuary legatee or heirs can sue for a resulting trust to recover the corpus of the bequest.⁵³ From what source or sources had this rule sprung? In 1935,

RESTATEMENT OF TRUSTS §§ 123 & cmts. b & c, 417 & cmts. (1935). Why these bequests should not also have been treated like powers, the *Restatement* failed to explain. It was left to the *Restatement (Second)* to clear away this anomaly, declaring as valid, but honorary, bequests for noncharitable purposes of both the definite and indefinite variety. See RESTATEMENT (SECOND) OF TRUSTS §§ 123 & cmts., 417 & cmts. (1959). Professor Scott had harbored doubts about the distinction between bequests for definite and indefinite noncharitable purposes as early as 1917. See Austin W. Scott, *Control of Property by the Dead* (pts. 1 & 2), 65 U. PA. L. REV. 527, 540-41 (1917) [hereinafter Scott, *Control*]; AUSTIN W. SCOTT, EXPLANATORY NOTES ON TRUSTS 30 (American Law Institute, prepared in connection with RESTATEMENT OF TRUSTS (Tentative Draft No. 1, 1930)). In 1945, Scott published a law review article advocating the rule subsequently adopted by the *Restatement (Second)*, for which he again served as Reporter. Rather than embark on an exercise in self-criticism, however, Scott chose as the target of his 1945 article the line of British cases he had followed, however reluctantly, in the first *Restatement*. Nowhere did Scott acknowledge or even cite to the *Restatement* into which he had himself imported the very rule he was now condemning! See Austin W. Scott, *Trusts for Charitable and Benevolent Purposes*, 58 HARV. L. REV. 548, 571-72 & passim (1945) [hereinafter Scott, *Trusts*].

51. See RESTATEMENT OF TRUSTS §§ 124 cmt. f, 418(2) (1935); RESTATEMENT (SECOND) OF TRUSTS §§ 123 & cmt. f, 124 & cmt. f, 417(b) & cmt. a, 418(b) & cmt. b (1959).

52. British courts have explicitly rejected the American rule. See *In re Endacott*, [1959] 3 All E.R. 562, 568 (C.A.); *In re Shaw*, [1957] 1 All E.R. 745, 759 (Ch.), appeal dismissed per compromise, [1958] 1 All E.R. 245 (C.A.).

53. Though the majority of states lack modern case law on point, commentators assume this to be the rule of today. See WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS AND ESTATES § 8.6, at 328 (1988); 5 WILLIAM H. PAGE, ON THE LAW OF WILLS § 40.3, at 108 (William J. Bowe & Douglas H. Parker eds., rev. ed. 1960 & Supp. 1999); 7 RICHARD R. POWELL, POWELL ON REAL PROPERTY ¶ 588, at 46-5 (Don R. Castleman rev., rev. ed. 1998); 2 SCOTT, *supra* note 4, § 124, at 242, 244. *But cf.* GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 166, at 167-68, § 218, at 313-14 (rev. 2d ed. 1979 & Supp., George G. Bogert et al. eds., 1995) (alleging general rule to be invalidity, despite absence of any American cases since 1935 so holding, apart from those implicating indefinite purposes or perpetuities violations). For modern cases, see *infra* note 62. For doctrinal discussions of some specific sorts of purpose bequests, see generally James T. Brennan, *Bequests for the Care of Specific Animals*, 6 DUQ. L. REV. 15 (1967-68); James T. Brennan, *Bequests for the Erection, Care, and Maintenance of Graves, Monuments, and Mausoleums*, 9 WASHBURN L.J. 23 (1969); James T. Brennan, *Bequests for Religious Services*, 17 CLEV.-MARSHALL L. REV. 388 (1968); R.P. Davis, Annotation, *Law as to Cats*, 73 A.L.R. 2d 1032, 1043-44 (1960); M.C. Dransfield, Annotation, *Gift for Maintenance or Care of Private Cemetery or Burial Lot, or of Tomb or of Monument, Including the Erection Thereof, as Valid Trust*, 47 A.L.R. 2d 596 (1956); Kenneth

it could scarcely have been called a restatement of the law, for not a single American court was then taking this approach.⁵⁴ It was, however, a rather precise restatement of a law review article, published by Professor James Barr Ames in 1892.⁵⁵ Taking umbrage at a line of New York decisions that, under a quirk in the state's early statutory law, had restricted the privileges of charitable status to charitable corporations (as opposed to trusts),⁵⁶ and hence that invalidated trusts for even salutary purposes under the beneficiary principle, Ames insisted in language unusually fiery for his time that *Morice* had been wrongly decided:

It may be said that there can be no trust without a definite *cestui que trust* [i.e., beneficiary]. This must be admitted. . . . But it does not follow from this admission that such a gift is void. . . . The only objection that has ever been urged against such a gift is that the court cannot compel [the trustee] to act if he is unwilling. Is it not a monstrous *non sequitur* to say that therefore the court will not permit him to act when he is willing? . . . Suppose a testator to give [the trustee] a purely optional power of appointment. . . . [T]he validity of this power would be unquestioned. . . . Does it not seem a mockery of legal reasoning to say that the court will sanction the exercise of the power where the donee was under no moral obligation to act at all, but will not sanction the appointment when the donee was in honor bound to make it?⁵⁷

R. O'Brien & Daniel E. O'Brien, *Seventy Years of Bequests for Masses in New York Courts, 1883-1953*, 23 FORDHAM L. REV. 147 (1954).

54. See *supra* notes 37-40 and accompanying text; *infra* note 57; cf. *In re Gibbons*, [1917] 1 Ir. R. 448, 453 (Ch.) (allowing noncharitable purpose trust to take effect where trustees were willing to carry it out without ruling on whether they could be compelled to do so). The relevant provisions all appeared in the earliest draft of the *Restatement*, submitted for discussion in 1930. See RESTATEMENT OF TRUSTS §§ 118-20 (Tentative Draft No. 1, 1930). Scott's innovative treatment of honorary trusts in the *Restatement* was hardly his only effort therein to remake, rather than restate, the law. See, e.g., RESTATEMENT OF TRUSTS § 55 (1935) (addressing secret and semisecret trusts); 1A SCOTT, *supra* note 4, § 55.8.

55. J.B. Ames, *The Failure of the "Tilden Trust,"* 5 HARV. L. REV. 389 (1892).

56. On New York's odd and complex early law of charity, see Stanley N. Katz et al., *Legal Change and Legal Autonomy: Charitable Trusts in New York, 1777-1893*, 3 LAW & HIST. REV. 51, 59-89 (1985); see also 4A SCOTT, *supra* note 4, § 348.3, at 33 n.2, 37-38.

57. Ames, *supra* note 55, at 395-96. Significantly, Ames had to dip back to antebellum slavery cases in order to discover American "precedents" for his position: In those few states where slaves lacked standing to sue for freedom, some courts had nonetheless held valid trusts for the purpose of manumitting slaves. Ames quoted several opinions in which the court suggested that the trustee in such a case was free to carry out the trust but could not be compelled to do so. See *id.* at 400-01. John Chipman Gray subsequently reviewed Ames's evidence and found it wanting: In each of the cases Ames cited, courts on appeal had deemed the trusts enforceable, either by the slave himself or by the court of equity. See John C. Gray, *Gifts for a Non-Charitable Purpose*, 15 HARV. L. REV. 509, 522-24 (1902); see also 2 SCOTT, *supra* note 4, § 124.6, at 276.

This argument was not, in fact, original to Ames. In more tempered tones, it had been sounded four years earlier in counsel's submission in one of the cases Ames was criticizing, *Holland v. Alcock*,⁵⁸ where it was rejected by New York's Court of Appeals.⁵⁹ Ames now took the idea and ran with it,⁶⁰ convincing Scott of its rightness long before Scott turned his hand to the *Restatement*.⁶¹ That project proved to be an effective pulpit. Soon enough, those American courts facing the issue had adopted (or simply took for granted) the Ames-Scott line.⁶² And so the honorary trust entered America's

58. 16 N.E. 305 (N.Y. 1888).

59. "[T]he absence of a beneficiary entitled to enforce the trust is not fatal to its existence where the trustee is . . . willing to execute it, and the purpose is lawful and definite." *Holland v. Alcock*, 16 N.E. 305, 309 (N.Y. 1888). The Court nonetheless ruled that the trustee's absence of "accountability to any one . . . contrary to the intention of the donor," constituted "a fatal objection" to the trust:

[E]quitable title cannot on any sound principle be made to depend upon the exercise by the trustee of an election whether he will or will not execute the alleged trust. In such a case there is no trust, in the sense in which the term is used in jurisprudence. There is simply an honorary and imperfect obligation to carry out the wishes of the donor, which the alleged trustee cannot be compelled to perform, and which he has no right to perform.

Id. at 307, 309-10.

60. Ames referred to counsel's argument in his article. See Ames, *supra* note 55, at 401.

61. See Scott, *Control*, *supra* note 50, at 537-42.

62. See *Green v. Connally*, 330 F. Supp. 1150, 1157-58 (D.D.C. 1971) (dicta); *In re Rogers*, 412 P.2d 710, 713 (Ariz. 1966) (failing to explicate holding); *Feinberg v. Feinberg*, 131 A.2d 658, 660-61 (Del. Ch. 1957) (dicta); *John Robinson Hospital v. Cross*, 272 N.W. 724, 727 (Mich. 1937) (dicta in dissenting opinion); *In re Byrne's Estate*, 100 A.2d 157, 159-60 (N.H. 1953) (dicta); *Renga v. Spadone*, 159 A.2d 142, 145 (N.J. Super. Ct. Ch. Div. 1960) (dicta); *In re Voorhis' Estate*, 27 N.Y.S.2d 818, 821-22 (Sur. Ct. 1941) (dicta); *Gold v. Price*, 211 S.E.2d 803, 804 (N.C. Ct. App. 1975), *cert. denied*, 214 S.E.2d 430 (N.C. 1975) (dicta); *In re Searight's Estate*, 95 N.E.2d 779, 781-82 (Ohio Ct. App. 1950); *cf.* *Fidelity Title & Trust Co. v. Clyde*, 121 A.2d 625, 630 (Conn. 1956) (declining to rule on validity of honorary trusts); *Kingsley v. Montrose Cemetery Co.*, 26 N.E.2d 613, 616-21 (Ill. App. Ct. 1940) (holding "trust" to build monument invalid for lack of beneficiaries, but not addressing whether bequest could have been given effect as power because "trustee" had already refused to accept appointment); *In re Swayze's Estate*, 191 P.2d 322, 324 (Mont. 1948) (holding void for "uncertainty" bequest to build memorial hotel because bequest failed to specify terms with sufficient clarity, but citing to section 124 of *Restatement* for authority); *Richberg v. Robbins*, 228 S.W.2d 1019, 1021 (Tenn. Ct. App. 1950) (dicta that "private trust" for care of animal is valid). In Pennsylvania, one post-*Restatement* case upheld the state's pre-*Restatement* tradition, see *supra* note 39, of deeming bequests for noncharitable purposes valid as full-fledged trusts. See *Devereux's Estate*, 48 Pa. D. & C. 491, 498-500 (Orphans' Ct. 1943), *appeal quashed*, 46 A.2d 168 (Pa. 1946). Nevertheless, subsequent opinions have given effect to intended trusts as honorary trusts. See, e.g., *Stewart Estate*, 13 Pa. D. & C.3d 488, 489-90 (Orphans' Ct. 1979); *Lyon Estate*, 67 Pa. D. & C.2d 474, 478-79 (Orphans' Ct. 1974); see also *In re Renner's Estate*, 57 A.2d 836, 838-39 (Pa. 1948) (construing bequest "in trust" to provide for pets—involving a substantial sum, where trustee was also named owner of pets and residuary legatee—as outright bequest to that person

legal lexicon – a telling irony, given that in prior appearances, the phrase had conveyed judicial disapproval of the bequests at issue.⁶³

III. Policy: Categorical Reassessment

The history of purpose trusts is indeed interesting and not without its small ironies. But all of this is just by way of introduction. We have, in the foregoing pages, beheld purpose trust doctrine as it proliferated into its modern trio of sub-categories. The question to be pondered in the balance of the Article is whether this state of affairs should gain our blessing as policy analysts. More specifically, how many regimes of law do we need to deal with the problem of purpose bequests, how should they be structured, and where should we nowadays draw the lines?

Before we partake of these questions, I want to remove from the table one potential ingredient in the discussion. The focus of this Article is substantive rules, not principles of taxation. The prevailing scheme of purpose trust categories evolved before the modern estate tax system came into being and hence was not tied to the considerations of policy underlying that system.⁶⁴ What is more, these two bodies of law were, and remain, formally independent of each other: Though the Internal Revenue Code grants an unlimited estate tax deduction for "charitable" transfers,⁶⁵ seemingly dovetailing one of

with precatory instructions). On the other hand, cases concerning bequests for indefinite noncharitable purposes – over which the *Restatement* had flip-flopped – have continued to go both ways. Compare *Cochran v. McLaughlin*, 24 A.2d 836, 838 (Conn. 1942) (valid), *Feinberg v. Feinberg*, 131 A.2d 658, 660-61 (Del. Ch. 1957) (same), and *Goetz v. Old Nat'l Bank*, 84 S.E.2d 759, 772 (W. Va. 1954) (same, dicta), with *Read v. McLean*, 200 So. 109, 110 (Ala. 1941) (void), *Hoenig v. Newmark*, 306 S.W.2d 838, 840 (Ky. 1957) (same), *Wilson v. Flowers*, 277 A.2d 199, 201 (N.J. 1971) (same, dicta), *Thomas v. Harrison*, 191 N.E.2d 862, 869 (Ohio Prob. Ct. 1962) (same), and *In re Estate of Kradwell*, 170 N.W.2d 773, 775 (Wis. 1969) (same). Cf. RESTATEMENT (SECOND) OF TRUSTS app. § 123 (1959) (Reporter's Notes) (misreading several of these cases); 4A SCOTT, *supra* note 4, § 398.1, at 457 n.20 (same). For additional cases not directly raising the issue of substantive validity, see *In re Hayward's Estate*, 178 P.2d 547 (Ariz. 1947); *In re Estate of Jones*, 318 So.2d 231 (Fla. Dist. Ct. App. 1975). For modern perpetuities cases, see SIMES & SMITH, *supra* note 29, §§ 1392, 1394.

63. See *Holland*, 16 N.E. at 306 ("There is simply an honorary and imperfect obligation . . ."). Ames had repeated the phrase in his article and was first to speak of an "honorary trust," so-called. See Ames, *supra* note 55, at 396-98, 400. For antecedents of the phrase in Great Britain, see *Mussett v. Bingle*, 1876 W.N. 170, 170 (V.C.); *Dawson v. Small*, 18 L.R.-Eq. 114, 118 (V.C. 1874); *Hunter v. Bullock*, 14 L.R.-Eq. 45, 48 (V.C. 1872); *Pettingall v. Pettingall*, 11 L.J.R. (n.s.) 176, 177 (V.C. 1842).

64. The first federal estate tax was enacted in 1916. The *Restatement of Trusts* nowhere addresses the taxation of purpose trusts or the exemption from taxation of charitable trusts.

65. See I.R.C. § 2055 (West 1989 & Supp. 1998). Recently, the category of charity has also colonized the Bankruptcy Code. See 11 U.S.C. §§ 544 (b)(2), 548 (a)(2), (d)(3) & (d)(4), 707(b), & 1325(b)(2) (West Supp. III 1998).

the key categorical distinctions found in the common law, deductibility actually depends on meeting a federally-defined standard that does not correspond in all respects with the one elaborated in the *Restatement* and concerning which state law determinations of the dividing line between categories have no bearing whatsoever.⁶⁶ Whether, when, and how government should tax bequests for purposes are interesting and controversial matters.⁶⁷ They are also matters quite distinct from legal substance, our focus herein.

Viewed substantively, purpose bequests raise an assortment of policy issues that we must explore in turn. But let us begin at the beginning: Under what conditions should lawmakers allow testators to make bequests for purposes at all?

A. Substantive Validity

1. Mise-en-Scène

This is the fundamental question. To address it, we must place the issue into fundamental context. Freedom of testation is today recognized to be a legal right, circumscribed by legal limits; lawmakers grant owners of property leeway to plan their own estates for affirmative reasons of public policy, but only to the extent that they do not overstep the bounds of justifying argument. Certainly, lawmakers can and have acted to curtail testamentary liberty when it strays into licentiousness; restrictions on the right to create far-future interests present an obvious example.⁶⁸ To assess, then, the inclusion *vel non* of purpose bequests within the parameters of acceptable exercise of the power of the will, we must start by rehearsing the ends we aim to accomplish thereby. Needless to say, that is a subject fit for a volume; we cannot dwell on it here. But, for present purposes, an adumbration of traditional analyses will suffice.⁶⁹

66. See 4A SCOTT, *supra* note 4, § 348.4; Miriam Galston, *Public Policy Constraints on Charitable Organizations*, 3 VA. TAX REV. 291, 297-99 (1984); cf. Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501, 636 n.377 (1990).

67. For recent discussions of this question, citing in turn to earlier ones, see Rob Atkinson, *Theories of the Federal Income Tax Exemption for Charities: Thesis, Antithesis, and Syntheses*, 27 STET. L. REV. 395 (1997); Atkinson, *supra* note 66, at 599-638; Evelyn Brody, *Of Sovereignty and Subsidy: Conceptualizing the Charity Tax Exemption*, 23 J. CORP. L. 585 (1998); Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393 (1988); Mark A. Hall & John D. Colombo, *The Donative Theory of the Charitable Tax Exemption*, 52 OHIO ST. L.J. 1379 (1991). For recent economic analyses, see Ralph Chami & Connel Fullenkamp, *Should Gift Giving Be Subsidized?* (1998) (unpublished manuscript on file with author); Louis Kaplow, *A Note on Subsidizing Gifts*, 58 J. PUB. ECON. 469 (1995); Louis Kaplow, *Tax Policy and Gifts*, 88 AM. ECON. REV., PAPERS & PROC., May 1998, at 283.

68. See generally MORRIS & LEACH, *supra* note 25.

69. A collaborator and I offer a somewhat fuller elaboration of the points set out in the following paragraph, along with scholarly references, in Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 6-14 (1992). I shall here take as a given

At the level of economic policy, commentators justify freedom of testation in four ways: (1) it supports a market for social services; owners can implicitly trade future bequests for the present attentions of beneficiaries that cannot explicitly be bargained for and contractually bound, given prevailing cultural taboos; (2) owners gain personal satisfaction from bequeathing property – testamentary freedom adds to the utility owners derive from what they acquire and hence enhances their incentive both to produce and to save wealth; (3) freedom of testation can also benefit survivors; by virtue of an owner's in-depth knowledge of her relatives' individual needs, she can craft a judicious estate plan, calculated to maximize the family's collective welfare, without incurring information costs; and (4) in any event, denying freedom of testation in the statute books would not curtail it in action (absent very costly policing), for testators could avail themselves of roundabout, or if need be surreptitious, expedients to reach the same result.

The question then becomes whether freedom to bequeath for purposes, as opposed to persons, finds support among the policies we have just outlined. At this point, we need to examine the nature of the beast: What exactly is a testator *doing* when she disposes of property in pursuit of a purpose? Viewed in the context of economic and social criteria, our answer could indeed depend upon the qualitative attributes of the purpose at issue – but, of course, differences and similarities are relative and contingent upon the frame from which they are viewed. Focusing at one level, lawmakers and commentators have discerned a structural dichotomy between purposes that affirmatively promote community interests and those that do not. In Great Britain, the validity of a purpose bequest can turn on this distinction;⁷⁰ plainly, it is one we must examine. But if we continue to widen our focus, a second, broader dichotomy enters our field of vision – one that lawmakers and commentators have not heretofore seized on as significant, yet, when perused in the light of traditional inheritance policies, one that manifests differences sufficiently pronounced as also to require extended analysis.

On the one hand, a testator may dictate some purpose which she prefers her property to be put *by the living*. In other words, she may seek to benefit those who come after her – just as when she bequeaths directly to persons – but still may wish to stipulate the uses to which her estate is devoted. Bequests for purposes that the law deems charitable fall into this category, but so do others not so acknowledged. When a testator bequeaths a sum for "the

the right of *inheritance* – that is, the right of property owners to leave their wealth to successors at death. The distinct question raised in the text above is why, assuming that right exists, the law further allows property owners the power of *testation*, i.e., the right to pen their own wills, making whatever provisions they choose for the distribution of their estates. On this distinction, see *id.* at 6 n.16.

70. See *supra* notes 23-27 and accompanying text.

promotion and furthering of fox hunting," for example, she decrees that her resources go to survivors, but only to subsidize a fixed variety of consumption – one that lawmakers fail to accept as generating public benefits.⁷¹ A testator might also tack such a use-restriction onto a bequest to a person or a class: a bequest in trust to pay for the fox-hunting expenses of a named beneficiary or the present and afterborn children of a named beneficiary, by analogy. Nonetheless, where the testator bequeaths for a purpose without specifying or defining the persons who are to enjoy the bequest, someone or other is still going to benefit; the recipients simply comprise an undefined group. Let us call this type of transfer a bequest for a *social* purpose.

On the other hand, a testator may direct that her estate be disbursed to accomplish her own, private purposes. Just as she consumes resources for her own comfort during life, so may a testator wish to spend money on herself postmortem. A bequest to build a tomb or to care for a pet are obvious examples. In such a case, the recipients of the bequest do not comprise an undefined group of living persons; the deceased herself is the only recipient. Let us call this type of transfer a bequest for a *personal* purpose.

2. Purposes and Testation

Obviously, bequests for purposes, whether social or personal, cannot form the currency of a market for services; only bequests to persons can sustain such an economy. It is the very absence of a named beneficiary – the potential provider of a current *quid* for the testator's *quo* – that marks this variety of testamentary transfer. Hence, a right to bequeath for purposes can find no basis in this particular rationale for freedom of testation.

At the same time, the opportunity to make bequests for purposes may be of no small interest and concern to testators.⁷² When a testator bequeaths to persons, the satisfaction she derives from the transfer – being a second justification for the right to make it – stems from what the economists, in their

71. See *In re Thompson*, 1934 Ch. 342, 343. For other social purpose bequests found to be noncharitable, see, for example, *Barton v. Parrott*, 495 N.E.2d 973, 974-76 (Ohio Prob. Ct. 1984) (bequest to fund annual harness horse stake race); *In re Nottage*, [1895] 2 Ch. 649, 653-54 (App.) (bequest to encourage yacht racing).

72. The point, oddly, has often been diminished by scholars. Professor Bogert referred to the arguments in favor of recognizing honorary trusts, including the fact that they reflect "the intent of the donor," as "relatively unimportant." BOGERT & BOGERT, *supra* note 53, § 166, at 164-65. In a similar vein, Professor Atkinson has argued in favor of permitting the trustees of charitable trusts to vary from the restrictions that a testator places on their use, immediately and without confinement to the traditional bounds of *cy pres*. Such a power to ignore designated purposes, Atkinson prophesies, would not discourage charitable giving, let alone overall productivity and saving, given the "more popular" outlets of private bequests to individuals and unrestricted charitable gifts. See Rob Atkinson, *Reforming Cy Pres Reform*, 44 HAST. L.J. 1111, 1123 & *passim* (1993).

inimitable fashion, dub an interdependent utility function: Making her loved ones happy also makes the testator happy.⁷³ Similarly, when a testator makes a bequest for a social purpose, her utility may derive from a more diffuse association with the undefined group that benefits; thus, a testator may be personally gratified by the knowledge that her bequest will aid fellow fox-hunting enthusiasts. These ties of identification (and sometimes of empathy) can bind one to a group, as to the members of a family.⁷⁴ Hence, the gratification flowing from the testator's knowledge that a bequest benefiting a group will be honored is, at the very least, comparable.

And that is not all: Tangled up with ties of affiliation could be other concerns of an egoistic nature. By hypothesis, bequests for social purposes can function as a mode of self-expression. Their inspiration could come not (merely) from the testator's feelings about the world, but also (in part) from how she wishes the world to feel about her. Social-psychological research suggests that individuals throughout their lives employ various and sundry strategies to highlight, and even to edit, aspects of their identities, signaling how they wish others to perceive them.⁷⁵ An estate plan can serve as the final move in this

73. 'Tis spring, and a young man's fancy turns to . . . *interdependent utility functions*? Alas, it loses something in the translation. For an economic discussion of interdependent utilities within families, see GARY S. BECKER, *A TREATISE ON THE FAMILY* 277-306 (rev. ed. 1991).

74. The point is uncontroversial among social psychologists. See, e.g., MARK H. DAVIS, *EMPATHY: A SOCIAL PSYCHOLOGICAL APPROACH* 102, 126-52 (1996); MICHAEL A. HOGG & DOMINIC ABRAMS, *SOCIAL IDENTIFICATIONS* 92-115 (1988); GROUP COHESION (Henry Kellerman ed., 1981). Identification and empathy often reinforce each other. See DAVIS, *supra*, at 145-46. In their own vernacular, economists have voiced agreement, postulating interdependent utility functions between individuals and social groups, which economists have taken to calling the "warm glow" phenomenon. See GARY S. BECKER, *A Theory of Social Interactions*, in *ACCOUNTING FOR TASTES* 162, 184-89 (1997) (essay first published in 1974); James Andreoni, *Impure Altruism and Donations to Public Goods: A Theory of Warm-Glow Giving*, 100 *ECON. J.* 464 (1990); Harold M. Hochman & James D. Rogers, *Pareto Optimal Redistributions*, 59 *AM. ECON. REV.* 542, 542-47 (1969). For an early discussion, see ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 219-27 (D.D. Raphael & A.L. Macfie eds., 4th prt. 1997) (1759).

75. The classic study is ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* (1959). For more recent discussions, see JEROLD HEISS, *THE SOCIAL PSYCHOLOGY OF INTERACTION* 70-84 (1981); TIMUR KURAN, *PRIVATE TRUTHS, PUBLIC LIES* (1995) (highlighting phenomenon of false presentations to win social acceptance and esteem); GEORGE J. MCCALL & J.L. SIMMONS, *IDENTITIES AND INTERACTIONS* 133-64 (rev. ed. 1978); GRANT MCCracken, *CULTURE AND CONSUMPTION* (1988); Ottman L. Braun & Robert A. Wicklund, *Psychological Antecedents of Conspicuous Consumption*, 10 *J. ECON. PSYCH.* 161 (1989) (suggesting, perceptively, that persons employ identity strategies to *compensate* for insecurity or incompleteness within their identities – a psychological insight which may help to explain why "old-money" and "new-money" behave so very differently). Sometimes the process is none too subtle: Individuals may display upon their automobiles or clothing, or even on their flesh, written messages proclaiming things about themselves. On the other hand, cultural taboos dictate that certain sorts of messages ("I am rich!") ought not be *stated*, though via strategies only a trifle less transparent they can still be *implied*. Hence, persons may parade around in

social game, communicating to survivors how individuals prefer to be remembered.⁷⁶ Bequests to persons could also sometimes function in this egoistic capacity;⁷⁷ a testator might hope to win posthumous recognition as a devoted parent, a benevolent employer, a loyal friend. But bequests for social purposes can do so far more flexibly,⁷⁸ allowing a testator to define her character with precision.⁷⁹ Thus can she present herself to the world as a humanitarian⁸⁰ or,

Polo shirts, flaunt Rolex watches, etc., but not before first removing the price-tags. See MC-CRACKEN, *supra*, at 68-69; Laurie Simon Bagwell & B. Douglas Bernheim, *Veblen Effects in a Theory of Conspicuous Consumption*, 86 AM. ECON. REV. 349, 367 (1996).

76. This point is developed in David R. Unruh, *Death and Personal History: Strategies of Identity Preservation*, 30 SOC. PROBS. 340 (1983). Individuals sometimes adopt a similar tactic earlier in the life-cycle, giving lifetime (as opposed to death-time) gifts chosen to underscore their own identities, rather than gifts tailored to their donees' identities. See HELGA DITTMAR, *THE SOCIAL PSYCHOLOGY OF MATERIAL POSSESSIONS* 97-98 (1992).

77. Bequests to persons may also serve other egoistic purposes, such as the testator's own dynastic ambitions. See Hirsch & Wang, *supra* note 69, at 15 n.52, 33, 53-54. For an early recognition, see Andrew Carnegie, *Wealth*, in *DEMOCRACY AND THE GOSPEL OF WEALTH* 1, 4 (Gail Kennedy ed., 1949) (1889) (essay published in Great Britain as *The Gospel of Wealth*).

78. Likewise, bequests to named individuals restricted to specific uses could conceivably be (in part) so motivated. For a possible example, see *Mitchell v. Whittier College*, 272 P. 748 (Cal. 1928), involving a bequest for the education of a beneficiary, where the testator specified as the preferred educational institution a college for which the testator had served as a trustee.

79. This is not invariably the case: The impetus for some purpose-gifts may be wholly empathetic, for plainly not everyone wishes personally to associate himself with the purpose or need he chooses to subsidize. See, e.g., Ian Fisher, *\$1 Million Gift for New Charity Case: The Viagra Needy*, N.Y. TIMES, June 10, 1998, at B3.

80. That many donors to charitable causes are actuated at some level by social posturing has long been a commonplace. Such posturing may be either direct, i.e., the donor wishes to win renown as a philanthropist, or stereotypic, i.e., the donor wishes to highlight her economic status, philanthropy being a social preserve of the well-to-do. For legal recognition of this social verity, see FISCHET AL., *supra* note 28, § 260 (remarking the rule that trusts for charitable purposes retain that status irrespective of testators' motives for creating them); RESTATEMENT (SECOND) OF TRUSTS § 368 cmt. d (1959) (same). For analyses by sociologists, see TERESA ODENDAHL, *CHARITY BEGINS AT HOME* 39-42 (1990); FRANCIE OSTROWER, *WHY THE WEALTHY GIVE* 124-28 (1995). For an early discussion, see SIR ARTHUR HOBHOUSE, *THE DEAD HAND* 15-20 (London 1880) ("[W]hatever fine words [the donor] may have used, we may be sure he was really thinking more of himself than of his fellow-creatures. . . . I attribute but a minor place to the influence of Patriotism or Public Spirit."). For economic discussions of this insight, see BECKER, *supra* note 74, at 184 & n.34; Amihai Glazer & Kai A. Konrad, *A Signaling Explanation for Charity*, 86 AM. ECON. REV. 1019 (1996); William T. Harbaugh, *The Prestige Motive for Making Charitable Transfers*, 88 AM. ECON. REV., PAPERS & PROC., May 1998, at 277; William T. Harbaugh, *What Do Donations Buy? A Model of Philanthropy Based on Prestige and Warm Glow*, 67 J. PUB. ECON. 269 (1998); cf. Robert Sugden, *On the Economics of Philanthropy*, 92 ECON. J. 341, 349 (1982). One interesting social repercussion is that some donors prefer to give to, and thereby to associate themselves with, more richly endowed charities, because these can offer greater prestige. Professor Brody calls this phenomenon the "Harvard Syndrome." See Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 938-39 (1997).

more particularly, as a hospitable host,⁸¹ a man of letters,⁸² a Marxist,⁸³ a midget,⁸⁴ a tobacco aficionado⁸⁵ – or as a fancier of equestrian blood sport.

In addition, bequests for social purposes display one other, related characteristic that could also appeal egoistically to a testator: They remain symbolically associated with her, rather than with posterity. When persons come to inherit property, it is absorbed into their own, individual estates. But when property is bequeathed for a social purpose, the corpus has no manifest owner and so can continue, for however long the bequest persists, to be connected with the testator's memory. Social psychologists have observed that the desire somehow to transcend mortality and sustain one's identity beyond the grave is both common and strong.⁸⁶ Testation aside, it often motivates the elderly to compose memoirs or to gather together artifacts of their lives.⁸⁷ A bequest for a social purpose – existing *in nubibus*, laid hold of by no one – could fulfill this same function. Thus could a testator endeavor to ensure not only how she will be remembered, but that she will be remembered at all.⁸⁸

81. See *Kelly v. Nichols*, 21 A. 906, 907 (R.I. 1891) (describing estate plan of testator who left his house for the purpose of lodging itinerant clergymen, "inasmuch as my house has been open during my life-time . . . for the reception and entertainment of ministers and others traveling in the service of truth").

82. Was it pure benevolence that led George Bernard Shaw to bequeath funds within his will for an "alphabet trust"? See *infra* note 113.

83. See *Alexander v. House*, 54 A. 2d 510, 511 (Conn. 1947).

84. See Helen O'Neill, *Scholarships Seek Special Students*, PORTLAND OREGONIAN, July 14, 1996, at A10 (describing estate plan of deceased actor, Billy Barty).

85. See FRANK THOMAS, *LAST WILL AND TESTAMENT: WILLS, ANCIENT AND MODERN* 73 (1972).

86. See Robert N. Butler, *Looking Forward to What?*, 14 AM. BEHAV. SCI. 121, 123 (1970) (labelling this phenomenon "historicity").

87. See Unruh, *supra* note 76, at 341-45. No such efforts need be taken by screen actors, who sometimes delight in leaving a mark upon the world in the form of celluloid. Ray Bolger, who played the Scarecrow in the classic feature film *The Wizard of Oz* (Metro-Goldwyn-Mayer 1939), once remarked that he had gained by it "a kind of immortality" that he rated "better than residuals," which the studio had denied him. Television Interview with Ray Bolger (n.d., rebroadcast May 8, 1998).

88. Some courts have intuitively grasped this psychology, analogizing a perpetual trust to a "monument" or "memorial" to the deceased. See *Williams v. Herrick*, 32 A. 913, 913-14 (R.I. 1895) (adding that "[t]he provisions of the will . . . seem to go beyond a legal perpetuity, and reach into eternity"); *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173, 175-76 (N.Y. 1927) (Cardozo, J.); *Medical Soc'y of S.C. v. South Carolina Nat'l Bank*, 14 S.E.2d 577, 581-82 (S.C. 1941). Some testators have drawn such analogies themselves. See, e.g., *In re Swayze's Estate*, 191 P.2d 322, 323 (Mont. 1948); *In re Endacott*, [1959] 3 All E.R. 562, 563 (C.A.) (discretionary bequest for "some useful memorial to myself"); see also Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 548, 589 (1964) (observing that charitable trusts allow testators "to found a bloodless dynasty"). Needless to add, professional fund-raisers for philanthropies both understand and exploit this desire. See ODENDAHL, *supra* note 80, at 26.

That some testators do harbor such motives is suggested by the care they take to label funds for social purposes with their own names, lest anyone forget whose money it was.⁸⁹

A testator may also value the opportunity to make bequests for personal purposes; just as she has personal expenses throughout her life, so may a testator conceive these to continue following her death. Of course, most expenditures stem from the demands of our corporal existence, but others can ensue from the very act of dying: the funeral and burial, for example, possibly hallowed by masses or prayers for the departed. More ineffably, the prospect of death could occasion in the testator a wish to preserve her memory, as we have seen. Bequests for the purpose of constructing a memorial or publishing an intellectual product of the deceased can once again play this role. The testator thereby purchases for herself a visible,⁹⁰ intelligible,⁹¹ or even audible⁹² reminder that she was here. Bequests of funds to maintain items of the testator's tangible property – the souvenirs of her passage through life – could be similarly motivated.⁹³

89. See, e.g., *In re Swayze's Estate*, 191 P.2d 322, 324 (Mont. 1948); *Allegheny College v. National Chautauqua County Bank*, 159 N.E. 173, 174 (N.Y. 1927); *Williams v. Herrick*, 32 A. 913, 913 (R.I. 1895); *Shenandoah Valley Nat'l Bank v. Taylor*, 63 S.E.2d 786, 788 (Va. 1951). Indeed, *anonymous* gifts for social purposes are so unusual that (ironically) they tend to attract notice. See Judith Miller, *He Gave Away \$600 Million, and No One Knew*, N.Y. TIMES, Jan. 23, 1997, at A1.

90. Inscriptions and the scale of a monument can speak to the identity and personality of the testator – though perhaps not always in the way that she intended. See *M'Caig's Trustees v. Kirk-Session of United Free Church*, 1915 Sess. Cas. 426, 438 (Scot.) (suggesting that testator's bequest for grandiose statues of family members would "turn a respectable and creditable family into a laughing stock to succeeding generations"); see also *Morristown Trust Co. v. Mayor & Bd. of Aldermen*, 91 A. 736, 737 (N.J. Ch. 1913) (bequest to fund construction of flagstaff as memorial). That an edifice can function to perpetuate the memory of a testator has been recognized since the Pharaohs – and some have not stopped there. Along with bequests to build monuments, testators sometimes leave substantial funds to care for them, or even, in a few cases, to employ persons to draw attention to them. See, e.g., *Shepp Estate*, 29 Pa. D. & C.2d 385, 388 (Orphans' Ct. 1962) (bequest for various specified floral arrangements to decorate graves on specified days); *Paethorp's Estate*, 24 Pa. D. & C. 215, 216 (Orphans' Ct. 1914) (including bequest for grave-guide), *aff'd*, 94 A. 1060, *appeal dismissed*, 94 A. 1066 (Pa. 1915); *Travis v. Randolph*, 112 S.W.2d 835, 835 (Tenn. 1938) (bequest of vast bulk of estate for upkeep of graves).

91. See *Fidelity Title & Trust Co. v. Clyde*, 121 A.2d 625, 627, 629 (Conn. 1956) (bequest to publish manuscripts).

92. For a bequest to employ a marching band to parade to the grave of the deceased each year on the anniversary of his death and other holidays, see *Detwiller v. Hartman*, 37 N.J. Eq. 347, 350 (Ch. 1883).

93. Of course, tangibles uniquely identified with – or depicting – a testator serve to keep alive her memory. See, e.g., *Grigson v. Harding*, 144 A. 2d 870, 872, 878 (Me. 1958) (bequest to care for building that was to "be preserved as a family memorial"); *In re Gassiot*, 70 L.J. Ch. (n.s.) 242, 243 (1901) (bequest of portrait to company on condition that it hang in "a conspicuous

Yet bequests for this last sort of personal purpose could have an additional psychological basis, more closely analogous to the one that motivates a bequest to a person: They may reflect a testator's emotional ties to her property. Whereas some objectionable folk are said to treat people like objects, psychological studies show that the reverse phenomenon also occurs (hence weakening the aspersion): Some individuals *treat their objects like people*. We all internalize at least some of our possessions within our self-concept—that is, we tend to view items of our property as extensions of ourselves.⁹⁴ The same is true of members of our family ("my better half"), and just as we wish to provide for loved ones after we are gone, so may we strive to ensure, for similar if not identical reasons, that treasured objects are protected.⁹⁵

part of their common hall," plus funds to maintain it). One bizarre variant of this strategy—excessive, to be sure—involves directions for the preservation of the testator's own remains. The renowned legal rationalist, Jeremy Bentham—who surely stood in no danger of being forgotten—nonetheless took pains to include in his will a bequest of this sort. To this day, his skeleton, fully clothed and peering out at the world through a wax mask, greets visitors of University College in London. See THOMAS, *supra* note 85, at 73. And along with memory-enhancement, the items selected by a testator for preservation might also serve to highlight her identity. Once again, the process could be either direct or stereotypic, for the sorts of objects that we purport to treasure can signal our status. See Helga Dittmar, *Material Possessions as Stereotypes: Material Images of Different Socio-Economic Groups*, 15 J. ECON. PSYCH. 561 (1994).

94. See DITTMAR, *supra* note 76, at 41-64; Russell W. Belk, *Possessions and the Extended Self*, 15 J. CONSUMER RES. 139 (1988). For a philosophical discussion, see MARGARET JANE RADIN, REINTERPRETING PROPERTY 35-71 (1993). For an anecdotal illustration, see *Obituary: Peter Ludwig*, ECONOMIST, Aug. 3, 1996, at 75 (recounting life of childless art collector who was wont to remark "I am what I own."). Estate planners as well have not been oblivious to the phenomenon. See JEROME A. MANNING ET AL., MANNING ON ESTATE PLANNING ch. 15, at 8-9 (5th ed. 1995); THOMAS L. SHAFFER, DEATH, PROPERTY, AND LAWYERS 126-28 (1970); THOMAS L. SHAFFER & CAROL ANN MOONEY, THE PLANNING AND DRAFTING OF WILLS AND TRUSTS 18-19 (3d ed. 1991). This psychological fact affects economic behavior during the lifetime of owners, often rendering them unwilling to sell property at its market value, a predisposition known as the "endowment effect." See, e.g., Robert Franciosi et al., *Experimental Tests of the Endowment Effect*, 30 J. ECON. BEHAV. & ORG. 213 (1996).

95. Psychologists have noted, by analogy, the tendency to dote over property while alive, see Belk, *supra* note 94, at 158, and the Germans have a saying (surely facetious but also, like all sayings, not without a grain of truth) that they "love their cars more than their children." One of the more flamboyant attorneys of our time, Melvin Belli ("King of Torts") listed his four pet dogs in the San Francisco telephone directory; his holographic will, dividing \$10,000 among them, referred to these animals as his "children." Julian Guthrie, *Belli's Battle of Wills: Son and Widow Exchange Verbal Assaults in Nasty Fight Over Estate*, S.F. EXAMINER, Sept. 22, 1996, at C1; Richard C. Reuben, *Strife After Death for King of Torts*, ABA J., Jan. 1997, at 37; Steve Rubenstein, *New Fight Over Belli's Scribbled Wills*, S.F. CHRON., Sept. 19, 1996, at A13. For judicial observations of cords of affection between testators and the property they bequeath funds to care for, see, for example, *New England Trust Co. v. Folsom*, 167 N.E. 665, 666 (Mass. 1929) (suggesting that testator "thought more of [her cats] than she did of her relatives"); *Smith v. Heyward*, 105 S.E. 275, 277, 279-80 (S.C. 1920) (remarking that testator's house was "hallowed by ancient family ties," and that she "was devoted to the place and regarded it with

Significantly, most bequests for the purpose of caring for property have covered precisely the sorts of items identified in the psychological literature as those with which persons form their closest attachments:⁹⁶ homes, collections, and pet animals.⁹⁷

The yearning to bequeath for the care of these items may be doubly reinforced in those instances where the testator lacks loved ones of the human variety. Property may then serve as a substitute for companionship, consoling the testator in lieu of relational gratifications, and may even be conceptualized by her in anthropomorphic terms.⁹⁸ And in such a case, the outlet of simply

a peculiar pride and veneration"); *Grigson v. Harding*, 144 A. 2d 870, 876 (Me. 1958) (regarding testator's "beloved Laboratory"); and cases cited *infra* note 98. The phenomenon is well enough known to have infiltrated popular culture: A bequest to pet animals formed the premise of the animated Disney film, *The Aristocats* (Walt Disney Co. 1970).

96. See RUSSELL W. BELK, COLLECTING IN A CONSUMER SOCIETY 68-96, 139-58 (1995); MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, THE MEANING OF THINGS 55-89, 121-45 (1981); ODEAN CUSACK & ELAINE SMITH, PETS AND THE ELDERLY 33-48 (1984); DITTMAR, *supra* note 76, at 107-08, 112-14; WERNER MUENSTERBERGER, COLLECTING 14-24 (1994); Belk, *supra* note 94, at 155-56; Russell W. Belk, *Collecting as Luxury Consumption: Effects on Individuals and Households*, 16 J. ECON. PSYCH. 477, 479 (1995); N. Laura Kamptner, *Personal Possessions and Their Meanings in Old Age*, in SOCIAL PSYCHOLOGY OF AGING 165, 190-92 (Shirlynn Spacapan & Stuart Oskamp eds., 1989). For a pathological example, see Ronald Smothers, *In a Passion for Antique Clocks, Executive Embezzled \$12 Million*, N.Y. TIMES, Oct. 1, 1997, at A1.

97. Homes: see, e.g., *Stanton v. Stanton*, 101 A.2d 789, 793 (Conn. 1953); *Thorp v. Lund*, 116 N.E. 946, 949-50 (Mass. 1917) (island); *Grigson v. Harding*, 144 A.2d 870, 871-72 (Me. 1958); *Bliven v. Borden*, 185 A. 239, 245 (R.I. 1936); *Kelly v. Nichols*, 21 A. 906, 907 (R.I. 1891), *aff'd on reh'g*, 25 A. 840 (R.I. 1892) (home and clock); *Smith v. Heyward*, 105 S.E. 275, 277 (S.C. 1920); *In re Corelli*, [1943] 2 All E.R. 519, 520 (Ch.) (home and all its contents); *Kennedy v. Kennedy*, 1914 App. Cas. 215, 215-16 (P.C.). Collections: see, e.g., *Palethorp's Estate*, 24 Pa. D. & C. 215, 216 (Orphans' Ct. 1914), *aff'd*, 94 A. 1060 (Pa.), *appeal dismissed*, 94 A. 1066 (Pa. 1915); *Medical Soc'y of S.C. v. South Carolina Nat'l Bank*, 14 S.E.2d 577, 578 (S.C. 1941). Pet animals: see, e.g., *In re Rogers*, 412 P.2d 710, 711-12 (Ariz. 1966); *Willett v. Willett*, 247 S.W. 739, 740 (Ky. 1923); *New England Trust Co. v. Folsom*, 167 N.E. 665, 666 (Mass. 1929); *In re Johnston's Estate*, 99 N.Y.S.2d 219, 221-22 (App. Div. 1950), *aff'd sub nom. In re Johnston's Will*, 98 N.E.2d 895 (N.Y. 1951) (finding that bequest failed because conservators sold animals prior to testator's death); *In re Howells' Estate*, 260 N.Y.S. 598, 600-01 (Sur. Ct. 1932), *modified*, 261 N.Y.S. 859 (Sur. Ct. 1933); *In re Searight's Estate*, 95 N.E.2d 779, 782-84 (Ohio Ct. App. 1950); *Stewart Estate*, 13 Pa. D. & C.3d 488, 489-90 (Orphans' Ct. 1979); *Lyon Estate*, 67 Pa. D. & C.2d 474, 475 (Orphans' Ct. 1974); *Wrenshall's Estate*, 72 Pa. Super. 258, 259 (1919).

98. Courts have observed these phenomena. See, e.g., *In re Rogers*, 412 P.2d 710, 712 (Ariz. 1966); *In re Howells' Estate*, 260 N.Y.S. 598, 600-01 (Sur. Ct. 1932); see also *Advance Desk*, L.A. TIMES, Jan. 9, 1994, at 7 (reporting case of unmarried testator who bequeathed her entire, substantial estate for care of her pet cat, identified in her will as her "best friend and companion"); *Drew Ward, Pet Owners' Wills Make Provisions for Fido and Fluff to Go to College*, WALL ST. J., June 10, 1996, at B1. This has long been the stuff of fable. See HANS CHRISTIAN ANDERSEN, *THE NIGHTINGALE* (Anna Bier ed., Harcourt Brace Jovanovich 1985)

bequeathing cherished objects to a family member as trusted caretaker is simultaneously foreclosed.⁹⁹ Indeed, the factual settings recounted in the published cases suggest that purpose bequests of this particular sort seldom occur otherwise.¹⁰⁰

In short, testators may have powerful motives for making bequests for purposes, both social and personal.¹⁰¹ Those who choose to include such bequests in their wills often spell them out in exquisite detail.¹⁰² Apparently wary of judicial resistance, some testators have even interrupted their wills with pleas to the probate judge to observe their stated wishes.¹⁰³ If freedom of testation enhances the value of ownership, and with it incentives to produce and save, then freedom to make bequests for purposes contributes to that value and adds to those incentives. Notice finally that our analysis does not suggest

(1894). But social psychologists remain in some disagreement on the point, *see* DITTMAR, *supra* note 76, at 51-52, 103-04, and it may happen that one who spurns human relations also shuns material possessions as a complementary expression of unworldliness. *See Obituary: Paul Erdős*, *ECONOMIST*, Oct. 5, 1996, at 83 (recounting solitary life of mathematician who also insisted on giving away most of his earnings because, as he put it, "private property is a nuisance"). For the mirror image of this philosophy, *see supra* note 94.

99. For a discussion of the phenomenon of beneficiaries playing the role of curators of family heirlooms that they inherit, *see* MCCracken, *supra* note 75, at 44-53.

100. *See, e.g., In re Rogers*, 412 P.2d 710, 711 (Ariz. 1966); *In re Forrester's Estate*, 279 P. 721, 722 (Colo. 1929); *In re Howells' Estate*, 260 N.Y.S. 598, 600-01 (Sur. Ct. 1932); *In re Renner's Estate*, 57 A.2d 836, 837 (Pa. 1948); *Richberg v. Robbins*, 228 S.W.2d 1019, 1021 (Tenn. Ct. App. 1950). One popular survey of 10,000 pet owners, yielding approximately 4100 respondents, found that 27% of dog owners and 21% of cat owners provide for the care of their pets in their wills. "Not surprisingly, it's the older (45+) set . . . who have done this good deed. Generally, they are single individuals who have income levels above \$30,000 a year." BARRY SINROD, *DO YOU DO IT WHEN YOUR PET'S IN THE ROOM?* at ix, 71 (1993).

101. *See, e.g., In re Rogers*, 412 P.2d 710, 714 (Ariz. 1966) (remarking testimony that testator "didn't care how much it cost to take care of her dogs the way she wanted them taken care of; and this was the reason she had gone down and had the will made up in the first place").

102. *See, e.g., In re Stoffel's Estate*, 145 A. 70, 70-71 (Pa. 1929); *Estate of Smith*, 181 Pa. 109, 110-11 (1896); *Callin Estate*, 25 Pa. D. & C.2d 376, 377-79 (Orphans' Ct. 1961). *But cf. WALDEMAR A. NIELSEN*, *THE GOLDEN DONORS 14-19* (1985) (finding that possessors of large fortunes can be remarkably vague and careless about purposes of foundations established under their wills).

103. "I have considered for a number of years the disposition of my estate. All that I possess has come to me as compensation and reward for services rendered and I have worked and saved since I was a small boy and I feel that I have a right to make whatever disposition I may care to make of my property. . . ." *Snouffer v. Peoples Trust & Sav. Co.*, 212 N.E.2d 165, 169 (Ind. App. 1965) (bequest to build family mausoleum); "I have regulated the disposition and appropriation of [my property] . . . in a spirit accordant with my own views and feelings . . . against which, it is my will and desire that, even the law itself, shall not interfere nor prevail." *Mitford v. Reynolds*, 60 Eng. Rep. 812, 813 (V.C. 1848) (emphasis omitted) (bequest for care of testator's horses); "No part of my estate is to be spent upon human beings. . . ." *In re Forrester's Estate*, 279 P. 721, 722 (Colo. 1929).

any reason why the utility of a purpose bequest from the testator's perspective should turn systematically on whether the purpose at issue happens to serve the public interest. Its worth to her may vary depending on the strength of her ties to the undefined group that benefits or to the property that is cared for, but those are factors independent of the charitability *vel non* of the purpose as perceived by lawmakers.

Whether survivors, in their turn, can be said to profit from a law that concedes testators power to create bequests for purposes is another matter. Plainly, the traditional argument that freedom of testation affords owners room to plan their estates in ways that enhance the overall welfare of surviving relatives has no bearing here. Bequests for purposes do not benefit the testator's relatives at all. Indeed, were the interests of the family our paramount concern, we might justly bar bequests for purposes, at least in those instances where close relatives do survive the testator.¹⁰⁴ In the nineteenth century some American commentators took that very stance, opposing even charitable bequests on this basis,¹⁰⁵ and the development of the British case law may well reflect this consideration implicitly.¹⁰⁶ Today, however, the

104. But compare the vision of Andrew Carnegie, who saw bequests to one's children as poisoned gifts, tending to their demoralization: "I would as soon leave my son a curse as the almighty dollar." Carnegie, *supra* note 77, at 4. However this may be, testators of their own volition tend to eschew bequests for purposes when they are survived by close relatives; in the ordinary course, bequests to relatives dominate the estate plan. See *Driscoll v. Hewlett*, 91 N.E. 784, 784 (N.Y. 1910) ("Some explanation may be afforded of the motive for [the testator's bequest of his entire estate for the care of his grave], in the fact that the testator left neither wife, child, nor parent, and that his estate at the time of his death was of the value of \$6,000."). See also, e.g., *In re Turk's Will*, 221 N.Y.S. 225, 227-28 (Sur. Ct. 1927); cases cited *supra* note 97; *supra* notes 98-100 and accompanying text. On the other hand, on rare occasion, feelings of antagonism toward close relatives motivate testators to make purpose bequests. See, e.g., *Gallagher v. Venturini*, 3 A.2d 157, 158 (N.J. Ch. 1938).

105. American advocates of this position included Thomas Jefferson and Joseph Story. See MILLER, *supra* note 28, at 40-50; Note, *supra* note 28, at 442-48; see also *Estate of Smith*, 181 Pa. 109, 114 (1896) (justifying enforcement of purpose bequest because testator had died childless); *Doughten v. Vandever*, 5 Del. Ch. 51, 77 (1875) (criticizing testator for disinheriting her family in favor of charities). One court went even further, questioning the wisdom of allowing *any* freedom of testation, on the theory that the scheme of intestate distribution provided the best means of family protection. See *In re Walker's Estate*, 42 P. 815, 818 (Cal. 1895), *modified*, 42 P. 1082 (Cal. 1896).

106. Most British courts have given effect to bequests for noncharitable purposes only when they concerned the care of tombs and pets. These typically have involved relatively small sums and could be viewed loosely as a matter of intrafamily concern. Larger bequests for noncharitable social purposes, generally avoided by British courts, posed a greater threat to the family. The case for this interpretation is thoughtfully put in Roger B.M. Cotterrell, *Some Sociological Aspects of the Controversy Around the Legal Validity of Private Purpose Trusts*, in *EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS* 302 (Stephen Goldstein ed., 1992); cf. Eggleston, *supra* note 25, at 120 (suggesting that noncharitable purpose bequests given effect under British law "deal with subjects near to the hearts of Englishmen" and so could be "regarded as deserving of exceptional treatment"); *In re Astor's Settlement Trusts*, [1952] 1 All

elective share and related statutes function to secure the minimum level of family protection that lawmakers deem expedient.¹⁰⁷ Apart from the forced shares reserved by these statutes, testators are perfectly free to bequeath to persons outside the family.¹⁰⁸ Do bequests for purposes procure any less social gain?

Here, we have several more concerns to address. In the case of a bequest for a social purpose, the individuals who ultimately get to enjoy the property will find it tied to a particular use. At first sight, this appears an economic drawback: When a testator restricts the use of a named beneficiary's bequest, by comparison, its value to her falls, for she must settle for the prescribed form of consumption, even though she would prefer to expend the resource otherwise.¹⁰⁹ On reflection, however, when a testator bequeaths for a purpose to an extended group, the value of the bequest is less likely to be compromised. Very probably, there are persons out there who enjoy, say, fox hunting well enough to expend their own funds for the activity; by virtue of its very namelessness, a purpose bequest can find its preferred users, satisfying a desire for consumption that exists somewhere or other.¹¹⁰

E.R. 1067, 1074 (Ch.) (observing similarly that these exceptional cases involve purposes "intimately connected with the deceased," leading courts to seek "means of escape" from the general rule); Note, 68 L.Q. REV. 449, 451 (1952) (asserting that British case law is perverse, in that bequests for social purposes invalidated by British courts involve "more beneficial schemes" than bequests for personal purposes which courts have allowed). The British Statute of Mortmain also was partly inspired by concern for the family, see A.H. Oosterhoff, *The Law of Mortmain: An Historical and Comparative Review*, 27 U. TORONTO L.J. 257, 279-84 (1977), as was its American counterparts, see Stephen D. Bomes, *The Dead Hand: The Last Grasp?*, 28 U. FLA. L. REV. 351, 353-57 (1976).

107. On the contours and policies of the elective share, see Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567 (1995). Community property operates as a counterpart to the elective share in a handful of states. See *id.* at 569. For a comparative discussion of British statutes, see Joseph Laufer, *Flexible Restraints on Testamentary Freedom—A Report on Decedents' Family Maintenance Legislation*, 69 HARV. L. REV. 277 (1955).

108. Still, traditional norms have never disappeared and today express themselves as homilies. Hence, "charity begins at home." To the extent that testamentary provisions permitted by law run afoul of such social norms, courts and juries may strive covertly to annul them. In this manner, social norms at odds with legal rules can seep into adjudicative subculture. For an analysis of cases suggesting that courts have stretched to defy wills seeking to disinherit the testator's immediate family, see Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235 (1996). But even if the law fails, as it well may, to reflect popular concerns for family protection, a stronger policy against disinheritance of the immediate family would call for no legal distinction between purpose bequests and ordinary bequests to nonrelatives. Hence, such a policy would provide no justification for banning purpose bequests *exclusively*.

109. For a further discussion of bequests for individuals limited to a particular use, see Hirsch & Wang, *supra* note 69, at 18-27.

110. The process is manifest when a testator bequeaths to an association devoted to a type of consumption. See *infra* note 263 and accompanying text.

This insight helps us to pin down the structural attributes of a bequest for a social purpose. In essence, *it is a bequest to individuals who fit a social description*, such as fox hunters; hence, like outright bequests to persons, it does not diminish the value of property. Such a bequest is efficient, in the economic sense.¹¹¹ And, note well, that is true whether or not the social purpose in question falls within any set parameters of charitability.

Assuredly, the case differs when a prescribed social purpose is so unorthodox that no one eligible to benefit would choose to spend her own funds for the activity. In that event, the value of the bequest does fall (and could conceivably amount to nothing). But even here, the consequent economic loss might prove transient. Testators typically impose use-restrictions onto bequests for persons out of a sense of paternalism. They thereby seek to influence consumption decisions – and eventually consumption preferences – in what they conceive to be the beneficiaries' own interest.¹¹² By the same token, testators experiencing a sense of fellowship with society-at-large might seek by a social purpose bequest to encourage unfamiliar or unwelcome forms of consumption which they believe would benefit the public. In the process, they could show fellow-citizens what they had been missing and stir demand for the subsidized good or service. As the new form of consumption came into vogue, members of society would once again discover in the bequest an efficient source of funding for something they would (at last) wish to have. Many social purpose bequests have almost certainly been so inspired¹¹³ – and

111. Even an individual beneficiary saddled with a use restriction may also be able to mitigate its effects on her consumption choices by diverting to other uses resources that she would otherwise have devoted on her own to the prescribed use, or via secondary trading. But the risk that value will be lost by a use restriction declines as the class of persons eligible to participate in the bequest expands, reaching its minimum when the eligibility pool is unlimited. Hence, if anything, there is a stronger economic case to be made for forbidding use-restrictions upon bequests to individual persons or classes than for forbidding general bequests for social purposes. See *infra* notes 262-63 and accompanying text.

112. See Robert A. Pollack, *Tied Transfers and Paternalistic Preferences*, 78 AM. ECON. REV., PAPERS & PROC., May 1988, at 240.

113. George Bernard Shaw provided a bequest under his will for the purpose of developing a revised British alphabet of 40 letters. See *In re Shaw*, [1957] 1 All E.R. 745, 749-50 (Ch.), *appeal dismissed per compromise*, [1958] 1 All E.R. 245 (C.A.). The will went on to remark Shaw's hope that this streamlined alphabet would gain eventual endorsement by the Ministry of Education and be taught in British schools. See *id.* at 750; see also *In re Bushnell*, [1975] 1 W.L.R. 1596, 1605 (Ch.) (finding that by funding bequest to advance socialized medicine, testator "was trying to promote his own theory"). Among the living philanthropists of today, billionaire George Soros has been making similarly innovative gifts. See *Giving It Away*, ECONOMIST, Oct. 25, 1997, at 77. Soros possibly was influenced by Karl Popper, the social philosopher under whom he studied, who advocated small-scale social experiments as the best route to social development (and who, in his own way, practiced what he preached, by climbing out onto more than a few intellectual limbs in his day). See KARL R. POPPER, *Piecemeal Social Engineering*, in POPPER SELECTIONS 304, 312-18 (David Miller ed., 1985) (1944).

though the underlying value in such cases is speculative, the potential welfare gain from the absorption of a new good or service into the economy is concomitantly substantial. Speculative social purpose bequests can thus be conceptualized as a gratuitous variant of venture capital.¹¹⁴

Efficiency to one side, we have also the broader welfare of survivors to consider.¹¹⁵ When a testator bequeaths to named beneficiaries, she can make

114. The sequel to the story of Shaw's "alphabet trust" bequest:

[After] compromise settlement of the appeal, money was made available for the extensive research which Shaw desired. An alphabet was produced, and the play of *Androcles and the Lion* was published in it. The alphabet has been widely recognized in the United States and elsewhere as of considerable educational value, and is being increasingly used as an aid to teaching.

GEORGE W. KEETON, *MODERN DEVELOPMENTS IN THE LAW OF TRUSTS* 299 (1971). Several legal commentators have perceived the opportunity to conduct social experiments to be among the greatest virtues of purpose bequests. See J.W. Harris, *Trust, Power, and Duty*, 87 L.Q. REV. 31, 38-39 (1971); Note, 73 L.Q. REV. 305, 307 (1957); Note, *Bernard Shaw's Will and the Advancement of Education*, 2 SOLIC. Q. 348, 348, 354 (1963). For an early discussion, see JOHN STUART MILL, *The Right and Wrong of State Interference with Corporation and Church Property*, in *DISSERTATIONS AND DISCUSSIONS* 34-36 (1874) (first published in *The Jurist*, Feb. 1833). But see HOBHOUSE, *supra* note 80, at 224 (doubting that experimentation mandated by testators would ever bear fruit):

New and valuable improvements are not so easy to design or to execute. They are made, not by those who simply hand over their property to trustees fettered by inflexible rules, but by living people who can give their hearts and souls to them as well as their property.

Id. Some commentators have deemed bequests for experimental purposes sufficiently useful to merit inclusion in the charitable category. See FISCHET AL., *supra* note 28, § 25; LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 132-34 (1955); John G. Simon, *Charity and Dynasty Under the Federal Tax System*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS* 246, 253-54 (Susan Rose-Ackerman ed., 1986); see also Atkinson, *supra* note 66, at 635-37 (expressing fear that exclusion of eccentric bequests from charitable category will result in its gradual over-restriction). And, indeed, experimental bequests sometimes are held charitable. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 589-91 (4th ed. 1990) (in the 4th ed. only); 4A SCOTT, *supra* note 4, § 374.7; see also RESTATEMENT (SECOND) OF TRUSTS § 374 cmt. 1 (1959) (asserting that "experimental tests of ideas" are charitable if they "may be reasonably thought to promote the social interest of the community"). For a sociological discussion of experimentation, observing shrewdly that "invention is often the mother of necessity, rather than vice versa," see JARED DIAMOND, *GUNS, GERMS, AND STEEL* 239-64 (1997) (quotation at 243). On the economics and economic value of venture capital, see generally ENTREPRENEURSHIP, INTRAPRENEURSHIP, AND VENTURE CAPITAL (Robert D. Hisrich ed., 1986).

115. I here avoid reference to the concept of "utility." Given the impediments to interpersonal comparisons of subjective utility, which would become relevant at this point, together with other troubling moral consequences of strict adherence to hedonistic concerns, theorists often formulate distributive policy by recourse to other normative predicates. See DANIEL M. HAUSMAN & MICHAEL S. MCPHERSON, *ECONOMIC ANALYSIS AND MORAL PHILOSOPHY* 71-83 (1996). I myself am unconvinced that interpersonal comparisons of utility are infeasible in

informed judgments about how to allocate her wealth among them in a manner calculated to provide for their individual needs and hence secure the family's overall welfare.¹¹⁶ This opportunity is accounted a positive virtue of freedom of testation, as we have seen. By the same token, society has an interest in preventing uninformed bequests, because these perform are indiscriminate; whence the Rule Against Perpetuities, barring a testator from allocating her wealth among persons as yet unborn whose relative needs she cannot possibly divine.¹¹⁷

On first glance, a bequest for a social purpose may appear similarly arbitrary: Like unborn persons, its nameless beneficiaries are, from the testator's perspective, total strangers. But a moment's contemplation suggests otherwise: Though a bequest for a social purpose fails to make use of the testator's detailed knowledge about individuals, the distribution of resources that results is not more unreflective on that account. This conclusion follows from another observation concerning the structural attributes of purpose bequests. In the case of ordinary bequests to persons, the testator utilizes her familiarity with individuals to see to their needs. In the case of bequests for social purposes, *the process is reversed*: The testator identifies the needs first, and those individuals who happen to display them benefit. Either way, the needs are satisfied. Although personal knowledge does not guide bequests for social purposes, it is no longer necessary to achieve a coherent result. Whether a testator bequeaths to persons she knows on the basis of their individual needs or to persons she does not know who share those needs, the ensuing distribution is thoughtful, so long as the needs favored for sating are themselves thoughtfully selected – for which we must rely, both in the case of bequests for persons *and* for purposes, not on the testator's personal knowledge, but rather on her social (and moral) experience.¹¹⁸ And, once

the context of *legal* decisions, where we seek a rule-utilitarian outcome involving aggregate values, but I wish to keep this Article on course, and so I will save the latter discussion for another day.

116. *But see* Mark O. Wilhelm, *Bequest Behavior and the Effect of Heirs' Earnings: Testing the Altruistic Model of Bequests*, 86 AM. ECON. REV. 874 (1996) (presenting empirical evidence which casts doubt on proposition that testators typically take advantage of their knowledge of beneficiaries to vary bequests).

117. *See infra* note 188 and accompanying text.

118. Appreciation of what needs are important will often evolve as an individual matures. For a discussion in connection with charitable giving, see Alan Radley & Marie Kennedy, *Charitable Giving by Individuals: A Study of Attitudes and Practice*, 48 HUM. REL. 685, 691-93 (1995). To the extent that testators are actuated by egoistic motives to make bequests for social purposes, these bequests may be premised on judgments concerning not what needs merit providing but what needs merit association with the testator's memory. Conceivably, the latter sort of judgment could lead a testator in a different direction, though the distribution that results would still be nonarbitrary, given the equivalent structure of the bequest.

again, notice that this structural attribute marks bequests for all social purposes, irrespective of whether they satisfy any given criteria of charity.

The case differs, however, when a testator bequeaths for a personal purpose. Here, no transfer of wealth occurs at all. The testator is simply consuming resources postmortem for her own gratification, and (apart from a secondary multiplier effect¹¹⁹) no one benefits other than herself.¹²⁰ The policy question we then must face is whether that is benefit enough – whether, so to say, we should suffer the departed to continue to behave just as selfishly as before.

Considered from the perspective of economic efficiency, no reason exists to regulate these bequests. In this situation, the testator is continuing to spend for her own purposes what someone else would otherwise spend for his. The channeling of the resource to a particular use occasions not the slightest loss of value, for the testator in this instance is making that choice for herself, and not for others. For the same reason, bequests for personal purposes are in no wise arbitrary: Here, the testator is attending to her own needs, and these she knows best of all.

Lawmakers might nonetheless posit other grounds for restricting bequests of this sort. As a matter of distributive justice, one could submit that the welfare of consumption by the living outweighs that of the dead. The point seems reasonable on the face of it: We all accept intuitively that the gratifications which money can buy are tied to the state of being, and that the disem-

119. Whenever anyone, living or dead, spends on herself, she contributes to the national income by employing others, who in turn employ still other others. Economists call this the multiplier effect. See PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 476-78 (14th ed. 1992). For a judicial recognition, see *In re Nottage*, [1895] 2 Ch. 649, 653-54 (App.) (observing that "[a]ny man who spends his income benefits the community by putting money in circulation").

120. One might argue that when a testator makes a bequest to provide for a pet animal, the animal itself derives utility from the transaction. Professor Sweet analogized bequests of this sort to "pensions . . . given to old servants." Charles Sweet, *The Monstrous Regiment of the Rule Against Perpetuities*, 18 JURID. REV. 132, 137 (1906-07). Whether it is meaningful (and moral) to consider the interests of inhuman beings is a question best left to the philosophers, and that is precisely where I intend to leave it. For discussions (and there are many), see, for example, BRIAN BARRY, *THEORIES OF JUSTICE* 203-12 (1989); GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995); ROBERT NOZICK, *SOCRATIC PUZZLES* 305-10 (1997); PETER SINGER, *ANIMAL LIBERATION* (2d ed. 1990); STEPHEN H. WEBB, *ON GOD AND DOGS* (1998). In addition, when a testator makes a bequest of funds for the care of an item of property that she bequeaths to someone else, the new owner benefits from the enhanced value of that new property (even if the new owner would not have expended so much of her own resources for its care). For a case in which a custodian of a decedent's pet dog spent bequeathed funds on a washing machine and a station wagon, ostensibly for the "care" of the animal, see *In re Rogers*, 412 P.2d 710 (Ariz. 1966).

bodied are dispossessed in the natural order of things.¹²¹ Obviously, a testator gains no satisfaction whatsoever from postmortem consumption at the time when the funds are spent, having grown oblivious to events on this earth.¹²² Still, the matter is a mite more complicated than that: As one astute court observed, a testator while alive can derive a benefit from the "mental picture" of consumption following her death.¹²³ Psychological research suggests that the anticipation of consumption – known technically as *savoring* – can comprise a significant component of the satisfaction that consumption affords.¹²⁴ And we have already remarked the substantial motives for posthumous spending.¹²⁵ To the extent a testator savors postmortem consumption, the potential redistribution flowing from its prohibition would in fact affect the welfare of *two* living persons – and hence becomes, at the very least, normatively problematic.

And here, the final justification for granting freedom of testation – namely, the practical difficulty of denying it – also comes into play. For any attempt by lawmakers to curtail a person's right to spend money on herself posthumously – an attempt, if you will, to *coerce generosity at death* – is unlikely even to produce the intended result. In all probability, it would simply provoke the self-indulgent testator to consume more of her property while she remains alive.¹²⁶ Examined in that light, the choice at hand is not

121. Philosophers of property have long argued for the limitation of dead hand control, often by reference to natural law. See RONALD CHESTER, *INHERITANCE, WEALTH, AND SOCIETY* 34-37 (1982); J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 98-100 (1997). At least one court has put the case in explicitly distributive terms: Extravagant bequests to care for burial plots "impoverish the living to decorate the graves of the forgotten dead." *Palethorp's Estate*, 24 Pa. D. & C. 215, 221 (Orphans' Ct. 1914), *aff'd*, 94 A. 1060 (Pa.), *appeal dismissed*, 94 A.1066 (Pa. 1915). Still, the issue cannot be portrayed in tones of black and white. Faced with a bequest for the purpose of caring for personal property after death, one court lauded the testator's (ineffective) estate plan as "perfectly natural and to be considered with the respect due to a commendable sentiment." *Smith v. Heyward*, 105 S.E. 275, 279 (S.C. 1920); see *Lounsbury v. Trustees of Square Lake Burial Ass'n*, 129 N.W. 36, 37 (Mich. 1910) (resolving validity of bequests to build cemetery vault and to care for graves: "We marvel that an heir will contest such a provision, but he has a right to do so.").

122. Or, put more reverently, there are no further benefits to be had from mere consumption once the testator has risen to an eternal perspective on this and other matters.

123. *Grigson v. Harding*, 144 A.2d 870, 876 (Me. 1958) (bequest to care for building).

124. See George Loewenstein, *The Fall and Rise of Psychological Explanations in the Economics of Intertemporal Choice*, in *CHOICE OVER TIME 3* (George Loewenstein & Jon Elster eds., 1992); Jon Elster & George Loewenstein, *Utility from Memory and Anticipation*, in *CHOICE OVER TIME*, *supra*, at 213. By comparison, the literal act of consuming is often a fleeting experience.

125. See *supra* text accompanying notes 90-100.

126. In fact, a testator probably could accomplish most objectives of postmortem consumption by contracting *inter vivos* for posthumous services. See *Gilman v. McArdle*, 2 N.E. 464

interpersonal, but intertemporal: The testator is simply deciding when to consume her personal resources, and no comparison between her interests and others' is even relevant.

Assuming that is so, our only remaining inquiry involves the public policy of interference with choice over time. Could we somehow conclude that the state is justified in regulating the temporal consumption choices of one who is minded to spend after death? The point is worth laboring for a moment or two, for the possibility of such regulation is by no means beyond the pale. Theorists have long justified legal intervention to prevent individuals from undersaving over time, by analogy. The inalienability of pension rights under ERISA and the Social Security Act is widely recognized as a concrete application of this policy.¹²⁷ One rationale offered for interference with individual choice in this context is that otherwise individuals could spend themselves into destitution and shift the cost of their support onto the rest of society, via the welfare apparatus.¹²⁸ The other commonly cited (though more controversial) rationale is a paternalistic one: Many consumers making current spending decisions are shortsighted in outlook, failing to look ahead to their future well-being, a phenomenon known in the psychological literature as *myopia*. Eventually, they come to regret the undersaving that leads to their impoverishment. Enforced saving forestalls that regret, protecting persons

(N.Y. 1885). The hypothesis that testators would choose to consume *inter vivos* in lieu of making bequests for personal purposes depends, however, on the further assumption that individuals save until death primarily with bequest motives (be they selfish or gratuitous) in mind, which doubtless is true in many cases. But persons may also save until death as a precaution against uncertain future needs and longevity – or simply because they already have everything they want. See R. Glenn Hubbard et al., *Precautionary Saving and Social Insurance*, 103 J. POL. ECON. 360 (1995); see also Michael Hurd et al., *Subjective Survival Curves and Life Cycle Behavior*, in INQUIRIES IN THE ECONOMICS OF AGING 259 (David A. Wise ed., 1998) (presenting empirical evidence that individuals tend to overestimate their longevity and on that basis over-save for future needs). For such persons, forbidding consumption post-mortem would probably succeed in inducing gratuity. Judge Posner, by contrast, argues that individuals who lack any bequest motives will buy annuities assuring that they leave nothing behind at their deaths. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* § 18.1, at 552 (5th ed. 1998). But individuals might fail to do so in practice for any number of reasons: information costs (How many lay persons are knowledgeable about annuities, apart, perhaps, from pension plans?), transaction costs (Insurance companies routinely assume that annuity buyers are unusually healthy and hence charge prices premised on adverse selection.), and a consumption preference for high-priced luxuries that cannot be paid for in installments out of an annuity. See Michael D. Hurd, *Research on the Elderly: Economic Status, Retirement, and Consumption and Saving*, 28 J. ECON. LIT. 565, 621-22 (1990) (raising some of these points); see also LESTER C. THURLOW, *GENERATING INEQUALITY* 141 (1975) (arguing that people do not buy annuities because of perceived loss of economic power that their purchase would entail).

127. See Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 23 n.78 (1995) (citing to discussions).

128. See *id.* at 11-13.

from their own economic imprudence. In the process, the myopic consumer's aggregate welfare is enhanced, by smoothing her consumption over time.¹²⁹

In the instant case, however, we face not the old problem of individuals inclined to save too little, but the novel scenario of ones who would (ostensibly) save too much.¹³⁰ By placing a ban on postmortem consumption, we would carry out a policy of *enforced spending* during life. Under these reverse conditions, we may conclude that neither justification for the legal regulation of intertemporal choice stands up to analysis. An individual who scrimps in order to splurge after death does not add to society's burdens. Her self-imposed privations fail to qualify her for welfare benefits. Nor does she ever come to regret her decision: For a saver (unlike a spender) remains in control of her economic fate, and if she pursues this course to the end, then she must continue to derive present satisfaction from doing so.

To summarize: There appears no sound argument premised on the traditional rationales of freedom of testation to preclude individuals from making bequests for purposes, either of the social or personal variety, and irrespective of whether they meet a defined threshold of charitability. Freedom to make these bequests can enhance the value of property in the testator's hands without compromising either the efficiency of the use of resources, or the thoughtfulness of its distribution. Professor Dukeminier has nonetheless questioned the public policy of robust enforcement of bequests for noncharitable purposes on the ground that they provide no larger, social benefits. Given their "marginal public utility," bequests of this sort merit our indulgence only "grudgingly."¹³¹ To be sure, bequests for purposes found to be charitable offer greater advantage than those which do not: Here, the utility is double-barrelled, aiding the body politic along with unnamed individuals. But the fact that bequests for some purposes fail to provide any perceived public utility is no reason to scorn them; these still deliver private utility every

129. See *id.* at 15-32. For a recent discussion, see RICHARD A. POSNER, *AGING AND OLD AGE* 262-64 (1995).

130. Professor Elster takes notice of the closely analogous problem of the miser and the still more closely analogous "mixed case" of the miser who saves "in order to become a spendthrift," but he declines to pursue their theoretical implications. See JON ELSTER, *ULYSSES AND THE SIRENS* 67 (rev. ed. 1984); see also Richard A. Posner, *Are We One Self or Multiple Selves? Implications for Law and Public Policy*, 3 *LEGAL THEORY* 23, 26, 34 (1997) (identifying problem of "asceticism").

131. Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 *COLUM. L. REV.* 1648, 1704 (1985). Accordingly, Professor Dukeminier would sharply limit the duration of noncharitable purpose bequests. See *infra* note 196. See also, by negative inference, Professor Lynn: "The gift to charity is *permissible* because it encourages the use of private funds for purposes commonly achieved by the expenditure of public funds." Robert J. Lynn, *Perpetuities: The Duration of Charitable Trusts and Foundations*, 13 *UCLA L. REV.* 1074, 1083 (1966) (emphasis added).

bit as substantial as an ordinary, single-barrelled bequest to a person.¹³² The inclusion of bequests for purposes, whether deemed charitable or not, within the scope of testamentary liberty is justifiable on that basis alone. As a matter of public policy, then, we may pronounce the American cases permitting these bequests to be right, and the British cases prohibiting a good many of them to be wrong.

3. *Exceptional Cases*

That said, it remains for us to consider whether this principle can be announced without qualification. Should the hoary distinction between valid and superstitious uses live on in some form and, if so, how should the latter today be defined? Born ignominiously of royal avarice, the original doctrine of superstitious uses operated to confiscate endowments for false religious practices and, needless to say, has no modern American (or, for that matter, British) application.¹³³ Nonetheless, the doctrine's broader postulate that bequests for purposes are void if they fall foul of public policy survives in the *Restatement* and under modern case law. Without exception, commentators have added their imprimatur.¹³⁴

The economic case for such a limitation is straightforward so long as the category is closely confined. Where the bequest in question is a perverse reflection of the traditional bequest for a social purpose – to wit, a bequest for an *antisocial* purpose, one that would cause injury to others or to society in

132. This is the point that needs to be fully appreciated. Professor Dukeminier offers the example of a bequest "for the benefit of the Yale Whiffenpoofs," a noncharitable singing group, as a disposition "of marginal social utility." See Dukeminier, *supra* note 131, at 1702. Who benefits from a bequest to the Whiffenpoofs? Persons who take pleasure in the art of a *cappella* – and who would gladly spend their own money (if they had it) to sing and to listen to singing. Though a bequest such as this provides little "social" utility, it does provide private utility, just like an ordinary bequest to persons, that is scarcely "marginal." See also *In re Hummeltenberg*, [1923] 1 Ch. 237, 240 (noting counsel's argument that bequest for training of mediums is "beneficial to a section of the public – namely, that section which proposes or intends to engage in the calling of a medium"); H.A.J. Ford, *Dispositions for Purposes*, in *ESSAYS IN EQUITY* 159, 160 (P.D. Finn ed., 1985) (observing that social purpose bequests can have "positive value" even if not charitable, and that there is virtue in having "a wide variety of purposes" endowed); L.H. Leigh, *Trusts of Imperfect Obligation*, 18 MOD. L. REV. 120, 130 (1955) (remarking that bequests for noncharitable sects can help to "provide many of the necessary amenities those communities require").

133. See *supra* note 12 and accompanying text.

134. See RONALD H. MAUDSLEY, *THE MODERN LAW OF PERPETUITIES* 169-70 (1979); MCGOVERN ET AL., *supra* note 53, § 3.11, at 154, § 8.4, at 319; MORRIS & LEACH, *supra* note 25, at 319, 321; POWELL, *supra* note 53, ¶ 588, at 46-7-8; Atkinson, *supra* note 72, at 1131-32; Gareth H. Jones, *The Dead Hand and the Law of Trusts*, in *DEATH, TAXES AND FAMILY PROPERTY* 119, 126 (Edward C. Halbach, Jr. ed., 1977); Scott, *Control*, *supra* note 50, at 632-33, 646-47, 658; Sweet, *supra* note 120, at 142 & n.a; cf. POSNER, *supra* note 126, § 18.6, at 559.

general,¹³⁵ – the resulting social costs weigh against the benefit to the testator in making the bequest. Because no one can bargain with a decedent to revise a socially harmful estate plan, it would remain in effect even where the cost to others (and the sums they would be willing to pay to avoid it) exceeded its value to her; this market failure justifies legal intervention to restore efficiency.¹³⁶ Though the cases are few, courts have invariably invalidated bequests for purposes that they identify as injurious to members of the community,¹³⁷ expressly on the basis of assumptions about the relative scale of the associated costs and benefits.¹³⁸

The Restators do not stop there, however. Also void, they say, are bequests for purposes that a court deems "capricious." The proffered examples include bequests ostensibly for social purposes that, while not affirmatively detrimental to others, are so outlandish that they offer no prospect of benefitting anyone, and bequests for personal purposes involving either the

135. Bequests for injurious purposes, though quite rare, could stem from a negative form of interdependent utility function, whereby the testator's happiness is *inversely* correlated to that of another or a group of others – a phenomenon that Professor Sen calls "antipathy." See AMARTYA K. SEN, *Rational Fools: A Critique of the Behavioural Foundations of Economic Theory*, in CHOICE, WELFARE AND MEASUREMENT 84, 92 (1982) (essay first published in 1977). For an example of a bequest for an antisocial purpose prompted by antipathy, see THOMAS, *supra* note 85, at 33-34 (quoting estate plan of an Englishman who loathed the Irish).

136. Cf. Hirsch & Wang, *supra* note 69, at 18-27 (discussing use restrictions generally).

137. See *Thrupp v. Collett*, 53 Eng. Rep. 844, 845 (M.R. 1858) (endowment to pay criminal fines: "Looking at this bequest in a plain commonsense view, it is obviously calculated to encourage offences prohibited by the Legislature"); *Meksras Estate*, 63 Pa. D. & C.2d 371, 373 (Orphans' Ct. 1974) (holding void testamentary instruction to bury jewelry because of its tendency to incite grave robbery and desecration of burial grounds) (further discussed *infra* note 163); *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 217, 219 (Mo. Ct. App. 1975) (holding void testamentary instruction to destroy testator's house because it would have damaged neighboring property values) (further discussed *infra* note 141); *Will of Pace*, 400 N.Y.S.2d 488, 492-93 (Sur. Ct. 1977) (similar facts and reasoning); see also *In re Hummeltenberg*, [1923] 1 Ch. 237, 242 (raising possibility that bequest for training of mediums was "illegal, or at all events against public policy").

138. Where, for example, a testator bequeathed a fund to provide support for the minor children of persons imprisoned for "crime[s] . . . of a political nature," the court found that "[a]ny risk that a parent might be induced to commit a crime he otherwise would not commit because of the possibility that his child might become a beneficiary . . . is far outweighed by the interests of the innocent children involved and society's interest in them." *In re Estate of Robbins*, 371 P.2d 573, 573-75 (Cal. 1962) (Traynor, J.); see also *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 217 (Mo. Ct. App. 1975) ("No benefits are present to balance against this injury . . ."). By analogy, under the law of conditional bequests to persons, potentially harmful conditions have been held valid where they have only a "slight tendency" to cause harm – hence, life estates are valid despite the fact that they create a minute incentive to criminal acts by impatient remaindermen. See *Scott, Control*, *supra* note 50, at 633; see also RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 7.1 (1983) (giving effect to bequests conditioned on divorce where testator's primary motive is not to occasion divorce).

disuse or destruction of property, or assignments of "unreasonably large" sums for personal purposes that are otherwise "normal" and benign.¹³⁹ Most (though not all) of the cases are in accord.¹⁴⁰

In that they impose no cost on others, bequests for capricious purposes – unlike antisocial purposes – cannot be condemned on efficiency

139. RESTATEMENT (SECOND) OF TRUSTS §§ 124 cmt. g & illustrations 5 & 6, 374 cmt. m (1959); see also *supra* note 45 and accompanying text. Conceivably, the last principle might also be applied, by analogy, to a bequest for a social purpose where the amount bequeathed is so great that the particular need addressed is fully "saturated," and part of the funding becomes superfluous. The Restators fail to contemplate this scenario, however. See John G. Simon, *American Philanthropy and the Buck Trust*, 21 U.S.F.L.REV. 641, 659-61 (1987) (raising issue in context of cy pres doctrine). At the same time, the Restators are careful not to decree bequests for personal purposes capricious per se. A purpose bequest "is not capricious merely because no living person benefits from its performance." So long as the purpose satisfies "a natural desire which normal people have with respect to the disposition of their property," it is to be ratified. RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1959).

140. Setting "capriciousness" as the general standard: see, e.g., *In re Byrne's Estate*, 100 A.2d 157, 160 (N.H. 1953) (dicta); *Will of Pace*, 400 N.Y.S.2d 488, 491 (Sur. Ct. 1977); *Devereux's Estate*, 48 Pa. D. & C. 491, 497 (Orphans' Ct. 1943), *appeal quashed*, 46 A.2d 168 (Pa. 1946); *Lindsay's Ex'r v. Forsyth*, 1940 Sess. Cas. 568, 572, 575-77 (Scot.). But see *infra* note 182. Bequests for useless publications: see *Fidelity Title & Trust Co. v. Clyde*, 121 A.2d 625, 629 (Conn. 1956); *Wilber v. Asbury Park Nat'l Bank & Trust Co.*, 59 A.2d 570, 578-79 (N.J. 1948), *aff'd sub nom. Wilber v. Owens*, 65 A.2d 843 (1949); cf. *Hanson Estate*, 8 Pa. D. & C.2d 620, 623 (Orphans' Ct. 1956) (finding that where testator provided bequest to publish useless writings with royalties paid to charitable foundation, bequest should go to foundation directly; intimating in dicta that, had testator been "motivated solely by vanity" in providing for useless publication, court might have upheld bequest as originally set out). Bequests for other useless purposes: see *M'Caig v. University of Glasgow*, 1907 Sess. Cas. 231, 239-48 (Scot.) (construction of statutes); *M'Caig's Trustees v. Kirk-Session of United Free Church*, 1915 Sess. Cas. 426, 434-38 (Scot.) (same). Destruction of moneys: see *In re Scott's Will*, 93 N.W. 109, 109 (Minn. 1903); *Will of Pace*, 400 N.Y.S.2d at 493 (dicta); *Capers Estate*, 34 Pa. D. & C.2d 121, 134 (Orphans' Ct. 1964) (dicta); *M'Caig v. University of Glasgow*, 1907 Sess. Cas. 231, 242 (Scot.) (dicta). Destruction of property: see *Eyeraman*, 524 S.W.2d at 210; *Will of Pace*, 400 N.Y.S.2d at 488; *Ford v. Ford's Ex'r*, 16 S.W. 451, 452-53 (Ky. 1891) (dicta). But see *National City Bank v. Case W. Reserve Univ.*, 369 N.E.2d 814, 818 (Ohio Prob. Ct. 1976) (holding valid instruction to destroy house) (discussed *infra* note 165); *Notes on People*, N.Y. TIMES, Apr. 13, 1977, at C2 (citing to unreported case holding valid instruction to bury automobile). Disuse of property: see *Brown v. Burdett*, 21 Ch. D. 667, 673 (V.C. 1882) (house to be closed up for twenty years); *Egerton v. Brownlow*, 10 Eng. Rep. 359, 417 (H.L.C. 1853) (dicta). Excessive bequests for benign purposes: see *In re Backes' Will*, 30 N.Y.S. 394, 395-96 (Sur. Ct. 1894) (dicta); *In re Turk's Will*, 221 N.Y.S. 225, 239 (Sur. Ct. 1927), *appeal denied*, 226 N.Y.S. 111, 112 (App. Div. 1927) (dicta). But see *infra* note 182. Courts in Pennsylvania, applying a state statute permitting bequests in perpetuity for grave care, have claimed authority to reduce to reasonable sums lavish bequests for such care: see *Devereux's Estate*, 48 Pa. D. & C. at 496-97; *In re Dreisbach's Estate*, 121 A.2d 74, 79 (Pa. 1956); *In re Leber's Estate*, 186 A. 225, 226 (Pa. 1936); *Paletorp's Estate*, 24 Pa. D. & C. 215, 221, 224 (Orphans' Ct. 1914), *aff'd*, 94 A. 1060, 1066 (Pa.), *appeal dismissed*, 94 A. 1066 (Pa. 1915); cf. RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1959) (failing to acknowledge this power).

grounds.¹⁴¹ Nor are they arbitrary, in the traditional sense of action taken in the dark: Once again, the testator knows full well what she wants for herself and frames her estate plan in order to acquire it. The case for legal intolerance of these bequests must be put otherwise, and it is far from an easy one. To the brief extent they have addressed the issue, courts and commentators have pressed two, related points: first, the testator's subjectively small interest in accomplishing capricious purposes and, second, society's objective disapproval of frivolous (even though harmless) forms of consumption.

The argument premised on subjective minuteness of interest follows from the general observation that the process of testation is "an exercise in power without responsibility."¹⁴² Living persons face the economic and social

141. Several courts have put forward the view that testamentary provisions for the razing of homes implicate collateral costs, in that their destruction depresses the value of neighboring properties. See *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 213, 217 (Mo. Ct. App. 1975); *Will of Pace*, 400 N.Y.S.2d 488, 493 (Sur. Ct. 1977); see also *Colonial Trust Co. v. Brown*, 135 A. 555, 564 (Conn. 1926) (finding that bequest of urban property restricting size of buildings constructed thereon would harm neighboring properties and pose threat to proper growth of city). Similarly, courts have sometimes invalidated bequests for excessively grandiose purposes on the ground that they would create eyesores, again harmful to the living. See *Murr v. Youse*, 80 N.E.2d 788, 797-98 (Ohio Prob. Ct. 1946) (bequest to fund "gaudy" cemetery statuary held offensive to interests of other users of cemetery); *Aitken's Trustees v. Aitken*, 1927 Sess. Cas. 374, 383 (Scot.) (bequest to fund an extravagant equestrian statue held offensive to interests of local townspeople); see also *M'Caig's Trustees v. Kirk-Session of United Free Church*, 1915 Sess. Cas. 426, 434 (Scot.) (hinting at this theme). Once again, we could then reasonably premise legal regulation on the inability of the affected parties to bargain with the testator. But the hypothesis of collateral costs, at least in the context of destructive bequests, is of doubtful plausibility: Whereas it is a commonplace among realtors that expensive homes raise the value of less expensive adjoining ones by increasing the attractiveness of a street or a neighborhood, there is another side to the economic coin — open spaces in a neighborhood are also attractive, and, as an elementary exercise in supply and demand, the fewer homes available in a neighborhood, the higher the price of those left standing. For a recognition of the speculativeness of alleged collateral costs in this context, see *Eyerman*, 524 S.W.2d at 219 (Clemens, J., dissenting). One court has asserted that the government has an interest in preventing the destruction of a home, in that this act will diminish the tax revenues flowing from the property. *Will of Pace*, 400 N.Y.S.2d at 493. In other words, government allegedly has a proprietary interest in the property singled out for destruction. But government stakes its proprietary claim to the property of the deceased via estate and inheritance taxes. These must be paid over initially, whatever is subsequently done with the property, and can be premised on the value of the estate prior to destruction. See *infra* note 157. *But cf.* *Ahmanson Found. v. United States*, 674 F.2d 761, 768 (9th Cir. 1981) (suggesting in dicta that for purposes of federal estate taxation gross estate is diminished to extent that testator prescribes its destruction). The hypothesis of collateral costs loses all color of reason when personalty and intangible assets lie at issue. The destruction of securities is nothing more than a gift to the issuer, and the destruction of moneys, a gift to the government!

142. M. Meston, *The Power of the Will*, 1982 JURID. REV. 172, 173. I have elsewhere explored this point in other analytical contexts. See Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 638-39 (1989); Hirsch & Wang, *supra* note 69, at 13;

repercussions of their actions; dead persons do not. One consequence is that a testator can, if she is so inclined, wash her hands of her dependents, without suffering the opprobrium that a living person would bear for such behavior. Death spares the testator from interpersonal costs. And that is not all: Because it is the end of personal expenses as well as pain, death can also spare the testator from opportunity costs.

Indeed, it bears noting that in this respect the economic panorama faced by the superannuated resembles that of the super-rich: Absent interdependent utilities, they too lack opportunity costs and can give themselves up to similar whims.¹⁴³ Thus could Cleopatra amuse herself (and awe her Roman guests) by dissolving priceless pearls in wine, because she knew she possessed more treasure than she could ever spend.¹⁴⁴ However much the dead possess, it too is more than they can spend; hence they too can squander it with abandon.

This last point appears the gist of the oft-repeated assertion that bequests for capricious purposes need to be curtailed because, unlike lifetime consumption, they are uninhibited by the restraint of self-interest.¹⁴⁵ With money to

see also Scott, *Control*, *supra* note 50, at 657-58. The fundamental insight traces to Lord Hobhouse, if not earlier:

While a man is alive, you have a tolerably sure guarantee that he will not . . . expose himself to privations, to blame, to ridicule . . . , or even undergo the exertions which any original or eccentric course involves. . . . But when a man's deeds are to have no operation till he is dead, what security have we . . . that he will feel the weight of responsibility; that his passions will be chastened by conscience, or his fancies corrected by sober reason and reflection?

HOBHOUSE, *supra* note 80, at 94; *see id.* at 221.

143. For an observation that possessors of large fortunes literally lack sufficient time usefully to consume all of their wealth, see THURLOW, *supra* note 126, at 134-36. Of course, most testators – like most wealthy folk – do have interdependent utilities with others and hence face opportunity costs. The more alienated one is from familial attachments, the more likely one becomes to pursue capricious testamentary ends. For an early recognition, see GEORG HEGEL, *PHILOSOPHY OF RIGHT* §§ 178-79 (T.M. Knox trans., Oxford Univ. Press 1967) (1821).

144. For a modern version of Cleopatra's conspicuous destruction, see MATTHEW JOSEPHSON, *THE ROBBER BARONS* 338 (1934) (remarking practice among America's economic titans during Gilded Age of smoking cigarettes rolled in hundred-dollar bills).

145. *See* Will of Pace, 400 N.Y.S.2d 488, 492 (Sur. Ct. 1977) ("Although a person may wish to deal capriciously with his property, while he is alive, his self-interest will usually prevent him from doing so. After his death there is no such restraint."); *M'Caig's Trustees v. Kirk-Session of United Free Church*, 1915 Sess. Cas. 426, 434 (Scot.) ("A man may, of course, do with his money what he pleases while he is alive, but he is generally restrained from wasteful expenditure by a desire to enjoy his property, or to accumulate it, during his lifetime."); *Eyerman v. Mercantile Trust Co.*, 524 S.W.2d 210, 215 (Mo. Ct. App. 1975). The Restators and other commentators endorsing rules against capricious bequests have also emphasized this point. *See* MCGOVERNET AL., *supra* note 53, § 3.11, at 154; MORRIS & LEACH, *supra* note 25, at 319; RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1959), 1A SCOTT, *supra* note 4, § 62.14; Atkinson, *supra* note 72, at 1131-32; Scott, *Control*, *supra* note 50, at 658.

burn, the testator can afford to take a devil-may-care attitude, giving vent to "whim," "folly," or "extravagance."¹⁴⁶ This occurrence does not implicate a market imperfection, strictly speaking. Opportunity costs are wholly intra-personal; their avoidance by the testator shifts no costs onto others.¹⁴⁷ But the testator is violating what appears a social norm that property should only be consumed in ways that accord its owner genuine satisfaction. In this vein, courts have sometimes passed judgment on capricious bequests by asking (as a thought-experiment) whether the *living* testator – when still faced with budget constraints – would have been prepared to make the same expenditure out-of-pocket as she is out-of-probate.¹⁴⁸ But even in instances where that is true, some courts have also condemned such bequests on a normatively objective basis:¹⁴⁹ namely, that "senseless destruction serving no apparent good purpose" is intolerable.¹⁵⁰

146. *In re Turk's Will*, 221 N.Y.S. 225, 236 (Sur. Ct. 1927), *appeal denied*, 226 N.Y.S. 111 (1927); *M'Caig's Trustees*, 1915 Sess. Cas. at 434, 438; *see also, e.g., Wilber v. Asbury Park Nat'l Bank & Trust Co.*, 59 A.2d 570, 578 (N.J. 1948), *aff'd sub nom. Wilber v. Owens*, 65 A.2d 843 (N.J. 1949); *Will of Pace*, 400 N.Y.S.2d at 491; MacKintosh's Judicial Factor v. Lord Advocate, 1935 Sess. Cas. 406, 413 (Scot.). At least one court has gone so far as to submit that a destructive bequest is worthless to a testator. A provision to destroy the testator's home "is without benefit to the dead woman. No reason, good or bad, is suggested by the will or record for the eccentric condition." *Eyerman*, 524 S.W.2d at 214.

147. Conceivably, it could be argued that extravagant personal consumption, at least when visible to others, implicates external costs in the form of anger and social censure and hence involves a true market imperfection when ordered upon death. *Cf. POSNER, supra* note 126, § 18.6, at 559.

148. "In the present case the testator's wishes are capricious in that they are not something which the testator would have done while alive." *Will of Pace*, 400 N.Y.S.2d at 493. "For many years [the testators] had apparently contemplated the erection of similar statues, but they could not bring themselves to part with the money during their own lifetimes." *M'Caig's Trustees*, 1915 Sess. Cas. at 434.

149. Presumably, the implicit basis for the social norm condemning frivolous consumption is distributive welfare, along with moral values. That norm has been embedded in the American grain from the very beginning, but of course it also has ancient roots. *See EDMUND S. MORGAN, The Puritan Ethic and the American Revolution, in THE CHALLENGE OF THE AMERICAN REVOLUTION* 88, 92-98, 108-09, 118-19, 129-30 (1976); JOHN SEKORA, *LUXURY* 23-62 (1977) (on disapproval of extravagance in classical thought); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 52, 64-65 (1969); *see also infra* note 168; *see generally* CHRISTOPHER J. BERRY, *THE IDEA OF LUXURY* (1994).

150. *Eyerman*, 524 S.W.2d at 217. Such arguments have been sounded both when personal purposes are abnormal and when the sums assigned to normal personal purposes are abnormally large. As one court mused, "[e]ven an animal hater probably would not complain if the bequest to benefit a dog was, figuratively, only a bone. But when the bequest is substantial and, figuratively, a whole quarter of beef, then even those who otherwise profess to like dogs often complain about the provisions of such a will." *In re Hill's Will*, 255 N.Y.S.2d 898, 899 (Sur. Ct. 1965) (Keane, J.). One economic case occasionally made on behalf of wasteful bequests for personal purposes is that they at least provide *employment* to survivors—a phenom-

The inference that testators are blasé about bequests for seemingly capricious purposes is a dubious one. Certainly, the flow of the argument leaves behind some nagging questions: If they care so little about them, then why do testators go to the trouble and expense of executing these bequests in the first place? Doing so entails immediate transaction costs. And why do testators under these conditions not choose instead to consume property while they are alive, when they can squeeze more benefit out of it? Returning to our last analogy, when an individual of ordinary means can *anticipate* becoming super-rich, she behaves rationally by spending more now, while money still matters to her.¹⁵¹ Why would the rational testator wait till it doesn't? One begins to suspect that courts have misjudged the situation. And, in fact, analysis suggests that there may be more benefit here than meets the judicial eye.

Bequests for seemingly wasteful purposes still yield satisfaction to the extent that they facilitate identity-editing, as previously discussed.¹⁵² A testator might intend a perverse estate plan as a memorial to her personality. Hence, a bequest to fund the publication of offensive writings makes psychological, if not economic, sense when the testator "considered himself a controversialist."¹⁵³ And a manifestly capricious bequest might appeal to a testator *for that reason alone* – assuming she wanted to be remembered as an eccentric.¹⁵⁴

Extravagant consumption at death might also emerge out of a testator's desire to draw attention to herself. By leaving behind funds for a fabulous monument, she might imagine that she stands a better chance of being remem-

anon known technically as the multiplier effect, *see supra* note 119. This argument has been rejected on the ground that an alternative disposition would *also* result in employment. *See M'Caig's Trustees v. Kirk-Session of United Free Church*, 1915 Sess. Cas. 426, 434 (Scot.). By analogy, this same rationale has sometimes been voiced to justify wasteful consumption by the wealthy and has been refuted by economists in precisely the same way! *See* RICHARD T. ELY & RALPH H. HESS, *OUTLINES OF ECONOMICS* 143-44 (6th ed. 1937) (1893); JOSEPHSON, *supra* note 144, at 339-40; 2 WILLIAM [WILHELM] ROSCHER, *PRINCIPLES OF POLITICAL ECONOMY* § 219 (John J. Lalor trans. 1882) (1854); HARTLEY WITHERS, *POVERTY AND WASTE* 160-65 (1919); John Kenneth Galbraith, *The Uses and Excuses for Affluence*, *N.Y. TIMES*, May 31, 1981, *Magazine* at 38, 38.

151. This is true of some heirs, who spend (or forbear to save) in reasonable anticipation of their inheritances, and it is also true of some college athletes, who can reasonably anticipate lucrative professional sports contracts. In the inheritance context, *see* MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 159, 170-71 (1970).

152. *See supra* notes 75-85 and accompanying text.

153. *Fidelity Title & Trust Co. v. Clyde*, 121 A.2d 625, 627 (Conn. 1956).

154. For one testator who said as much, and for the estate plan that followed from that desire, *see* ROBERT S. MENCHIN, *THE LAST CAPRICE* 27-30 (1963); *see also In re Estate of Robbins*, 371 P.2d 573, 574 n.1 (Cal. 1962) (quoting will that hinted at this desire).

bered.¹⁵⁵ Alternatively, an outsized bequest for a personal purpose could reflect a testator's strong attachment to the object in question. Princely sums left for the care of pets, for example, almost certainly follow from emotional bonds comparable to the ones that tie together human beings.¹⁵⁶ In such instances, testators again derive real satisfaction from their bequests.

Estate plans calling for the destruction of property must stem from different motivations. Testators probably make provisions of this sort not out of indifference toward the world they have lost; rather, they may wish to destroy property postmortem in order to preserve their privacy. Testamentary instructions to burn diaries or other personal papers, however valuable given the celebrity of the testator, find their purchase in this way.¹⁵⁷ Alternatively, some testators' sense of ownership could cause them to resist the appropria-

155. See *supra* notes 86-93 and accompanying text. An early president of Yale College, Ezra Stiles, had planned to bequeath funds for a fifty-foot monument to himself, "somewhat in Resemblance of the Ancyran Marble of Augustus Caesar." See EDMUND S. MORGAN, *THE GENTLE PURITAN* 164 (1962). Eventually he thought better of it. See *id.* at 163-65. Conceivably, through this sort of conspicuous consumption at death, a testator seeks more precisely to be remembered as a person of means. Whether the latter strategy holds the promise of success is another matter. The rich are able to draw social distinctions by their wasteful opulence precisely because they, and they alone, can afford it. This exclusivity is lessened in connection with the dead, and so any effort on their part to inspire awe (forget envy!) through testamentary ostentation is more problematic. See *MacKintosh's Judicial Factor v. Lord Advocate*, 1935 Sess. Cas. 406, 411 (Scot.) (assessing grandiose burial project: "It is no doubt impossible to look at her plan for the realisation of such a project without a smile."); *M'Caig's Trustees v. Kirk-Session of United Free Church*, 1915 Sess. Cas. 426, 438 (Scot.), quoted *supra* note 90.

156. In one recent instance, an unmarried testator left her entire estate of \$500,000 for the support (including an apartment and full-time caretaker) of her pet cat, "Tinker," identified in the will as her "best friend and companion." *Kitty's Life Is the Cat's Meow After He Inherits \$500,000*, L.A. TIMES, Jan. 9, 1994, at 7. As an acquaintance reported, "This cat was [the testator's] life." *Id.*; see Barbara W. Schwartz, *Estate Planning for Animals*, 113 TR. & EST. 376 (1974); *Wills of the Month*, 108 TR. & EST. 321 (1969); *Wills of the Month*, 113 TR. & EST. 384 (1974). Such bonds could even extend to other forms of inanimate property. In finding "extravagant and unreasonable" a testator's bequest of her entire estate for the care of her grave, the Surrogate's Court of New York paid no regard to the circumstance that the testator had lived her entire adult life in a house on the premises of the cemetery in question, and that she seldom ventured outside it. See *In re Turk's Will*, 221 N.Y.S. 225, 227-28, 235 (Sur. Ct. 1927); cf. *MacKintosh's Judicial Factor*, 1935 Sess. Cas. at 411 (Scot.) (holding reasonable, in light of testator's circumstances, grandiose burial project).

157. Thus, for example, the will of the late Jacqueline Susann, author of "Valley of the Dolls," called upon her executor to destroy her diary "so that its contents would never become public and embarrass those mentioned within it." *Tax Report*, WALL ST. J., Aug. 29, 1979, at A1. The executor complied, although the IRS subsequently valued the diary at \$3.8 million as a literary property and billed the estate accordingly. See *id.* A famous request of this sort was made by Franz Kafka, though in his case a more complex psychology (or psychosis) appears to have been at work. See FRANZ KAFKA, *THE TRIAL* 326-35 (Modern Library ed. 1956) (1925). For still another example from classical times, see BROOKS OTIS, *VIRGIL* 1 (1964) (recounting Virgil's instructions for burning his epic poem, *The Aeneid*, upon his death).

tion of that which is uniquely theirs. Psychologists have found that persons sometimes identify strongly with items of their property, as we have seen.¹⁵⁸ This depth of attachment may prompt testators to take steps designed to ensure that their property is cared for after they are gone¹⁵⁹ – or perhaps to take steps leading in another direction. One observed manifestation of an owner's connection to her property is the anxiety induced by its involuntary loss, especially by theft. Studies reveal that the experience can be acutely traumatic.¹⁶⁰ Yet, death too involves an involuntary taking! The thought that cherished property will fall into someone else's hands – at least in the absence of loved ones whose hands the testator can look upon metaphysically as her own – may strike her as a personal violation.¹⁶¹ Faced with the prospect of imminent dispossession, some owners have been known to destroy their property before they will part with it.¹⁶² The same impulse could move some testators: Faced with the robbery of their lives, destruction of prized possessions may offer real utility.¹⁶³ Accordingly, those courts that have tested the capriciousness of a purpose bequest by asking whether the testator during her

158. See *supra* note 94 and accompanying text.

159. See *supra* notes 95-97 and accompanying text.

160. See DITTMAR, *supra* note 76, at 46-47 (surveying psychological literature); Belk, *supra* note 94, at 142-44.

161. Whence perhaps the occasional qualification of a bequest of a home to the surviving spouse "so long as she does not re-marry." JANET FINCH ET AL., *WILLS, INHERITANCE, AND FAMILIES* 106-08 (1996).

162. For example, some Japanese-Americans facing internment during World War II preferred to ruin their property rather than relinquish it to profiteers. See AUDRIE GIRDNER & ANNE LOFTIS, *THE GREAT BETRAYAL* 112-13 (1969).

163. Provisions for the destruction of property, once again, have usually involved the types of items with which testators are most likely to form emotional attachments: homes and, in at least one instance, pet animals. See *supra* note 140; Capers Estate, 34 Pa. D. & C.2d 121, 133-34 (Orphans' Ct. 1964). Rather than destroy property per se, some modern testators – following ancient practice – have endeavored literally to take cherished property with them. For one who sought to be buried with her jewelry, see Meksras Estate, 63 Pa. D. & C.2d 371, 371 (Orphans' Ct. 1974). The court in *Meksras* held this provision void on the ground that it would tend to incite grave-robbery, see *id.* at 373, but in another unreported Texas case, the court gave effect to a testator's instruction that she be buried seated in her Ferrari sports car; this instruction (involving, implicitly, no threat of grave-robbery) the court deemed "unusual, but not illegal." *Notes on People*, N.Y. TIMES, Apr. 13, 1977, at C2. The Texas scenario has lately been reenacted in an offbeat television commercial for Infiniti automobiles, parodying drivers' strong attachment to the company's products; in the commercial, it is unclear whether survivors are mourning the burial of the car or its occupant. Some testators may employ yet another strategy to do away with property following their deaths: They may leave instructions that it be broken apart, so that it will no longer possess, in the testator's view, its original character – hence, the contents of a home could be liquidated, thereby converting it into a (mere) house. For a related discussion, see Janet Finch & Lynn Hayes, *Inheritance, Death and the Concept of the Home*, 28 SOCIOLOGY 417, 428-31 (1994).

lifetime would have dealt with the property in the same manner may well have missed the point.¹⁶⁴ In this case, *death itself is the event that triggers the benefit of the prescribed use*, be it the preservation of a testator's privacy or her material integrity. At least one court has seemingly bowed to this logic, upholding a testamentary instruction to raze a home on (more or less) this basis.¹⁶⁵

In short, a testator's motives for "capricious" purpose bequests may well prove substantial after all — no less so than those underlying other ones of the "normal" variety. What seems a resentable waste of resources to survivors could mean much to the testator psychologically and cannot blithely be dismissed as inconsequential to her. In those instances where testators seek out professional counsel, purpose bequests are especially unlikely to follow from frivolity. Part of the estate planner's fiduciary responsibility is to sort out the testator's wishes, averting those that (upon consultation) she comes to recognize as improper or ill-advised.¹⁶⁶ Without counsel, the risk of careless will-making rises — as more than a few heirs have had occasion to learn. Still, the very unorthodoxy of this sort of bequest suggests that its author will have given the matter at least a modicum of thought. If defiance of convention requires efforts of concentration, then few testators will hatch an unnatural scheme of testation unless it actually suits their nature.¹⁶⁷

164. See *supra* note 148 and accompanying text.

165. See *National City Bank v. Case W. Reserve Univ.*, 369 N.E.2d 814, 816 (Ohio Prob. Ct. 1976), in which testimony showed that the testator had been troubled by the evolution of her neighborhood from a residential to a commercial district, had a "great affection" for her home, and wanted to ensure that it was not used for commercial purposes following her death. See *id.* The court concluded that "[w]hile her purpose and motive may have been impelled by sentiment, it did not thereby become a capricious or irrational act . . . [and] is not . . . contrary to public policy. . . ." *Id.* at 818. Yet even in that case, the house was not destroyed but instead granted by the court with restrictive covenants to a historical society. See *id.* at 819; *cf.* *Will of Pace*, 400 N.Y.S.2d 488, 493 (Sur. Ct. 1977) (refusing to give effect to testator's provision for demolition of his home, where his "intent was apparently to memorialize the property by having it remain vacant"). For an argument that personal endowments in homes should be taken into account in the law of takings and residential rent control, by analogy, see RADIN, *supra* note 94, at 72-97, 146-65; *cf.* William A. Fischel, *The Offer/Ask Disparity and Just Compensation for Takings: A Constitutional Choice Perspective*, 15 INT'L REV. L. & ECON. 187 (1995).

166. See *Rosser v. Prem*, 449 A.2d 461, 463 (Md. Ct. Spec. App. 1982) (concerning bequest for publication of book of dubious literary merits about which attorney-scrivener "testified that had he seen a copy of the book before drawing up the will he would have tried to discourage [the testator]"). On the fiduciary responsibilities of the attorney-scrivener in this respect, see JOHN R. PRICE, *PRICE ON CONTEMPORARY ESTATE PLANNING* § 1.9 (1992 & Supp. 1996). For anecdotal examples of attorneys playing this role in connection with bequests for charitable purposes, see ODENDAHL, *supra* note 80, at 214-17.

167. See, e.g., *In re Baeuchle's Will*, 82 N.Y.S.2d 371 (Sur. Ct. 1948), *aff'd*, 94 N.Y.S.2d 582, 583 (App. Div.) ("The former wills of this testatrix show that the disposition [to build an

All of this is not to say that bequests for capricious purposes must necessarily be countenanced. Courts can fall back on objective criteria of wastefulness as a litmus test of legal acceptability. The assertion that expenditures deemed wasteful are contrary to social welfare is normative and hence incontestable. Still, we can take lawmakers to task when they implement a norm inconsistently. In this regard, notice that no comparable rules regulate consumption by the super-rich: Sumptuary laws have long since departed the scene, and billionaires are free to deploy their inexhaustible resources in any manner that they please, however frivolous.¹⁶⁸ Whereas excise taxes on a few luxury items survive,¹⁶⁹ having apparently been premised on the assumption that these goods satisfy comparatively insignificant wants,¹⁷⁰ most such taxes disappeared decades ago, on the contrary subjective theory (still echoed by critics of the few remaining excise taxes) that "what constitutes a luxury . . . to one person, is not a luxury . . . to another person."¹⁷¹ If con-

elaborate mausoleum] made in the will here involved had been contemplated by her for a considerable period of time."), *aff'd mem.*, 93 N.E.2d 491 (N.Y. 1950).

168. The issue is so uncontroversial as to be ignored by latter-day political economists. Montesquieu defended sumptuary laws if crafted to ensure that the citizenry had "more of what it needs." CHARLES DE SECONDAT MONTESQUIEU, *THE SPIRIT OF THE LAWS* pt. 1, ch. 5 (Anne M. Cohler et al. eds. & trans., 1989) (1748). On the other hand, Adam Smith opposed such laws as unnecessary, see 1 ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 367 (Edwin Cannan ed., 1976) (1776), whereas the late nineteenth-century economist Alfred Marshall deemed them futile, see 1 ALFRED MARSHALL, *PRINCIPLES OF ECONOMICS* 136 (C.W. Guillebaud ed., 9th [variorum] ed. 1961) (1890). The German political economist Wilhelm Roscher agreed with both of these assessments. See 2 ROSCHER, *supra* note 150, §§ 234-36. For a general history of sumptuary legislation in Great Britain (which often served the very different purpose of reinforcing class divisions), see FRANCES E. BALDWIN, *SUMPTUARY LEGISLATION AND PERSONAL REGULATION IN ENGLAND* (1926).

169. The one surviving excise tax on luxuries covers automobiles. See I.R.C. § 4001 & note to ch. 31, subchapter A (West Supp. 1998). (A previous version of this tax had also covered boats, aircraft, jewelry and furs.) In addition, the Internal Revenue Code currently limits the deductibility of certain forms of luxury consumption as business expenses. See *id.* at §§ 162(a)(2), 274(m)(1), 280F.

170. See F.R. Nagle, *Can the U.S. Afford the Luxury Tax?*, 52 TAX NOTES 878, 880 (1991). Though opposed to sumptuary laws, see *supra* note 168, Adam Smith favored taxes on luxuries that contributed merely to "the indolence and vanity of the rich." 2 SMITH, *supra* note 168, at 246; see 2 *id.* at 368, 401.

171. ELY & HESS, *supra* note 150, at 144-45. For modern criticisms of luxury taxes, see BERRY, *supra* note 149, at 215-17; Nagle, *supra* note 170; Norman B. Ture, *Social Policy and Excise Taxes*, 40 TAX NOTES 737 (1988). *But cf.* Bagwell & Bernheim, *supra* note 75, at 352, 368-69 (arguing that luxury taxes constitute ideal sources of revenue, given that, at least in the presence of Veblen effects, they are nondistortionary); Yew-Kwang Ng, *Diamonds Are a Government's Best Friend: Burden-Free Taxes on Goods Valued for Their Values*, 77 AM. ECON. REV. 186 (1987) (same). For an early anticipation of this analysis, see JOHN RAE, *THE SOCIOLOGICAL THEORY OF CAPITAL* 294-96 (1905) (originally published in 1834 under the title *Statement of Some New Principles on the Subject of Political Economy*); see generally *id.* at 286-96.

sumer sovereignty reigns among the idle rich, then why treat differently the idle dead?¹⁷²

Still more to the point, freedom of testation is not otherwise cabined in by judicial evaluations of an estate plan's normality.¹⁷³ By tradition, courts have conducted their inquiry at a different level, filtering out abnormal wills by evaluating not the testator's sense, but rather her sensibility. In order to have the capacity to execute a will, a testator must possess a "sound mind" – that is, she must enjoy "sufficient mental ability to know . . . the natural objects of her bounty, to comprehend the kind and character of [her] property,"¹⁷⁴ and then in her testamentary deliberations "to form a rational judgment concerning them."¹⁷⁵ This rule functions indirectly to avoid capricious estate plans, by requiring that testators at least be able to appreciate what others would regard as just or natural.¹⁷⁶ It does not, however, require testators invariably to abide by conventional attitudes. Once a court has satisfied itself that a testator's mind is sound, "nothing can prevent him from making . . . a will . . . as eccentric, as injudicious, or as unjust as caprice, frivolity [or] revenge can dictate."¹⁷⁷ It follows that "a disposition of property,

172. If, however, lawmakers deemed sumptuary laws inexpedient *only* because they are difficult to police, *see supra* note 168, then an exception for testamentary spending could be warranted: Postmortem extravagance is far easier to curtail, because the testator's directives appear in a will (being a public document) and hence can be discovered and challenged by interested parties – unlike the potentially secret behavior of a live plutocrat minded to misspend.

173. Bequests to individual beneficiaries conditioned on actions that are merely capricious, not affirmatively harmful, may also be held void, however. *See Cast v. National Bank of Commerce Trust & Sav. Ass'n*, 183 N.W.2d 485, 489 (Neb. 1971); 1A SCOTT, *supra* note 4, § 62.14; *cf. Olin L. Browder, Jr., Illegal Conditions and Limitations: Miscellaneous Provisions*, 1 OKLA. L. REV. 237, 250-51 & n.64 (1948) (questioning this principle without analysis).

174. *Estate of Wrigley*, 433 N.E.2d 995, 1003 (Ill. App. Ct. 1982) (emphasis omitted).

175. *In re Estate of Congdon*, 309 N.W.2d 261, 266 (Minn. 1981) (quoting *In re Estate of Healy*, 68 N.W.2d 401, 403 (Minn. 1955)); *see MCGOVERNET AL.*, *supra* note 53, § 7.2, at 272-77. The rule has ancient common law origins. For a sixteenth-century discussion, *see HENRY SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLES* 34-42 (photo reprint 1978) (1590).

176. "[I]t would be socially undesirable to give [testamentary] power to one who is so deficient or unbalanced mentally that he does not appreciate the significance of the disposition. It is better to distribute the property according to intestate laws than according to the caprice of an unsound mind." THOMAS E. ATKINSON, *HANDBOOK OF THE LAW OF WILLS* 233 (2d ed. 1953).

177. *Schneider v. Vosburgh*, 106 N.W. 1129, 1130 (Mich. 1906). The point has been endlessly recapitulated: "A will may be contrary to the principles of justice and humanity, – its provisions may be shockingly unnatural . . . ; nevertheless, if it appears to have been made by a person . . . of a sound mind, the courts are bound to uphold it." *Middleditch v. Williams*, 17 A. 826, 827 (N.J. Prerog. Ct. 1889). And again: "The tests are mental capacity and free agency. When these exist the testator has the right . . . "to make an unreasonable, unjust, injudicious will. . . ." *Maurath v. Sickles*, 586 S.W.2d 723, 732 (Mo. Ct. App. 1979) (quoting

though ever so capricious or unreasonable, will not be avoided on that ground alone."¹⁷⁸

To be sure, the substance of an estate plan is admissible in a suit contesting testamentary capacity; in practice, the outcome can turn on circumstantial evidence of the plan's perceived reasonability.¹⁷⁹ And so it happens that in a good many cases, contestants have challenged wills containing personal purpose bequests under the sound-mind doctrine, often successfully.¹⁸⁰ In some cases, however, those challenges either are waived or fail.¹⁸¹ For lawmakers to posit an additional rule voiding purpose bequests that a court

Maddox v. Maddox, 21 S.W. 499, 502 (Mo. 1893), quoting in turn Boylan v. Meeker, 28 N.J.L. 276, 277 (1860). And again:

[I]t is one of our most fundamental legal principles that an individual has the right to dispose of his own property by gift or will as he sees fit; indeed this right is so much protected that a testator's direction will be enforced even though contrary to the general views of society . . . and however arbitrary, unwise, intolerant, discriminatory, or ignoble his exercise of that right may be. He is entitled to his idiosyncracies and even to his prejudices.

In re Estate of Girard, 127 A.2d 287, 290-91 (Pa. 1956), *rev'd on other grounds sub nom. Pennsylvania v. Board of Dirs. of City Trusts*, 353 U.S. 230 (1957).

178. *Calhoun v. Calhoun*, 290 S.E.2d 415, 418 (S.C. 1982) (citing *Farr v. Thompson*, 25 S.C.L. (Chev.) 15 (1839)).

179. Even some courts trumpeting the testator's freedom to make an injudicious will have hinted that this black-letter rule is not entirely unvarnished:

I do not mean to be understood as saying that the contents of the will may not often be very important evidence, as the product of [the testator's] mind, to show the state of that mind; the character of the stream near its source is often the best evidence of the condition of the fountain.

Boylan v. Meeker, 28 N.J.L. 276, 277 (1860). Commentators too have remarked judicial resistance to unnatural wills. See MCGOVERNET AL., *supra* note 53, § 7.6, at 292-94 & n.16; 3 PAGE, *supra* note 53, § 29.40, at 491; Lawrence M. Friedman, *The Law of the Living, the Law of the Dead: Property, Succession, and Society*, 1966 WIS. L. REV. 340, 358-59; Leslie, *supra* note 108.

180. See, e.g., *New England Trust Co. v. Folsom*, 167 N.E. 665, 665-66 (Mass. 1929); *In re Hill's Will*, 255 N.Y.S.2d 898, 900 (Sur. Ct. 1965) (remarking this strategy); Harry Hirschman, *Whimsies of Will-Makers*, 66 U.S. L. REV. 362, 365-66 (1932):

181. See, e.g., *Wilber v. Asbury Park Nat'l Bank & Trust Co.*, 59 A.2d 570, 584 (N.J. Ch. 1948) (finding that testator who bequeathed funds for publication of useless writings "was eccentric, egotistical, pompous, and had an exaggerated idea of his own importance," but possessed capacity), *aff'd sub nom. Wilber v. Owens*, 65 A.2d 843 (N.J. 1949); *In re Turk's Will*, 221 N.Y.S. 225, 228, 235 (Sur. Ct. 1927) (ruling that testator who bequeathed her entire estate for care of her grave was "eccentric and quarrelsome," but "[h]er oddity . . . was not shown to amount to insanity generally"); *In re Baeuchle's Will*, 82 N.Y.S.2d 371, 373 (Sur. Ct. 1948), *aff'd*, 94 N.Y.S.2d 582 (App. Div.), *aff'd mem.*, 93 N.E.2d 491 (N.Y. 1950); *M'Caig v. University of Glasgow*, 1907 Sess. Cas. 231, 239 (Scot.) (concluding that testator who bequeathed her estate for construction of statues depicting family members suffered from "a moral disease, though quite consistent with sanity").

deems capricious contradicts the sound-mind doctrine.¹⁸² And such a rule can also be said to contradict the public policy underlying that doctrine: One of the reasons lawmakers grant freedom of testation is to avail themselves of the testator's inside information into what will benefit her family (including, in this case, herself?), thereby circumventing costly judicial inquiries into these matters,¹⁸³ provided she possesses the mental wherewithal to put that informa-

182. In framing the modern prohibition against superstitious uses, neither courts, nor Restators, nor commentators have sought to reconcile their injunction against eccentricity with the sound-mind doctrine. In fact, hardly any reference appears to the doctrine at all. Its comparative significance has gone unaddressed for the reason that it has been overlooked. The sole American exception is a little-remarked case, *Snouffer v. Peoples Trust & Sav. Co.*, 212 N.E.2d 165 (Ind. App. 1965), where the court's recognition of the sound-mind doctrine led it to *reject* a challenge to a bequest of the remainder interest in the testator's residuary estate for the purpose of constructing a family mausoleum as being "capricious and wasteful." Said the court (contrary to *Restatement* doctrine):

[W]e do not have the authority, nor the duty, to . . . determine . . . the wisdom, efficiency, or economic value of testator's expressed desires. . . . The fact that a testator may make an unreasonable or unnatural disposition of his property is a proper matter to consider where his soundness of mind is in question but of itself it furnishes insufficient basis for a court to reject a will. In this matter there was no attack on . . . the testator's mental capacity.

Id. at 171-72. Several other (mainly older) cases, all involving allegedly excessive bequests for the construction and care of monuments and tombs, also took the position that bequests for purposes were valid so long as they were not affirmatively harmful to society, without explicit reference to the sound-mind doctrine. See *Clark v. Portland Burying Ground Ass'n*, 200 A.2d 468, 470 (Conn. 1964) (dicta); *Morrow v. Durant*, 118 N.W. 781, 784 (Iowa 1908) ("Whether it shall be regarded as selfish or not must depend upon the point of view. If it be so conceded, it determines nothing."); *Detwiller v. Hartman*, 37 N.J. Eq. 347, 352-53 (1883) ("[T]his court manifestly cannot deal with the provision as a violation of good taste, neither can it deal with it on the ground that it is a wasteful expenditure. As to that, too, the testator was the sole judge. . . . It stands on the same footing as an expensive funeral."); *In re Baeuchle's Will*, 82 N.Y.S.2d 371, 377 (Sur. Ct. 1948) ("It does not seem that the folly or wisdom of [the testator's] directions are the concern either of her kin or the court."), *aff'd*, 94 N.Y.S.2d 582 (App. Div.), *aff'd mem.*, 93 N.E.2d 491 (N.Y. 1950); *In re Getman's Will*, 291 N.Y.S.2d 395, 397, 401 (App. Div. 1968) ("[S]uch a gift is valid . . . even though in the minds of some persons it seems to be an improvident disposition."); *Ermans v. Hickman*, 19 N.Y. Sup. Ct. 425, 427 (1877) (dicta); *In re Boardman's Will*, 20 N.Y.S. 60, 61 (Sur. Ct. 1891) (dicta); *Bainbridge's Appeal*, 97 Pa. 482, 486 (1881) ("We will not consider the wisdom or the folly of this disposition."); *Kalbach's Estate*, 10 Pa. D. & C. 195, 198 (Orphans' Ct. 1927) ("[O]ur own views of the propriety of such a disposition would not dare interfere with . . . compliance."); *Estate of Smith*, 181 Pa. 109, 114-15 (1896); *In re Close's Estate*, 103 A. 822, 823 (Pa. 1918); *Mellick v. President and Guardians of the Asylum*, 37 Eng. Rep. 818, 820 (M.R. 1821); see also *Meksras Estate*, 63 Pa. D. & C.2d 371, 372 (Orphans' Ct. 1974) (dicta). One Scottish judge, however, saw no incompatibility between the capricious purpose rule and the sound-mind doctrine: "[T]he principle seems (if I may state it in a popular way) to be that, just as a mad person cannot make any will, so a sane person cannot make a mad will." *MacKintosh's Judicial Factor v. Lord Advocate*, 1935 Sess. Cas. 406, 410-11 (Scot.).

183. See *supra* text following note 69.

tion to good use. A testator in possession of a sound mind is assumed to have a sound reason for the estate plan she chooses, even if that reason fails to appear to an outsider peering in;¹⁸⁴ and this assumption spares us adjudicative expenses that we would just as soon avoid.

Several nondiscretionary limits on testamentary freedom do stand alongside the sound-mind doctrine, of course. Were lawmakers to substitute for a capriciousness standard specific tests for avoiding wasteful bequests – a rule barring destruction of property at death, for instance – they could block the stream of litigation unleashed by the vaguer existing rule.¹⁸⁵ Still, were lawmakers to undertake systematically to develop objective rules prohibiting purpose bequests that violate social norms, consistency demands that, with equal thoroughness, they distill testamentary prohibitions out of the mass of capricious bequests to persons, hitherto ratified despite that characterization.¹⁸⁶ To date, no such effort has ever been contemplated.

Again to summarize: The doctrine of superstitious uses should continue, though (arguendo) in a more lenient form. Courts should overturn bequests for purposes when they tend to the injury of society. Otherwise, capable

184. "That the will to others not having the means of knowing what the testator knows, not occupying his stand-point, not having lived his life, not having his secret affections and hates, may seem unreasonable, injudicious, and even unjust, is no reason why it should be declared the product of a diseased mind." *Boylan v. Meeker*, 28 N.J.L. 276, 277 (1860).

185. The Restators themselves confess that "[i]t is impossible to draw a clear line between purposes which are capricious and those which are not." RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1959); see *id.* § 374 cmt. m. In one Scottish case raising the question whether a bequest of £1000 to provide flowers for a grave was capricious, one judge opined that the purpose itself, as an act of self-piety, was capricious, two other judges opined that the purpose was reasonable but the sum was capricious, and a fourth judge opined that both the purpose and the sum were reasonable. See *Lindsay's Ex'r v. Forsyth*, 1940 Sess. Cas. 568 (Scot.). Apart from the costs of litigation encouraged by such a vague legal standard, some might take alarm at the judicial latitude that it creates – though what some see as arbitrary authority, others will look upon as laudable flexibility. At the other edge of the spectrum, similar qualms have been expressed by some scholars – and shrugged off by others – with regard to the haziness of the prevailing definition of a "charitable purpose." Cf., e.g., Norman Bentwich, *The Wilderness of Legal Charity*, 49 L.Q. REV. 520, 526-27 (1933); Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341, 1384 & *passim* (1995); Robert J. Lynn, *The Questionable Testamentary Gift to Charity: A Suggested Approach to Judicial Decisions*, 30 U. CHI. L. REV. 450, 468 (1963).

186. Bequests to persons never violate the norm against wasting property, but they can violate other norms, seemingly of comparable weight. Thus, for example, bequests to persons to be chosen by lot violate the norm against random division of property, whereas nonnominal bequests to persons who lack familial or social ties to the testator and about whose needs she has no knowledge violate the norm against arbitrary division of property. For examples of such estate plans, see MENCHIN, *supra* note 154, at 26 (mandating that beneficiary be chosen by toss of dice); *Man Left \$50,000 to Favorite Paperboy*, SAN DIEGO UNION-TRIB., June 28, 1998, at A9.

testators may reasonably be granted leave to craft the estate plans they reckon best calculated to their needs and circumstances, whether those plans have to do with persons or purposes.

B. *Subsidiary Issues*

Having concluded that bequests for purposes should in general be respected under our law, we proceed to the details of the rules that govern them. We face two issues here, which we shall examine seriatim. We begin with matters of duration – that is, the testator's power to prolong a bequest for a purpose for a space of time. We then turn to matters of process – that is, the legal apparatus the testator can employ to see that her purpose is carried out.

1. *Duration*

As under the common law, the *Restatement* distinguishes the maximum longevity of a purpose bequest depending upon how it is categorized. Bequests for charitable purposes can continue indefinitely, whereas those for noncharitable purposes are restricted to the period of the Rule Against Perpetuities.¹⁸⁷ Is this legal dichotomy a sound one?

First, to place the issue in context:¹⁸⁸ All else being equal, lawmakers have reason to permit testators to extend their dead hand control over property. This power increases the value of wealth to its owner, and so enhances her incentive to create it. Dead hand control can also indirectly benefit society when it is exercised to conserve the corpus of a bequest. Conservation of wealth serves the public interest by adding to the stock of investment capital available to society at any given time; that contributes, in turn, to economic growth.

Nonetheless, lawmakers have restricted the right of testators to bequeath among persons in perpetuity because this projection of testamentary power can simultaneously impair social interests. Bequests to persons as yet unborn are formulated in ignorance; to the extent that they mandate how a future beneficiary must use her inheritance, they may ill-suit her needs and preferences, yielding inefficiency. But even unrestricted allocations of property among the unborn, whose relative wants the testator cannot today anticipate, result in arbitrary distributions; these too are contrary to the overall welfare of subsequent generations. The Rule Against Perpetuities is precisely crafted with these concerns in mind. By restricting testamentary power to "lives in being," that is, to persons whom the testator knows, plus "twenty-one years,"

187. See *supra* note 51; SIMES & SMITH, *supra* note 29, §§ 1392, 1394.

188. The two paragraphs following are distilled from Hirsch & Wang, *supra* note 69, at 14-27, 36-38.

that is, the guardianship-period of the next generation, lawmakers ensure that distributive decisions are made only by an informed party. If the testator is uninformed, then she must relinquish that task to some later, living hand.

Bequests for purposes are structured differently, however, and hence call for a different analysis. Let us begin by considering bequests for social purposes in general. As pointed out earlier,¹⁸⁹ one of the interesting features of a bequest for a social purpose is that its restrictions on the use of property are less confining than they first appear. Because the takers are nameless, the subsidy that the bequest provides will find its way to those who prefer the form of consumption dictated. Thus, the beneficiaries of a bequest to subsidize fox hunting are those persons who happen to enjoy the sport and who would themselves choose to consume resources in this manner. Economically, then, a bequest for a social purpose should prove efficient. And it should also prove thoughtful, in that the benefit it creates follows from the testator's judgments, based on her life-experiences, concerning what forms of consumption merit subsidization.

Knowledge of beneficiaries is what makes bequests for persons judicious; but it evaporates abruptly after a single generation. Knowledge of society and its culture is what makes bequests for social purposes judicious; and this too is bound to erode as time wears on. In due course, a bequest for a social purpose may grow archaic, betraying a sort of moral eccentricity. And once too few persons would choose to use their own resources for the purpose subsidized by the bequest, it will become economically inefficient as well.¹⁹⁰

But just when these liabilities will set in cannot be predicted with any accuracy; no bright line marks the temporal horizon of a testator's cultural (unlike her familial) knowledge. Some aspects of human culture evolve at a snail's pace — a bequest for the general relief of poverty is as efficient and morally apt today as it was a millennium ago. Other (especially technology-

189. See *supra* notes 109-10 and accompanying text.

190. For some examples in connection with charitable bequests, see SIMES, *supra* note 114, at 121-23. For early discussions, see HOBHOUSE, *supra* note 80, at 7-12, 222-23 (observing that a testator "may have understood the wants of his own time as well as we understand those of our time, but he certainly did not understand the wants of our time so well"), and John Stuart Mill, who put his case rhetorically:

[S]hall we say it is supposed by . . . the Judges of the land, that a man cannot know what partition of his property among his descendants, thirty years hence, will be for the interest of the descendants themselves; but that he may know . . . how children may be best educated five hundred years hence; how the necessities of the poor may then be best provided for . . . and by what body of men it will be desirable that the people should be taught religion, to the end of time?

MILL, *supra* note 114, at 4-7, 13.

driven) aspects can change at a moment's notice.¹⁹¹ One thing is clear: The traditional Rule Against Perpetuities has no policy relevance whatsoever in this arena.¹⁹² To peg the duration of an ordinary bequest for persons to "lives in being" makes sense, given that the enduring thoughtfulness of the estate plan depends on the enduring existence of beneficiaries known to the testator. But cultural obsolescence is not tied to particular individuals' longevity; accordingly, lifespans do not afford a useful measure of the thoughtfulness of bequests for social purposes. That lawmakers nonetheless have determined the validity of bequests for noncharitable purposes by reference to the Rule Against Perpetuities illustrates the (alas, all too common) common-law phenomenon of history outshining policy – here, resulting in the extended application of a legal rule for no other reason than that it was glaringly evident in an adjoining segment of the legal landscape.¹⁹³

Given the unpredictability of obsolescence, the ideal rule appears to be a variable one – allowing a court to terminate a bequest for a social purpose once it is found inefficient (or, *arguendo*, merely anachronistic¹⁹⁴). The Restators assumed that the social benefits of bequests for charitable purposes constituted the justification for their prolongation, and they defined charity in precisely these terms.¹⁹⁵ Yet, so long as they retain their currency,

191. The upshot is that today one can become culturally disoriented even within one's *own* lifetime. *See generally* ALVIN TOFFLER, *FUTURE SHOCK* (1970).

192. But compare Professor Scott: "[T]he principle involved [in limiting the duration of trusts for noncharitable purposes] rests on the same public policy which underlies th[e] Rule [Against Perpetuities] and the period is the same as that of the Rule." AUSTIN WAKEMAN SCOTT, *SELECT CASES AND OTHER AUTHORITIES ON THE LAW OF TRUSTS* 281 n.2 (1st ed. 1919) (in the 1st ed. only).

193. For a further discussion, see Hirsch, *supra* note 6.

194. *See infra* note 203.

195. A bequest is charitable if it "promot[es] . . . purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment." RESTATEMENT (SECOND) OF TRUSTS § 374 (1959). Other commentators have offered similar assessments:

The gift to charity is permissible because it encourages the use of private funds for purposes commonly achieved by the expenditure of public funds. . . . Perpetual life of the charitable gift is justifiable on precisely the same basis – quasi-public funds are being devoted, or ultimately will be devoted, to a public purpose, and therefore the indefinite life of the charitable gift is an irrelevant consideration.

Lynn, *supra* note 131, at 1083; *see* BOGERT & BOGERT, *supra* note 53, § 351, at 514-15; SIMES, *supra* note 114, at 116; *cf.* RESTATEMENT OF PROPERTY § 398 cmt. (1944) (asserting that lawmakers have removed temporal restrictions on charitable bequests as inducement for testators to grant them). *But see* Evelyn Brody, *Institutional Dissonance in the Nonprofit Sector*, 41 VILL. L. REV. 433, 477, 494-95 (1996) (noting proposals to limit duration of charitable bequests); Allan D. Vestal, *Critical Evaluation of the Charitable Trust as a Giving Device*, 1957 WASH. U. L.Q. 195, 212-14 (same); *cf.* POSNER, *supra* note 126, § 18.5.

bequests for *any* social purpose will remain as efficient and coherent as a bequest for a person; it is their structural attributes, designating beneficiaries *by stereotype* and hence transcending personal familiarity, that renders them durably productive of private benefits, irrespective of any secondary public benefits they may generate. Absent the degradation of cultural knowledge, one finds no reason to discontinue them.¹⁹⁶ And, note well, that degradation is a malady to which bequests for charitable and noncharitable social purposes are in equal measure susceptible.

By tradition, however, only bequests for charitable purposes have been permitted to continue indefinitely, until they become impossible or impractical to effectuate. And, again within this limited category, lawmakers have gone further, allowing courts, if and when that day comes, to vary from – and hence to update – the purpose specified. This authority may be explicit, as in the case of bequests for indefinite charitable purposes.¹⁹⁷ But it may also be implicit. Under the so-called *cy pres* doctrine, a court can infer the testator's readiness to vary from the strict terms of a charitable bequest when it becomes obsolete and then can modify it to continue for a similar purpose no longer hampered by inefficiency.¹⁹⁸

196. The issue has aroused little scholarly commentary. Several British critics have urged that bequests for social purposes that are found to confer some substantial benefit to the public, whether strictly charitable or not, should be allowed to continue in perpetuity. See Geoffrey Cross, *Some Recent Developments in the Law of Charity*, 72 L.Q. REV. 187, 205-06 (1956); Nigel P. Gravells, *Public Purpose Trusts*, 40 MOD. L. REV. 397, 406-10, 418-19 (1977); see also Trevor C.W. Farrow, *The Limits of Charity: Redefining the Boundaries of Charitable Trust Law*, 13 EST. & TR. J. 306 (1994) (Canadian proposal). But others, both British and American, have sought to limit the life-span of a noncharitable purpose bequest, some advocating a period shorter than is allowed presently under the common law. See MAUDSLEY, *supra* note 134, at 178 (advocating twenty-one year limit, without analysis); 2 SCOTT, *supra* note 4, § 124.1, at 248 (stating, without analysis, that "[t]here is a clear policy against tying up property in this way for an indefinite period"); Dukeminier, *supra* note 131, at 1702, 1704 (suggesting twenty-one year limit on assumption that noncharitable purpose bequests are of "marginal public utility"); William F. Fratcher, *The Missouri Perpetuities Act*, 45 MO. L. REV. 240, 251-52 (1980) (suggesting same, without analysis); William F. Fratcher, *Bequests for Purposes*, 56 IOWA L. REV. 773, 801 (1971) (focusing on intent side of equation and concluding that testator ought to be able "to ensure the continuation, for at least a few years after his death, of an undertaking in which he is interested") [hereinafter Fratcher, *Bequests*]; Palmer, *supra* note 21, at 286-87 (favoring existing common law limit). For an early discussion, see George L. Clark, *Unenforcible Trusts and the Rule Against Perpetuities*, 10 MICH. L. REV. 31, 37-38 (1911).

197. Most of the great charitable foundations have taken this form. See Atkinson, *supra* note 72, at 1150.

198. See RESTATEMENT (SECOND) OF TRUSTS § 399 & cmt. m (1959). Though in theory the doctrine contemplates that a court will restrict its modification "as nearly as possible" to the testator's original purpose (*cy pres comme possible*), the Restators recognized that courts have come to adopt a more liberal approach, altering stated purposes more broadly within the parameters of a testator's "general charitable intention." See *id.* § 399 & cmts. b & d;

Not only have lawmakers unnecessarily limited bequests for noncharitable social purposes in their duration; they have also rendered them unnecessarily inflexible. Astonishingly, in many jurisdictions, an avowedly discretionary bequest for noncharitable purposes is void per se, even as bequests for defined noncharitable purposes are valid.¹⁹⁹ No cogent justification has ever been offered for this result.²⁰⁰ Furthermore, if a bequest for a defined noncharitable purpose becomes impossible or impractical to effectuate before it would terminate naturally, it simply fails; it cannot be modified to continue, because (we are told) the cy pres doctrine applies only to charitable gifts. Again, courts have failed to justify this doctrinal limitation – it is simply repeated, mantra-like, as a truism.²⁰¹ Yet, lawmakers rationalize the cy pres

cf. RESTATEMENT OF TRUSTS § 399 & cmt. c (1935). Hence, the doctrine has outgrown its name. But, in any event, a court must find that the testator had a general charitable intention – in other words, that she would have wished that the purpose be modified rather than fail – for the doctrine to be invoked. See RESTATEMENT (SECOND) OF TRUSTS § 399 & cmts. a & c (1959).

199. According to Professor Scott, this is the majority rule. See 2 SCOTT, *supra* note 4, § 123, at 224-25, 236-39. In fact, the cases seem fairly evenly divided. See *supra* note 62. Modern statutes in several states also give effect to bequests for indefinite noncharitable purposes. See Hirsch, *supra* note 6.

200. The rationale sometimes voiced is that public policy will not abide the "delegation" of a benefactor's testamentary power by virtue of the creation of a discretionary power. See *Adye v. Smith*, 44 Conn. 60, 67 (1876); *Bristol v. Bristol*, 5 A. 687, 691 (Conn. 1885); *Tilden v. Green*, 28 N.E. 880, 888 (N.Y. 1891). The argument has often appeared in more modern British opinions. See D.M. Gordon, *Delegation of Will-Making Power*, 69 L.Q. REV. 334 (1953). *But see In re Beatty's Will Trusts*, [1990] 1 W.L.R. 1503, 1509 (Ch.) (rejecting no-delegation principle in connection with bequests for persons). Quite inexplicably, these courts have gone out of their way to condemn what they ought to commend – control by a living hand – and what, indeed, they have abided for centuries under the law of charitable bequests, as well as the law of powers of appointment. The inconsistency between the delegation rationale and powers doctrine has been recognized by a number of scholars. See 2 SCOTT, *supra* note 4, § 123, at 232; Gordon, *supra*, at 334-35, 342, 345 (arguing, however, against right of delegation); Palmer, *supra* note 21, at 260; Scott, *Control*, *supra* note 50, at 540-41; Scott, *Trusts*, *supra* note 50, at 566-67, 571; Glanville L. Williams, *The Three Certainities*, 4 MOD. L. REV. 20, 21 (1940). The Restators explicitly rejected the delegation rationale. See RESTATEMENT (SECOND) OF TRUSTS § 123 cmt. d (1959).

201. See *In re Gonzalez*, 621 A.2d 94, 95 (N.J. Super. Ct. Ch. Div. 1992); *Grebenstein v. St. John's Evangelical Luth. Church*, 66 A.2d 461, 462 (N.J. Super. Ct. Ch. Div. 1949); *Martin v. North Hill Christian Church*, 412 N.E.2d 413, 415 (Ohio Ct. App. 1979); *Callin Estate*, 25 Pa. D. & C.2d 376, 381 (Orphans' Ct. 1961); *In re Essig's Estate*, 74 A.2d 787, 789 (Pa. Super. Ct. 1950); *In re Stephan's Estate*, 195 A. 653, 657 (Pa. Super. Ct. 1937); *Edwards v. DeSimone*, 252 A.2d 327, 332 (R.I. 1969); *Kelly v. Nichols*, 21 A. 906, 908 (R.I. 1891); *Foshee v. Republic Nat'l Bank*, 617 S.W.2d 675, 768-79 (Tex. 1981); *BOGERT & BOGERT*, *supra* note 53, § 431, at 99-100; *FISCH*, *supra* note 2, at 129-30; *FISCHET AL.*, *supra* note 28, § 573, at 433-34; 4A SCOTT, *supra* note 4, § 399, at 479; *cf.* *Security Trust Co. v. Willett*, 97 A.2d 112, 113 (Del. Ch. 1953) (suggesting, without ruling, that cy pres might be applied to cemetery trust, which "is in some respects akin to a charitable trust").

doctrine as an intent-effectuating rule of construction.²⁰² Rules of construction are supposed to operate whenever a testator would wish them to, not (merely) when she happens to be of a socially magnanimous frame of mind. Certainly, no other rule of construction found within the law of wills is held out to the testator as a reward for tailoring her estate plan in a manner lawmakers would prefer. In this respect, the confinement of the cy pres doctrine to charitable bequests is not only bad policy – it is anomalous policy besides.²⁰³

202. See, e.g., *Rohlf v. German Old People's Home*, 10 N.W.2d 686, 691 (Neb. 1943); *City of Keene v. Eastman*, 72 A. 213, 214 (N.H. 1909); 4A SCOTT, *supra* note 4, § 399, at 476.

203. A scholarly consensus appears to be forming in support of the view that the traditional cy pres doctrine is insufficiently intrusive to avoid obsolescence of charitable bequests and that it ought to be new-modelled, either to permit revision of a purpose in the face of undesirability, rather than literal uselessness, or to render any purpose subject to revision at the trustee's discretion after a set number of years has passed. Since the Rule Against Perpetuities already restricts future interests in persons when they are arbitrary, even though they involve no literal inefficiency, such an extension of the cy pres doctrine applicable to purposes appears to me to be thematic. For discussions, see 4A SCOTT, *supra* note 4, § 399.4, at 534-40; SIMES, *supra* note 114, at 132-40; Joseph A. DiClerico, Jr., *Cy Pres: A Proposal for Change*, 47 B.U.L. REV. 153, 166, 200 (1967); Alex M. Johnson, Jr. & Ross D. Taylor, *Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and the America's Cup Litigation*, 74 IOWA L. REV. 545, 566-86 (1989); Peter Luxton, *Cy-Près and the Ghost of Things that Might Have Been*, 1983 CONV. & PROP. LAW. 107, 115-18 (1983). For an early proposal, see Austin W. Scott, *Education and the Dead Hand*, 34 HARV. L. REV. 1, 16-19 (1920), and still earlier, see MILL, *supra* note 114, at 1, 19-20, 27-33 & *passim*. The *ne plus ultra* of these schemes is Professor Atkinson's suggestion that trustees be allowed to deviate at their discretion from any charitable purpose immediately upon creation of the trust. In effect, then, only charitable trusts for indefinite purposes would be permissible. See Atkinson, *supra* note 72, at 1143-44, 1155-56. Again, for an early proposal along these lines, see HOBHOUSE, *supra* note 80, at 120-22, 229-30, 235-37. Such an approach pays insufficient regard to the strong intent a testator may have to accomplish some fixed purpose, see *supra* notes 72-89, 101-03 and accompanying text, and could prompt the testator *ex ante* to refrain from making charitable bequests, *cf.* Atkinson, *supra* note 72, at 1121-34; HOBHOUSE, *supra* note 80, at 122-23, 224-27; MCGOVERNET AL., *supra* note 53, § 8.6, at 334; MILL, *supra* note 114, at 4, 29; 4A SCOTT, *supra* note 4, § 399.4, at 536-37. Other critics proposing to allow trustees similar discretion would nonetheless adhere strictly to the testator's wishes in the first few years after her death, the period of time during which – given its immediacy for her – she has the greatest interest in ensuring that her intent is effectuated. See MILL, *supra* note 114, at 4, 13, 19, 27, 29; SIMES, *supra* note 114, at 139; Luxton, *supra*, at 118; see also Scott, *supra*, at 17 (anticipating and dissenting from Atkinson's proposal). A too-liberal cy pres power could prove counterproductive even from the perspective of society's welfare. If the testator's social purpose is of the paternalistic-cum-experimental variety, see *supra* note 113 and accompanying text, wielders of a broader cy pres power might terminate the experiment prematurely; in order to succeed, a paternalistic testator – like any other paternalist – must stand in a position to impose her will at least for a trial period. But whatever approach is thought best, the point to be emphasized here is that the problem of purpose-obsolescence arises in connection with bequests for social purposes of all sorts, and so the solution chosen, be it orthodox cy pres or some reformed variant of the doctrine, ought to apply across the board, not merely to charitable

When we turn to bequests for personal purposes, the problem of anachronism fails to arise at all – the only person who derives benefits from the bequest is the testator herself, and all of these she gleans initially, from the psychological anticipation of postmortem consumption. Here, changing circumstances, whether familial or culture, are inconsequential: From the unique perspective of *this* beneficiary, the world is frozen in time, and unfolding events affect neither the efficiency nor the coherence of the bequest.

Challenges to the extended validity of bequests for personal purposes can only be framed in terms of comparative welfare. We have already observed that bequests for personal purposes can concern a testator greatly.²⁰⁴ One may, however, posit that most of the testator's concern is focused on the years immediately following her death, when the social world she inhabited and cared about still exists.²⁰⁵ Just as individuals tend to discount the value of future consumption during life,²⁰⁶ so may this tendency extend to any spending that might follow death – and if the marginal value of consumption diminishes over time, then eventually, at some limit, the comparative welfare of persons who would consume here and now becomes too conspicuous to ignore.

The assumption that temporal discounting persists postmortem may, however, oversimplify testamentary psychology. Quite possibly, a discontinuity looms here: Granting that the marginal utility of consumption drops as a consequence of *anno domini*, the prospect of *perpetual* consumption can nonetheless hold a special allure for the testator, because immortality (after a fashion) is greater than the sum of its temporal parts.²⁰⁷ Hence, the opportunity to engage in eternal postmortem consumption can still afford testators substantial satisfaction, meeting a psychological need that could well be universal, however rarely testators choose this particular outlet for its realization.

And here again, we also face the difficulty that lawmakers cannot coerce testators to be generous.²⁰⁸ Confronted with a temporal barrier to bequests for protracted personal purposes, the selfish testator will choose simply to con-

bequests. Once that is the case, the argument that bequests for noncharitable purposes have to be limited temporally in order to avoid obsolescence loses its analytic force.

204. See *supra* text accompanying notes 90-100.

205. See *Mellick v. President and Guardians of the Asylum*, 37 Eng. Rep. 818, 820 (M.R. 1821) (questioning whether testator would wish to expend funds for monument to his memory if its construction were delayed to a time when he was already forgotten).

206. In fact, cognitive studies suggest that lifetime discounting is often irrationally great in light of the interest rate in the economy, a phenomenon known as myopia. See *supra* note 129 and accompanying text.

207. See *supra* notes 86-87 and accompanying text. For an earlier speculation along these lines, see Friedman, *supra* note 88, at 548.

208. See *supra* note 126 and accompanying text.

sume her wealth with greater dispatch, either during her lifetime or within whatever postmortem window of opportunity lawmakers allow her. Thus, if denied the right to set aside in perpetuity a fund for the care of her grave-site, for example, a testator could simply devote that same fund to the construction of a sturdier, more enduring mausoleum initially.²⁰⁹ If the choice at hand is (once again) not interpersonal, but intertemporal – in this case, a choice between consumption concentrated immediately after, or spread out after, death – then society's interests are better served by encouraging the testator to prolong the process. That way the corpus is conserved and remains a source of investment capital.

On this logic, bequests for personal purposes should be valid *per se*, even in perpetuity, so long as they remain possible to effectuate.²¹⁰ Once they are not, the *cy pres* doctrine again appears applicable as an intent-effectuating rule of construction, as pertinent here as in the case of any other bequest.

And so we may conclude that bequests for purposes of all sorts – charitable and noncharitable, social and personal – could sensibly be merged into a single durational formula, namely, the one presently applied to charitable bequests.

2. Process

When we turn to the process whereby bequests for purposes can be effected, we encounter a second line of cleavage dividing bequests for charitable and noncharitable purposes. Bequests for charitable purposes can take the trust form, as the testator intended; these are specifically enforceable in equity by the state attorney general.²¹¹ Bequests for noncharitable purposes, however, are relegated to the honorary trust form, leaving the honorary trustee at liberty to perform or to terminate the interest and distribute the corpus to residuary legatees or heirs whenever she pleases.²¹²

What sense is there in this dichotomy? American courts and commentators have typically regarded the honorary trust as a *pis aller*: Lacking benefi-

209. Cf. John A. Andrews, *Gifts to Purposes and Institutions*, 29 CONV. & PROP. LAW. (n.s.) 165, 168-69, 174 (1965) (arguing that removal of existing durational restraints would "serve[] only to eternalise the results of the testators' posthumous vanity").

210. This result is reached under modern statutes in well over half the states, permitting the creation of perpetual trusts for a specific personal purpose, the care of graves. For a fairly up-to-date tally, see 4A SCOTT, *supra* note 4, at 236 n.13; see also Hirsch, *supra* note 6; *infra* note 283. Once again, note well that tax policy forms a distinct question: If they so chose, lawmakers could subject perpetual purpose trusts to continuing, periodic estate taxation.

211. See *supra* note 43. Bequests can also be made directly to charitable corporations, but these serve as quasi-trustees, and the attorney general again has supervisory authority. See 4A SCOTT, *supra* note 4, §348.1.

212. See *supra* notes 46-63 and accompanying text.

ciaries with equitable standing to enforce the bequest, an honorary trust "give[s] effect to [the testator's intent] so far as is possible."²¹³ As in Great Britain, the American approach takes the beneficiary principle for granted,²¹⁴ it simply adds a remedial corollary, reforming an "intended trust"²¹⁵ for a noncharitable purpose into a power – the interest that remains once the element of equitable enforceability is removed.²¹⁶

At one level, this result is commendable: Surely, as Professor Scott – and Ames before him – reasoned, the testator will prefer to create a power when the alternative under the beneficiary principle is outright failure of the bequest for impossibility.²¹⁷ But at another level, this way of thinking is still too rigid, for the beneficiary principle is itself empty of substance.

213. Lyon Estate, 67 Pa. D. & C.2d 474, 478 (Orphans' Ct. 1974); see, e.g., J.H.C. MORRIS & W. BARTON LEACH, THE RULE AGAINST PERPETUITIES 307 (1st ed. 1956) (in the 1st ed. only) ("But if the whole of the testator's intention cannot be effectuated, that is no reason for preventing the fulfillment of so much of his intention as can be carried out.").

214. In fact, the beneficiary principle is enshrined in the *Restatement*: "A trust is not created unless there is a beneficiary . . ." RESTATEMENT (SECOND) OF TRUSTS § 112 (1959); see also *id.* §§ 112 cmts. g & h, 124 cmt. c. But even so, the *Restatement* does not apply the principle comprehensively. See *infra* note 273 and accompanying text.

215. RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. c (1959).

216. Curiously, the Restators fail to address directly the case where a testator initially intends to create a *power* for a purpose, but the effectiveness of this device has to be implicit: A law permitting testators to create a power only by intending a trust would be worthy of Lewis Carroll. It seems the Restators of Trust felt that any discussion of intended powers for purposes lay beyond their doctrinal jurisdiction. See Austin W. Scott, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 1266, 1267 (1931). But unfortunately, the Restators of Property, in whose province powers lay, failed to leap into the breach. The *Restatement of Property* includes only "persons" within its definition of the objects of a power of appointment. See RESTATEMENT OF PROPERTY § 319(3) (1944); RESTATEMENT (SECOND) OF PROPERTY § 11.2(3) (1983). On powers for purposes, see also *supra* notes 25 and 38.

217. See 2 SCOTT, *supra* note 4, § 124, at 242-44; Ames, *supra* note 55, at 395-96, quoted *supra* in text accompanying note 57. Honorary trust doctrine was thus a harbinger (along with dependent relative revocation) of the modern trend toward judicial intervention to correct flawed estate plans. For the traditional anticurative position, see ATKINSON, *supra* note 176, at 277; 1 PAGE, *supra* note 53, § 13.6. For an early case expressly invalidating a trust for a noncharitable purpose on this traditional basis, though characterizing the outcome as "a matter of regret," see *McHugh v. McCole*, 72 N.W. 631, 636 (Wis. 1897). For the modern curative perspective, see RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS §§ 12.1, 12.2 (Tentative Draft No. 1, 1995) (advocating reform of wills that include mistakes of law); see also RESTATEMENT (SECOND) OF PROPERTY § 34.7 (1983) (advocating correction of mistakes of execution); UNIF. PROBATE CODE § 2-503 (amended 1993) (advocating correction of mistakes of formalization); *id.* § 2-903 (advocating correction of mistaken violations of Rule Against Perpetuities). But see *infra* note 222 (noting arbitrary limitations on remedial doctrine). Most of the debate concerning honorary trust doctrine has revolved around this issue – and hence implicitly accepts the beneficiary principle as a given. See GEORGE G. BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 166 (1st ed. 1951) (fully elaborated in the 1st ed. only); ALBERT M.

Students of a historical bent will notice that the latter-day honorary trust has an atavistic flavor. Wanting a legal obligor, the honorary trustee incurs merely a moral responsibility, "one binding the conscience of the [honorary] trustee."²¹⁸ Once upon a time, this conception underlay the whole category of trust, which also lacked a legal mechanism of enforcement; barring that, courts could only say that "the feoffee is obligated in conscience to perform it."²¹⁹ Under pressure for relief, Chancery, as the court of conscience, began to enforce trusts during the medieval period.²²⁰ Soon enough, responsibilities hitherto conscientious had become compulsory. The same was true of trusts for charitable purposes, as we have seen.²²¹ To deny the effectiveness of an intended trust for a noncharitable purpose by reciting the formalistic beneficiary principle – a trust is not a trust unless its trustee owes obligations – is simply to beg the question of what (if any) obligations we ought to create. Beggars *can* be choosers, however. If lawmakers discover reasons to enforce trusts for noncharitable purposes, then, rest assured, ways and means can once again be found.²²² The Restators decided to reform the intended trust; they might instead have reformed *the law*, to make the intended trust possible.

KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS § 660, at 759 (1920); MORRIS & LEACH, *supra* note 213, at 306-11; Gray, *supra* note 57, at 512-15; Leigh, *supra* note 132, at 133-34; Scott, *Control*, *supra* note 50, at 540-42; L.A. Sheridan, *Purpose Trusts and Powers*, 4 U.W. AUSTL. L. REV. 235, 240-44 (1958); Sheridan, *supra* note 25, at 220, 231-32; Charles Sweet, *Restraints on Alienation* (pt. 2), 33 L.Q. REV. 342, 360-62 (1917); Note, *Private Trusts for Indefinite Beneficiaries*, 45 YALE L.J. 1515, 1518-19 (1936).

218. *In re Searight's Estate*, 95 N.E.2d 779, 781 (Ohio Ct. App. 1950).

219. DeVine, *supra* note 6, at 318-19 (quoting *Re Lord Dacre of the South* (dec'd) (1535), *Spelman's Reports*, vol. 1, 93 Seld. Soc. 228 (1977)). "During this period, then, uses were mere honorary obligations." 1 SCOTT, *supra* note 4, § 1.3, at 13.

220. See 1 SCOTT, *supra* note 4, § 1.4, at 14-15; DeVine, *supra* note 7, at 338-50.

221. See *supra* notes 7-9 and accompanying text.

222. At still another level, the *Restatement* can be criticized for administering its curative medicine arbitrarily. An instructive comparison can be drawn between the problem of an intended trust for a purpose and an intended trust including limitations as to use, where the sole beneficiary is also named as the sole trustee. In such a case, the trustee once again owes enforceable duties to no one and so, under current law, the trust cannot be carried out as planned. The evident remedial solution in the second case is for the court to name a substitute trustee. Yet, under the *Restatement* the limitation as to use simply fails for impossibility, and the trust beneficiary receives the corpus free of trust. See RESTATEMENT (SECOND) OF TRUSTS § 99(5) & cmt. e, § 115(5) (1959); 2 SCOTT, *supra* note 4, § 99. If unenforceable trusts for purposes are worthy of reform, then one would suppose that unenforceable trusts for persons merit the same consideration. Indeed, this principle could be extended in other ways: Should not a bequest *outright* to an animal also be reformed into an honorary trust for its care? Under current law, a bequest *outright* to an animal, not being *sui juris*, fails for impossibility. See 1 THOMAS JARMAN, A TREATISE ON WILLS 116 (Raymond Jennings ed., 8th ed. 1951) (1st ed. 1841-43); *In re Estate of Russell*, 444 P.2d 353, 363-64 (Cal. 1968); see also *Richberg v. Robbins*, 228 S.W.2d 1019, 1020-21 (Tenn. Ct. App. 1950) (holding that where testator left his

Surely, none of this comes as a revelation. Though the *Restatement of Trusts* is shrouded in formalism,²²³ its architect framed the issue rather differently in his parallel treatise. "It is arguable that since the court has control over the administration of the trust it can act on its own initiative in directing the carrying out of the purpose of the testator," Professor Scott allowed; "The question in its final analysis is one of policy rather than technique."²²⁴ Having peeled away the formalistic husk of the issue, Scott seemed poised to probe the kernels beneath. But, anticlimactically, all he had to add was a curt intuition, corresponding with his prior adherence to the beneficiary principle: "It is submitted that it is not in accordance with public policy that a decedent should be permitted to control the disposition of property to this extent."²²⁵ However lofty his stature in the field, Scott's pronouncement on this occasion was bereft of analysis; we must remain chary of unsubstantiated claims, even by our leading lights.²²⁶ My own conclusion – which I do hope briefly to substantiate – is that Scott's submission was unsound: Bequests for purposes ought not to be categorically differentiated in respect of their enforceability.

Our starting point is the principle of intent-effectuation. All else being equal, lawmakers should give testators the estate plans they want,²²⁷ and we may safely assume that a testator who leaves a "trust" for a purpose wishes to make it enforceable, if possible. It would not do, then, to defend the prevailing process distinction simply by averring that society has no stake in the enforcement of a noncharitable purpose bequest.²²⁸ The testator has a stake in the enforcement of every one of her bequests and hence, by extension, so

entire estate to his dog but also specified periodic sums "to be . . . spent for the dog's care," the question of whether testator intended outright bequest or honorary trust was ambiguous and required construction); *cf.* RESTATEMENT (SECOND) OF TRUSTS § 119 cmt. c (1959) (suggesting that bequest outright to unincorporated association will be reformed into trust for benefit of association). The *Restatement* also fails expressly to allow a court to reform a purpose bequest by reducing to a reasonable sum the amount allocated for the purpose. Under the *Restatement*, an oversized bequest for a purpose is simply void as against public policy. *See* RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1959). For cases, *see supra* note 140.

223. *See supra* text accompanying notes 46-50.

224. 2 SCOTT, *supra* note 4, § 124, at 246; *see id.* at 247 (pointing out that courts could indirectly enforce honorary trusts by replacing any trustees who withdrew their services).

225. *Id.* at 246; *cf.* 2 *id.* § 122, at 222 n.33 (taking opposite view with respect to trusts for indefinite classes of persons).

226. One is reminded of Justice Scalia's sprightly rebuke of his brethren for having indulged in "policy intuitions of a legislative character." *Dewsnup v. Timm*, 502 U.S. 410, 422 (1992) (Scalia, J., dissenting).

227. *See supra* text following note 69.

228. This is the traditional justification for confining at least the Attorney General's standing to enforce bequests for purposes to the charitable category. *See supra* note 10 and accompanying text; *infra* note 265.

does society. Rather, we have to turn the question around: Is there any reason in public policy *not* to give enforceable effect to an honorary trust?

In practice, the distinction between the two alternatives may amount to little. When we get down to cases, honorary trustees probably can be counted on to carry out their duties as a matter of course.²²⁹ Still, examples of balky trustees do turn up in the reports.²³⁰ Perhaps Scott's concern was that some living person should remain on hand to appraise both the immediate and continued viability of the designated purpose and to bring the trust to a close prematurely when that is appropriate. Otherwise, the trust could give rise to inefficiency.²³¹ But this responsibility (which, in any event, is pertinent only to bequests for defined social purposes, not indefinite or personal ones²³²) is better left to courts, which can exercise judgment more professionally and impartially.²³³ Courts already perform this function in connection with charitable trusts under the *cy pres* doctrine and could do so comprehensively if invested with expanded *cy pres* authority, as earlier proposed.²³⁴ Once that reform is in place, the trustee's power to terminate an honorary trust accomplishes nothing constructive,²³⁵ even as it raises the testator's

229. Maitland thought it well enough to provide mere precatory instructions to trusted friends for the performance of purposes. See MAITLAND, *supra* note 6, at 62-63; see also Fratcher, *Bequests*, *supra* note 196, at 785-86. Furthermore, if the testator names professional trustees, they have a reputational incentive to carry out honorary trusts.

230. See *Kingsley v. Montrose Cemetery Co.*, 26 N.E.2d 613, 616 (Ill. App. Ct. 1940); *Epstein Estate*, 47 Pa. D. & C.2d 239, 240 (Orphans' Ct. 1969); *Braig Estate*, 36 Pa. D. & C.2d 469, 471-73 (Orphans' Ct. 1965).

231. See *supra* note 190 and accompanying text.

232. See *supra* text following note 203.

233. If an honorary trustee receives compensation for her services, she has a mercenary incentive to keep the trust going, whereas if she receives no compensation, she has the opposite incentive. See *infra* text accompanying notes 241-42. Though the problem of obsolescence pertains only to bequests for social purposes, an initial "capriciousness" standard may be applied to bequests for personal purposes as well; but this has always been assessed by courts, not trustees. See *supra* notes 139-40 and accompanying text.

234. See *supra* notes 201-03 and accompanying text. Courts also perform this function in connection with use-restricted trusts for persons in a few states. See *Hirsch & Wang*, *supra* note 69, at 51 n.205.

235. Compare Professor Atkinson, who would rather move in the opposite direction, shifting *cy pres* power over charitable trusts from courts to trustees. See Atkinson, *supra* note 72, at 1115-16. Under Atkinson's proposal, then, charitable trusts would take on some of the existing attributes of honorary trusts. See *id.* at 1142-44. In defense of this position, Atkinson asserts that "the absence of an objective definition of charitable efficiency" (i.e., the relative social welfare of alternative charitable purposes) governing the application of *cy pres* results in judicial judgments imposed "arbitrarily" — whereas, "trustees would not need such a definition to guide their actions. They could make their own judgments as to efficiency based on the donors' wishes; on universal, societal standards; or on their own standards." *Id.* at 1143. But how can Atkinson then conclude that "this approach would avert the primary problem of

"error costs."²³⁶

Indeed, it could do worse than that. The concern sometimes voiced by courts and commentators about honorary trust process is that it is insufficiently supervised; without beneficiaries who have standing to safeguard the bequest, an honorary trustee may yield to temptation and misappropriate the funds.²³⁷ This appears a false alarm: The fact that the trustee cannot be enjoined to carry out an honorary trust shifts standing to residuary legatees or heirs to petition for a resulting trust in the event of refusal or malfeasance.²³⁸ These alternative beneficiaries have precisely the same mercenary incentive to monitor an honorary trustee's activities in pursuit of nonperformance as would direct beneficiaries of a like-sized enforceable trust in pursuit of performance.²³⁹ So long as honorary trustees have a duty to account, their

judicial control"? *Id.* Is not the prospect of judgments by unfettered trustees equally, if not more, problematic? Indeed, in the context of noncharitable trusts, we have no assurance that the trustee will even be a professional, following professional standards of conduct. Atkinson's proposal seems premised on the empirical assumption that most charitable trustees fall into that category. *See id.* at 1127-28, 1141-42, 1145.

236. That is to say, the risk that she will misread the honorary trustee's willingness to carry out the purpose as prescribed.

237. "[I]t is not possible to contemplate with equanimity the creation of large funds devoted to non-charitable purposes which no court and no department of State can control, or, in the case of maladministration, reform." *In re Astor's Settlement Trusts*, [1952] 1 All E.R. 1067, 1071, 1074 (Ch.); *see also* BOGERT & BOGERT, *supra* note 53, § 166, at 165; L. McKay, *Trusts for Purposes – Another View*, 37 CONV. & PROP. LAW. (n.s.) 420, 423, 430-32, 435 (1973). *But cf.* P.A. Lovell, *Non-Charitable Purpose Trusts – Further Reflections*, 34 CONV. & PROP. LAW. (n.s.) 77, 87-88 (1970) (asserting issue's insignificance: "The trustee must in fact be trusted," as in practice she is with respect to charitable trusts).

238. But compare the case where the honorary trustee selected to carry out a purpose is the alternative beneficiary. Here, no one else can challenge nonperformance of the purpose, and the case is structurally analogous to an ordinary trust for a person, where the named trustee and beneficiary are one and the same (and hence, once again, where no one can challenge nonperformance of the terms of the trust). Under trust law, the second construct fails and becomes an absolute bequest to the beneficiary. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 99(5) & cmt. e, 115(5) (1959). By analogy, the first construct should also fail under honorary trust law and become an absolute bequest to the alternative beneficiary. *See In re Renner's Estate*, 57 A.2d 836, 838 (Pa. 1948) (construing bequest "in trust" for purpose, with residuary legatee named as trustee, as outright gift to her with precatory instructions, in implicit recognition of structural flaw in estate plan). *Quære*, however, whether both of these constructs should be cured by allowing the court to name a substitute trustee. *See supra* note 222.

239. *See* MORRIS & LEACH, *supra* note 213, at 309 ("[T]his . . . provides a means of indirect enforcement which is almost as satisfactory as direct enforcement."); Harris, *supra* note 114, at 36-38. *But see* BOGERT & BOGERT, *supra* note 53, § 166, at 165 ("[T]he carrying out of the terms of the gift is not apt to be insured by intervention by the successors of the testator, since it is unlikely that they will have the inclination or ability to watch the trustee over a period of years and go to the trouble and expense of seeking to secure the property."); McKay, *supra* note 237, at 432, 435 ("[T]he courts . . . should not accept any beneficial interest as being

monitors' information costs will also remain symmetrical.²⁴⁰

But the real hazard built into the honorary trust vehicle is that it invites *collusion* between the honorary trustee and alternative beneficiaries. Quite apart from the social expediency of the testator's purpose, a trustee may refuse to carry out an honorary trust at the behest of grasping heirs. She can then divvy up the spoils with them under the table. Within the law of powers, this act, thwarting testamentary intent, constitutes a fraud on the power and hence is void.²⁴¹ But one still requires a human object of the power to police the other parties' activities. When the objects are purposes, nothing falls in the way of conspiracies of this sort, and the fraud may proceed in broad daylight.²⁴²

sufficient. . . . If the settlor has failed to confer upon some person an interest of such a character as to guarantee (as far as that is possible) that he will come to court to compel performance then the basic principle underlying the human beneficiary rule is breached."). One British court distinguished the case in which a testator creates contingent interests in alternative beneficiaries from one in which the alternative beneficiaries are already determined; in the former case, "I agree at once that, if the persons to take in remainder are unascertainable, the court is deprived of any means of controlling such a trust," but in the latter case, where "the persons taking the ultimate residue are ascertained, I do not feel the force of this objection. They are entitled to the estate except in so far as it has been devoted to the indicated purposes, . . . and they can come to the court and sue . . . the trustee for a breach of trust, and thus, though not themselves interested in the purposes, enable the court indirectly to control them." *In re Shaw*, [1957] 1 All E.R. 745, 758 (Ch.), *appeal dismissed per compromise*, [1958] 1 All E.R. 245 (C.A.); see *In re Astor's Settlement Trusts*, [1952] 1 All E.R. 1067, 1071-74 (Ch.); see also E.O. Walford, *Gifts to Non-Charitable Bodies*, 24 CONV. & PROP. LAW. (n.s.) 278, 282 (1960) (asserting incorrectly that if testator devotes her entire estate to a purpose, and hence names no residuary legatee, then there are no alternative beneficiaries at all; but in such case, testator's heirs constitute her alternative beneficiaries). When alternative beneficiaries of an honorary trust hold only contingent interests, it is conceivable that their individual stakes in the corpus are so attenuated that they could succumb collectively to "rational apathy" and fail to monitor the trust. (On this phenomenon in other contexts, see MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION* 9-16, 21-36, 163-65 & n.102 (Harvard Univ. Press 1971) (1965)). But this is no less true of contingent beneficiaries of an ordinary trust, which does not fail on that account. See 2 SCOTT, *supra* note 4, § 129, at 399.

240. Under current law, it must be said, the duty to account is unclear, see *infra* notes 247, 250 and accompanying text, though at least one court has assumed that the duty exists: The report would be filed with the court, "and notice of the filing of such report will be given to the testatrix's next of kin. Thus the performance of the trust duties will be adequately supervised." *Feinberg v. Feinberg*, 131 A.2d 658, 661 (Del. Ch. 1957); see *In re Dean*, 41 Ch. D. 552, 561-62 (1889) (finding duty to account but also ruling that bequest for purpose constituted trust); cf. Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 EMORY L.J. 295, 319 (1988) (suggesting that monitoring costs are higher for purpose trusts than for personal trusts).

241. See RESTATEMENT (SECOND) OF PROPERTY § 20.2 (1983).

242. This outcome violates an acknowledged public policy. See *In re Stoffel's Estate*, 145 A. 70, 71 (Pa. 1929) (invalidating family settlement agreement that would have overridden bequest to build monument); *Callin Estate*, 25 Pa. D. & C.2d 376, 381 (Orphans' Ct. 1961)

A secondary difficulty with the honorary trust device as presently implemented is its haziness as a legal category. The Restators insist that an honorary trust "is not a trust, as that term is used in the *Restatement* of this Subject."²⁴³ Rather, "it is more accurate to state that the trustee has a power than it is to state that he holds upon trust."²⁴⁴ Accurate, or *more* accurate? As presently conceived, honorary trusts are neither fish nor fowl, inhabiting "an obscure no-man's land between the 'trust' and the 'power'."²⁴⁵ As a consequence, one cannot say with any assurance what subsidiary rules apply to them.²⁴⁶

The questions that ensue are legion. Must honorary trustees fulfill (any of) the litany of fiduciary duties that regulate trust administration, but not powers?²⁴⁷ Likewise, do the limitations on investment and responsibilities of financial prudence pertinent to trusts (but not powers) apply to honorary trusts?²⁴⁸ The *Restatement* seems to suggest not,²⁴⁹ though no cases on point

(stating dictum that "the court will not permit the parties beneficially interested in the estate to arrange among themselves to defeat" bequest for monument). Compare the law of trusts, under which courts have held trustees liable to beneficiaries even if they distribute to them outright property subject to trust restrictions. Thus, for example, a trustee who would collude with the beneficiary of a spendthrift trust to accelerate distributions in violation of the distribution restrictions imposed by the testator might still face a subsequent suit by the beneficiary for later distributions due under the trust instrument. Accordingly, collusion between trustee and beneficiary is deterred. See 4 SCOTT, *supra* note 4, § 342.1.

243. RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. c (1959).

244. *Id.*

245. Leigh, *supra* note 132, at 133; see also Palmer, *supra* note 21, at 285 n.198 (stating that honorary trusts "are both trusts and powers"); Note, 73 L.Q. REV. 305, 306 (1957) ("combination of trust and power").

246. Compare Professor Bogert's somewhat cryptic assertion that "[t]he proposal for honorary trusts is an attempt to alter one of the basic ideas [i.e., compellability] of the trust. Such an alteration would mar the trust as an institution and confuse courts and lawyers as to its characteristics." BOGERT, *supra* note 217, § 166, at 112; see also A.K.R. Kiralfy, Note, 13 CONV. & PROP. LAW. (n.s.) 379, 379 (1949) ("[T]he law of trusts has become the involuntary receptacle of the anomalies of other branches of law. These anomalies stand in the way of any systematic law of trusts."). On the other hand, Professor Leigh sees no conceptual obstacle to the notion of an unenforceable trust. See Leigh, *supra* note 132, at 134-36.

247. These include the duty of loyalty, the duty not to delegate trust responsibilities (except, under the latest *Restatement*, as a prudent person would do so), the duty to segregate and earmark the corpus, and the duty to account. See RESTATEMENT (SECOND) OF TRUSTS §§ 169-85 (1959); RESTATEMENT (THIRD) OF TRUSTS §§ 170-71, 181 (1992). Unless clothed in a trust, a power does not impose fiduciary duties on the donee of the power. See RESTATEMENT (SECOND) OF PROPERTY § 11.1 cmt. a (1983). Still, the doctrine of fraud upon powers would seem a rough counterpart to the (singular) duty of loyalty. Compare *id.* § 20.2 with RESTATEMENT (THIRD) OF TRUSTS § 170(1) (1992).

248. See RESTATEMENT (THIRD) OF TRUSTS §§ 227-29 (1992).

249. "Since, however, the transferee has only a power and not a duty to apply the property,

have ever appeared.²⁵⁰ Whereas state statutes ensure that a testator can include in her will a bequest to fund a preexisting trust (known as a "pourover" bequest), can she fund a preexisting honorary trust in the same manner?²⁵¹ And what if the honorary trustee is not named, or predeceases the testator, or dies before the honorary trust terminates? Powers are deemed personal to their donees and expire automatically upon their deaths (or failures to be named), whereas under the law of trusts the court appoints a trustee if none is named, or if one dies before the trust terminates naturally.²⁵² Which rule applies to honorary trusts?²⁵³ (This question is doubly significant, for it also

and since in the Restatement of this Subject the term 'trust' connotes the existence of duties which will be enforced in the courts, it is more accurate to state that the trustee has a power . . ." RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. c (1959). Does the reference to "duties" include fiduciary duties of administration and investment as well as essential duties of performance and expenditure?

250. In only one reported case has a party been challenged and sanctioned for his actions in carrying out a noncharitable purpose designated in a will. In that case, however, the relevant party — who had claimed exorbitant charges for care of a dog — was still serving as executor to the estate, and hence was subject to fiduciary duties and court supervision in that capacity. See *In re Rogers*, 412 P.2d 710 (Ariz. 1966). In at least one other case, it was asserted that the honorary trustee would make an accounting to the court. See *Feinberg v. Feinberg*, 131 A.2d 658, 661 (Del. Ch. 1957).

251. A pourover bequest at common law is probably effective under the doctrine of incorporation by reference (although this may result, inefficiently, in a duplicate of the original vehicle rather than consolidation into the original vehicle) and, if the bequest funds an amendable vehicle, under the doctrine of acts of independent significance. But statutory law governing pourover bequests into trusts in most states goes further: (1) surely permitting consolidation into the "receptacle" trust, (2) giving effect to pourover bequests even when the receptacle trust is empty (hence when amendments to it have no independent significance), and (3) in some states, giving effect to pourover bequests even when the receptacle trust is executed after the will (and hence could not be incorporated by reference into the will). See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 364-67 (5th ed. 1995); IA SCOTT, *supra* note 4, § 54.3.

252. Compare RESTATEMENT (SECOND) OF PROPERTY § 11.2 cmt. b (1983) with RESTATEMENT (SECOND) OF TRUSTS §§ 33 & cmt. a, 101 & cmt. a (1959). In some states, antilapse statutes apply to donees of special powers of appointment, but these nowhere apply to trusts. See Susan F. French, *Application of Antilapse Statutes to Appointments Made by Will*, 53 WASH. L. REV. 405, 421-28 (1978).

253. The matter has arisen only rarely in the published reports. In one case where a will failed to name the trustee of an honorary trust to provide flowers for a grave, the cemetery company housing the grave was appointed trustee upon undescribed "adjudication." When the cemetery company declined to accept the honorary trust, the court without analysis proceeded to appoint one of the executors as honorary trustee. See *Epstein Estate*, 47 Pa. D. & C.2d 239, 239-40 (Orphans' Ct. 1967); see also *Richberg v. Robbins*, 228 S.W.2d 1019, 1020-21 (Tenn. Ct. App. 1950) (asserting in dicta that bequest, if construed as trust for care of animal rather than as outright gift to animal, would be valid, despite failure of bequest in question to name trustee). In another case where a bequest to build a cemetery monument failed specifically to entrust anyone with that responsibility, the court read the bequest as "a direction to her execu-

bears on the validity of bequests for purposes under rules limiting their duration.²⁵⁴) All of this, and more,²⁵⁵ the *Restatement* leaves up in the air.

tor." *In re Koppikus' Estate*, 81 P. 732, 732-33 (Cal. Ct. App. 1905). In another case, a bequest to provide for the care of an animal that neglected to name a trustee was expressly found valid on the traditional trust principle that "equity never allows a trust to fail for want of a trustee." But the court interpreted the bequest at issue as creating an enforceable (not honorary) trust under a state statute decreeing bequests for a noncharitable "humane" purpose as "valid." See *Willett v. Willett*, 247 S.W. 739, 739-41 (Ky. 1923). In another case, where a trust for a cemetery monument also came under a state statute rendering it charitable and hence enforceable, and the will named a predeceasing trustee, the court distinguished between specific instructions to spend all funds and discretionary instructions whereby some funds might be left over for alternative beneficiaries: A substitute trustee would be named in the first case but not in the second, on the theory that alternative beneficiaries have no property interest in the first case but do in the second. Had the trust not come under the statute, and hence been unenforceable, the court presumably would have ruled that alternative beneficiaries again had a residual property interest in the event of nonperformance by the trustee; hence, by analogy, no substitute trustee would have been named. See *In re Voorhis' Estate*, 27 N.Y.S.2d 818, 822-23 (Sur. Ct. 1941). Finally, dicta in one further case asserted, without analysis, that if an honorary trustee survived the testator but died before completing an honorary trust, no successor trustee would be named. See *In re Howard's Estate*, 25 N.Y.S. 1111, 1112 (Sur. Ct. 1893); see also 2 SCOTT, *supra* note 4, § 124, at 246-47 (favoring appointment of successors upon deaths of honorary trustees); SIMES & SMITH, *supra* note 29, § 1394, at 251-52 (assuming that successors will be named); cf. *In re Will of Ryan*, 60 I.L.T.R. 57, 59-60 (Ir. H. Ct. 1925) (asserting that substitute should be named for predeceasing trustee, but whether successor should be named for one who dies before completing honorary trust turns on inference of testamentary intent).

254. As Professor Simes pointed out, if honorary trustees are deemed to be impressed with a power personal to themselves, then no honorary trust can endure past their lives; hence, the branch of perpetuities doctrine requiring a bequest for a noncharitable purpose to terminate within a life in being plus twenty-one years is always satisfied, unless (as is, however, often the case) the testator selects a corporate fiduciary as honorary trustee. See SIMES & SMITH, *supra* note 29, § 1394, at 251-52. But the published cases have never turned on whether the will names a human or corporate trustee, and bequests for noncharitable purposes not limited in duration have almost always failed, even where human trustees are to serve. See, e.g., *Barton v. Parrott*, 495 N.E.2d 973, 974, 976 (Ohio Prob. Ct. 1984), *aff'd*, No. 85-CA-22, 1986 WL 6993 (Ohio Ct. App. June 11, 1986); *Kelly v. Nichols*, 21 A. 906, 907 (R.I. 1891). *But cf. In re Gibbons*, [1917] 1 Ir. R. 448, 452 (Ch.) (construing bequest for purpose as limited to lives of trustees, and hence not subject to Rule Against Perpetuities, though not because bequest was deemed equivalent to a special power). Accordingly, either courts have assumed implicitly that successor honorary trustees can be appointed, or the issue—never discussed in connection with durational validity in a published case—has not been raised by the parties and so has not come to courts' attention for analysis.

255. Do state laws regulating trustees' compensation cover trustees of honorary trusts? Absent express provision in the will, can an honorary trustee demand fees, as an ordinary trustee can, see RESTATEMENT (SECOND) OF TRUSTS § 242 (1959), whereas the donee of a power of appointment cannot? Assuming an honorary trust involves discretionary judgments by the honorary trustee, is there any redress for abuses of discretion, as there is with respect to an ordinary discretionary trust? See *id.* § 187. Under the *Restatement*, an honorary trust terminates if the trustee "refuses to apply [the corpus] to the designated purpose." *Id.* § 124 cmt. b. What constitutes such a refusal? Does an abuse of discretion suffice? Do trust principal-and-income rules, see RESTATEMENT (THIRD) OF TRUSTS §§ 240-41 (1992), apply to honorary trusts?

In a word, honorary trust doctrine needs a fountainhead.²⁵⁶ This could be either the law of powers, the law of trusts, or some precisely delineated admixture of the two. Were lawmakers prepared to give full effect to intended trusts for noncharitable purposes, the subsidiary-rule problem would of course disappear in the same stroke. But even if lawmakers insisted on treating honorary trusts as powers for purposes of performance, they still could treat them as trusts for purposes of administration.²⁵⁷ Because purpose bequests often involve long-term responsibilities of care or expenditure, principles of trust administration appear apropos.²⁵⁸ In those jurisdictions where the probate court exercises continuing administrative supervision over testamentary trusts,²⁵⁹ the beneficiary principle would present no obstacle, real or imagined, for the trustee accounts to the court in the ordinary course. And even in jurisdictions where the court does not (by tradition) receive an accounting—hence, where the honorary trustee would, in the absence of beneficiaries and barring law reform, have no one to account to—the thematic remedial solution is to require an accounting to the alternative beneficiaries, on pain of *termination* were the trustee to violate a fiduciary duty. This solution more closely approaches the testator's intent of a full-fledged trust than does absolving the honorary trustee from any fiduciary duties at all. Nor does the absence of beneficiaries bear on the testator's right to create an honorary trust with successor trustees, for courts have traditionally intervened to make these appointments.²⁶⁰ In short, the analogy of an honorary trust to a power of appointment need not extend beyond the province of enforceability, even if lawmakers continue to make obeisance to the beneficiary principle.²⁶¹

256. The same structural difficulty arises in all borderlands between legal categories. See Hirsch, *supra* note 142, at 588-91.

257. In an article advocating abolition of the beneficiary principle, Professor Palmer took this position. Most curiously, he did not take the final step and advocate rendering honorary trusts enforceable, though that step would not appear alien to his thinking. See Palmer, *supra* note 21, at 282-89.

258. Honorary trusts are treated like trusts for federal estate tax purposes. See 3A A. JAMES CASNER, ESTATE PLANNING § 12.10.2, at 196 n.8 (5th ed. 1988 & Supp. 1998); see also *In re Shanahan's Estate*, 112 N.E.2d 665, 666-67 (Ohio 1953) (discussing state inheritance tax treatment of honorary trusts).

259. See *infra* note 269 and accompanying text.

260. See 2 SCOTT, *supra* note 4, § 108.2.

261. Notice also that the beneficiary principle should not interfere with the testator's right to poulover testamentary assets into an honorary trust, a process which would again in the ordinary course occur under the auspices of the probate court. Given that gifts for purposes are simply another form of donative transfer, one surely finds no reason in substantive policy to deny a testator the right to make poulover provisions for them. The opportunity to do so opens to a testator wishing to make gifts for purposes the same efficiencies of asset consolidation

As matters stand, testators have it in their power to wedge bequests for noncharitable social purposes into the enforceable trust category, if they are careful to limit the pool of potential beneficiaries. When a testator restricts a purpose bequest to a sufficiently small group – say, the employees of a specified company – the bequest can be deemed a class gift and so can take the trust form, enforceable by whoever is, or becomes, a member of the class.²⁶² Similarly, a testator might bestow her largesse on a limited class of *enthusiasts*, by bequeathing to an association devoted to a social purpose she wishes to promote. This bequest too can take the trust form, enforceable by whoever is, or becomes, a member of the association.²⁶³ In the first case, the risk that a purpose restriction will cause inefficiency rises by virtue of the fact that the purpose must find its appeal among a smaller audience; yet, perversely, here the purpose is strictly enforceable! In the second case, the risk is constant, assuming new members can join the association. But why should the issue of enforceability turn on the depth of the beneficiary pool? Although added deepness may disrupt *traditional* mechanisms of trust enforcement, no policy reason for distinguishing enforceability on this basis presents itself – nor has one ever been presented by lawmakers or commentators.

Were lawmakers disposed to render intended trusts for noncharitable purposes effective as such, the question of how to go about enforcing them

available to those who would make ordinary bequests. On the estate planning virtues of pour-overs, see, for example, W.S. McClanahan, *The Pour-Over Device Comes of Age*, 39 S. CAL. L. REV. 163, 164-65 (1966). Furthermore, by treating gratuitous transfers for persons, charitable purposes, and noncharitable purposes symmetrically in an administrative sense, the law would allow testators to consolidate an estate plan combining one sort of transfer with another into a single, omnibus trust vehicle, possibly generating economies of scale.

262. See *In re Denley's Trust Deed*, [1969] 1 Ch. 373, 374, 382-87. On class gifts, see generally RESTATEMENT OF TRUSTS § 120 (1935); RESTATEMENT (SECOND) OF TRUSTS § 120 (1959); 2 SCOTT, *supra* note 4, § 120. The extent to which a testator must circumscribe the eligibility pool of a purpose trust for it to crystallize into a trust for a class is not clarified by the *Restatement* or the case law. In Great Britain, the contrast is even starker: A trust for a noncharitable purpose is either enforceable or void, depending on whether it can fit into the category of a class gift; but again, the line of demarcation separating the two categories is fuzzy. In *Denley's Trust Deed*, a purpose trust restricted to a company's employees was deemed a class gift; cf. *R. v. District Auditor, ex parte West Yorkshire Metro. County Council*, 1986 R. & V.R. 24 (Q.B. Div'1 Ct.) (holding that inhabitants of a county, as recipients of noncharitable purpose trust, constituted a group "far too large" to comprise a class); *In re Lipinski's Will Trusts*, [1976] 1 Ch. 235, 248-50 (holding that members of association could enforce purpose trust, and adding in dicta that the Jewish community of Hull would have comprised too large a group); *Keewatin Tribal Council, Inc. v. City of Thompson*, 61 Man. Rep. 2d 241, 251-52 (Q.B. 1989) (holding that individual members of Indian bands could enforce noncharitable purpose trust to provide housing for students from those bands while attending school in city of Thompson).

263. See RESTATEMENT OF TRUSTS § 119 & cmt. f (1935); RESTATEMENT (SECOND) OF TRUSTS § 119 & cmt. g (1959); 2 SCOTT, *supra* note 4, § 119.

has still to be confronted. Here, alternative beneficiaries no longer have a constructive role to play, for they hold no interest in the execution, as opposed to the termination, of a purpose bequest.²⁶⁴ Nevertheless, several other candidates present themselves. The simplest solution as a technical matter — though unsatisfactory as a practical matter — would be to absorb noncharitable purpose trusts into the administrative sphere of charitable trusts, leaving to state attorneys general the duty of enforcing them.²⁶⁵ Because the task of monitoring noncharitable purpose trusts corresponds to that of charitable trusts, structural consolidation appears warranted.²⁶⁶ The difficulty, however, is that attorneys general already have their hands full with other matters; they have little time to spare riding herd over trustees. Even now, it is a notorious fact that attorneys general look into the accounts of charitable trusts only when word leaks back to them of irregularities, usually as a result of media publicity.²⁶⁷ Such a turn is unlikely in the case of noncharitable purpose

264. Several courts have nonetheless posited this possibility, apparently on the assumption that the testator's heirs feel a moral obligation to see her wishes carried out. See *Snouffer v. Peoples Trust & Sav. Co.*, 212 N.E.2d 165, 170 (Ind. App. 1965) (treating bequest for mausoleum as aspect of burial rights, rather than as trust); *In re Sill's Estate*, 84 N.Y.S. 213, 215 (Sur. Ct. 1903) ("It seems to me that some person must have the right . . . to see that the trust is properly carried out. In this case who could it be if not the next of kin of the testatrix?"); *Sherman v. Baker*, 40 A. 11, 12 (R.I. 1898) ("[I]t is hard to see why it should not be enforced as a trust. The answer that there is no one in interest to have a standing in court is met by the rejoinder that an heir at law of the testator has a sufficient interest to see that the will is carried out."). A few courts have also granted heirs standing to enforce trusts for charitable purposes, although most courts, following the *Restatement*, do not. See RESTATEMENT (SECOND) OF TRUSTS § 391 & cmt. e (1959); 4A SCOTT, *supra* note 4, § 391, at 375-78.

265. For a British proposal along these lines, though limited to noncharitable trusts conferring "an appreciable benefit on a sufficient section of the public," see Gravells, *supra* note 196, at 415-16. Under current law, state attorneys general claim jurisdiction only over charitable trusts. In the case of a noncharitable trust, "[t]here is no community benefit which permits the time and effort of a public official to be devoted to its enforcement." *Green v. Connally*, 330 F. Supp. 1150, 1157-58 (D.D.C. 1971).

266. If cost is a consideration, noncharitable trusts could be made subject to a periodic administrative fee for the attorney general's efforts. See, by analogy, I.R.C. § 4940 (West 1989) (imposing periodic excise tax on private foundations); *Williams Home, Inc. v. United States*, 540 F. Supp. 310, 312 (W.D. Va. 1982) (reciting legislative history indicating that purpose of excise tax is to impose costs of supervision of foundations on those foundations).

267. See *DUKEMINIER & JOHANSON*, *supra* note 251, at 675; 4A SCOTT, *supra* note 4, § 391, at 361; *Brody*, *supra* note 195, at 481-82. For an example of the abuses that can result, see *Brody*, *supra* note 195, at 454-56; cf. *Rob Atkinson, Unsettled Standing: Who (Else) Should Enforce the Duties of Charitable Fiduciaries?*, 23 J. CORP. L. 655, 683-85 (1998). In many jurisdictions, charitable trustees do not even have to account to the attorney general, adding considerably to information costs. The Commissioners have promulgated legislation designed to cure this difficulty. See UNIF. SUPERVISION OF TRUSTEES FOR CHARITABLE PURPOSES ACT, 7B U.L.A. 727 (1954). A few states have also reorganized the offices of their attorneys general to better accommodate the task of monitoring charitable trusts. See, e.g., Wallace Howland, *The*

trusts, especially trusts for personal purposes like the care of graves or pets, of small interest to anyone who is alive.

A different, and probably more effective, option, achieving consolidation of a different sort, would be to lodge jurisdiction over noncharitable trusts in the probate court, *sua sponte*.²⁶⁸ Probate courts are well suited to this task: They serve already in a supervisory (and not merely adjudicative) capacity, auditing the accounts of personal representatives of estates and, in some jurisdictions, of trustees of *all* testamentary trusts.²⁶⁹ To give effect to purpose bequests as testamentary trusts under this same judicial mandate would extend a preexisting responsibility, one that probate courts have discharged effectively.²⁷⁰ At least one modern court has taken this position, in spite of the *Restatement*.²⁷¹ But if courts found this added responsibility burdensome,

History of the Supervision of Charitable Trusts and Corporations in California, 13 UCLAL. REV. 1029, 1030-32 (1966). This is the exception, however. Judge Posner has suggested that, in the absence of effective oversight by the attorney general, lawmakers limit the duration of bequests for charitable purposes. Professional trustees and foundations will then have strong market incentives to self-regulate, given the periodic need for new fund-raising. See POSNER, *supra* note 126, § 18.5. One cannot assume, however, that this approach would much affect the behavior of trustees of noncharitable trusts, many of whom probably are not "repeat players" with reputational capital to protect—though for one unlikely counter-example, see Ward, *supra* note 98 (noting Purdue University's entry into honorary trust business).

268. This solution would not, however, suffice for a revocable inter vivos honorary trust (or, if you will, an "honorary living trust"), which would escape the jurisdiction of the probate court. That this vehicle is valid we can surmise from the fact that the *Restatement* contemplates revocable powers, when clothed in trust. See RESTATEMENT (SECOND) OF PROPERTY § 15.1 & cmt. b & illus. 1-2 (1983). So, whether an honorary trust is itself deemed a trust or merely a power which can be placed within a revocable trust, honorary trusts may be structured to avoid probate.

269. See ATKINSON, *supra* note 176, § 142; BOGERT & BOGERT, *supra* note 53, § 563; 5A SCOTT, *supra* note 4, § 570. But see UNIF. PROBATE CODE § 7-303 & cmt. (amended 1993) (stipulating no requirement to account to court). In a few jurisdictions, courts also audit the accounts of all charitable trusts. See 4A SCOTT, *supra* note 4, § 391, at 363.

270. See Thomas J. Alexander, *Court Control of Trusts*, 33 UMKC L. REV. 1, 17-21 (1965) (advocating judicial supervision of accounts of ordinary testamentary trusts). But cf. 2 SCOTT, *supra* note 4, § 124, at 244-46 (asserting that "it would be a departure from the traditional view of the function of a court to permit it to act on its own motion" in this situation, but acknowledging analogy and admitting possibility). The criticism sometimes made of judicial supervision of testamentary trusts is that, given the trustee's coextensive obligation to account to beneficiaries, court accounting is redundant, adding unnecessarily to the expense of trust administration. See UNIF. PROBATE CODE § 7-303 cmt. (amended 1993); MCGOVERN ET AL., *supra* note 53, § 14.10, at 702-03. Of course, in connection with noncharitable purpose trusts which lack beneficiaries, court accounting would implicate no redundancy.

271. See *Devereux's Estate*, 48 Pa. D. & C. 491, 500 (Orphans' Ct. 1943), *appeal quashed*, 46 A.2d 168 (Pa. 1946) (deeming noncharitable purpose trusts valid as trusts, with "standing to compel the trustee to perform . . . here supplied by the power . . . of orphans' courts to supervise and control the activity of the trustee"); see also *Snouffer v. Peoples Trust & Sav. Co.*,

they could be granted power to delegate it, appointing an independent auditor for each purpose trust.²⁷² Professor Scott suggested this solution, by analogy, in the case of a trust for an unborn person, which (incidentally) the *Restatement* acknowledges as enforceable, despite the absence of a present beneficiary.²⁷³ The executor of the estate could also be charged with the duty, as a natural (albeit long-term) extension of her fiduciary obligations to the estate. Executors already oversee the performance of conditions precedent to taking a bequest and of contractual obligations owed to a decedent, devices which can also serve as vehicles for effectuating purposes.²⁷⁴

Yet another possibility would be to grant standing to persons who benefit indirectly from a purpose bequest. Courts have had recourse to this expedient to give full effect to trusts for purposes in a few instances. Where, for example, the testator bequeaths funds for the maintenance of a cherished homestead, the surviving owner has been deemed the beneficiary, with standing to sue the trustee.²⁷⁵ And in the case of trusts for social purposes meeting the charitable criterion, courts have awarded individuals holding a "special interest," distinct from the general public, standing to sue to enforce the purpose.²⁷⁶ Lawmakers could readily generalize and even liberalize this

212 N.E.2d 165, 170-71 (Ind. App. 1965) (finding that bequest — expressly held not to constitute trust — to build family mausoleum is valid: "The court having probate jurisdiction officially oversees performance of all conditions in the will."). For opinions taking this position prior to the promulgation of the *Restatement*, see *supra* notes 39-40.

272. Were such an approach taken, the auditor — like other court appointed guardians — should serve as an officer of the court, subject to personal liability if she fails faithfully to perform her duties. Like a guardian, the auditor might also be required to post a bond guaranteeing performance of those duties. See RICHARD V. MACKAY, *THE LAW OF GUARDIANSHIPS* at v, 56-57 (3d ed. 1980).

273. The *Restatement* itself fails to set out an enforcement mechanism for trusts of this sort. See RESTATEMENT (SECOND) OF TRUSTS § 112 cmts. c & d (1959); 2 SCOTT, *supra* note 4, § 112.1 (adding that recognition of enforceable trust in this connection presents "no great difficulty"); see generally William F. Fratcher, *Trustor as Sole Trustee and Only Ascertainable Beneficiary*, 47 MICH. L. REV. 907 (1949).

274. See *Snouffer*, 212 N.E.2d at 170 (suggesting that executor serves to enforce bequest for purpose of constructing mausoleum when considered an aspect of burial rights); ATKINSON, *supra* note 176, §§ 117, 120. On the use of contracts and conditions to effectuate purposes, see Hirsch, *supra* note 6.

275. See *Stanton v. Stanton*, 101 A.2d 789, 793-94 (Conn. 1953) (involving bequest for upkeep of homestead, to be maintained "as a memorial" to testator's parents, where their descendants were to have beneficial use of the property); *Bliven v. Borden*, 185 A. 239, 245 (R.I. 1936) (oddly suggesting that issue turns on whether testator *intends* by bequest for upkeep of property to benefit its owner or not); *In re Cassel*, 1926 Ch. 358, 370; *Kennedy v. Kennedy*, 1914 App. Cas. 215, 220 (P.C.) (finding trust invalid on other grounds).

276. See *Weaver v. Wood*, 680 N.E.2d 918, 923-24 (Mass. 1997), *cert. denied*, 118 S. Ct. 694 (1998); RESTATEMENT (SECOND) OF TRUSTS § 391 & cmt. c (1959); 4A SCOTT, *supra* note 4, § 391, at 366-70. This was also the solution adopted by the ancient court

principle. Because indirect beneficiaries hold a financial stake in a purpose trust, whether charitable or not, we might expect them to be its most vigilant monitors. The attorney general and other representatives lack this personal incentive. The problem is that in the case of trusts for social purposes, the group of indirect beneficiaries may be so large or uncertain that no single, potential beneficiary has a sufficient motive to undertake the cost of monitoring on her own;²⁷⁷ whereas, if the trust is for a personal purpose, the indirect beneficiaries (though few in number) may have interests so insubstantial as to deter monitoring no less decisively.²⁷⁸ This form of enforcement must hence be judged inadequate in and of itself, though it could serve to supplement those already described.²⁷⁹

The most radical – and possibly best – solution would be to establish a state board to oversee all purpose trusts. Such has often been proposed in connection with charitable trusts to ease harried attorneys general out of the business of trust-enforcement.²⁸⁰ Rather than a charity board, lawmakers might just as well create a general *purpose trust board*, again collecting all of these kindred entities, facing identical challenges of nonbeneficial enforcement, into the same regime of accountability. By combining administrative centralization (an advantage over court or executor supervision) with structural consolidation, lawmakers might achieve significant economies of scale.²⁸¹

of chancery, prior to the enactment of the statutes of charitable uses. See *supra* note 7 and accompanying text.

277. This is the problem of rational apathy, discussed in a different context *supra* note 239. Information costs (i.e., those necessary to ensure that the persons who benefit from a purpose bequest are aware of its existence) pose an additional obstacle.

278. Cemetery companies and successive owners of animals, for example, may care relatively little whether trusts for the care of graves and pets are properly implemented. Cf. SHERIDAN, *supra* note 27, at 152-53.

279. Notice, by analogy, that persons with a "special interest" in enforcing a charitable trust receive standing to sue that is *concurrent* to that of the attorney general. See RESTATEMENT (SECOND) OF TRUSTS § 391 (1959).

280. See Brody, *supra* note 195, at 481-82; Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 449-60, 476-83 (1960). Such a system exists under reforms begun over a century ago in Great Britain. See 4A SCOTT, *supra* note 4, § 391, at 361-62.

281. Similar benefits could be gained by reorganizing the attorney general's office to accommodate the responsibility of trust monitoring. For a discussion in connection with charitable trusts, arguing that an independent agency can serve as a more effective monitor than courts or an attorney general (who inevitably responds to political pressures), see Karst, *supra* note 280, at 476-83; cf. Brody, *supra* note 195, at 497-500 (criticizing state charity board alternative). Once again, if cost is a factor, noncharitable purpose trusts could be charged administrative fees for state monitoring services. See *supra* note 266.

We may notice lastly that in many states lawmakers have already addressed themselves to one fragment of this problem. Their response belies by way of concrete demonstration suppositions we have challenged in the abstract and also reveals that no novel legal processes need be contrived in order to render noncharitable purpose trusts enforceable; lawmakers could accomplish this end simply by broadening the sweep of rules already extant.

In most jurisdictions today, bequests for the upkeep of a cemetery lot, though noncharitable at common law,²⁸² and despite the absence of a living beneficiary, are by statute permissible in trust form.²⁸³ In a number of these states, legislators have circumvented the beneficiary principle by decreeing cemetery trusts to be charitable,²⁸⁴ a path that, if widened, would lead to categorical consolidation.²⁸⁵ But in other states, legislators have not hesitated to charge the beneficiary principle head on. They have done so by bestowing

282. See RESTATEMENT (SECOND) OF TRUSTS § 374 cmt. h (1959); see also, e.g., *In re Waldron*, 109 N.Y.S. 681, 684-88 (Sur. Ct. 1907); *Todd v. St. Mary's Church*, 120 A. 577, 578 (R.I. 1923); *Foshee v. Republic Nat'l Bank*, 617 S.W.2d 675, 677 (Tex. 1981). Some critics have nonetheless detected a public interest in these bequests. See *Heinlein v. Elyria Sav. & Trust Co.*, 62 N.E.2d 284, 289 (Ohio Ct. App. 1945); BOGERT & BOGERT, *supra* note 53, § 377, at 184.

283. For a fairly up-to-date compilation of the relevant statutes, see 7 POWELL, *supra* note 53, ¶ 589, at 46-15-35; see also RESTATEMENT (SECOND) OF PROPERTY § 1.6, statutory note 3 (1983); 4A SCOTT, *supra* note 4, § 374.9, at 236-40. The *Restatement of Trusts* contains no such provision: bequests for the care of graves remain honorary trusts. See RESTATEMENT (SECOND) OF TRUSTS § 124, cmt. d (1959). Statutes of the sort described hereinafter are to be distinguished from others expressly permitting contracts for the care of graves; these are not specifically enforceable and hence are structurally akin to honorary trusts. See, e.g., NEV. REV. STAT. ANN. § 452.090 (Michie 1996).

284. See ALA. CODE § 11-17-13 (1989); CAL. HEALTH & SAFETY CODE § 8776 (West 1970 & Supp. 1997); FLA. STAT. ANN. § 689.13 (West 1994 & Supp. 1997); KAN. STAT. ANN. § 12-1419a (1991); NEB. REV. STAT. § 12-511 (1997); N.H. REV. STAT. ANN. §§ 31:19, 31:20 (1988 & Supp. 1998) (construed in *Webster v. Sughrow*, 45 A. 139, 140 (N.H. 1898), and *Opinion of the Justices*, 133 A.2d 792, 794 (N.H. 1957)); N.M. STAT. ANN. §§ 58-17-4, 58-17-8 (Michie 1998); N.Y. EST. POWERS & TRUSTS LAW § 8-1.5 (McKinney 1992); S.C. CODE ANN. § 27-5-70 (Law. Co-op. 1991); WASH. REV. CODE ANN. §§ 68.24.080 (West 1997) ("shall be deemed to be . . . for the benefit of] the general public").

285. The decision by a state to re-label purpose trusts as charitable has no federal tax consequences. See *Child v. United States*, 540 F.2d 579, 581-82 (2d Cir. 1976); *First Nat'l Bank v. United States*, 532 F. Supp. 251, 253 (D. Neb. 1981); *supra* note 66. It could have state tax consequences, though once again the legal status of a purpose trust respecting its tax treatment is severable from its status respecting other substantive rules: Thus in one state, lawmakers have made trusts for cemetery lots enforceable and tax deductible *without* deeming them charitable; accordingly, although exempt from state inheritance taxes, they do not fall within the jurisdiction of the attorney general. See 760 ILL. COMP. STAT. ANN. 95/2, 100/6, 100/12 (West 1992 & Supp. 1998); 4A SCOTT, *supra* note 4, § 374.9, at 239-40.

standing on courts,²⁸⁶ or state authorities,²⁸⁷ or individual persons²⁸⁸ to compel the execution of a cemetery trust.²⁸⁹ These breaches of the forensic palisade erected so long ago by Sir William Grant confirm its flimsiness as a conceptual (let alone functional) impediment to purpose-trust enforcement and could open the way to its complete demolition.²⁹⁰

286. See ARK. CODE ANN. § 20-17-904(c) (Michie 1991 & Supp. 1995) (annual accounting to chancery court); OKLA. STAT. ANN. tit. 11, §§ 26-202, 26-208 (West 1994) (semi-annual accounting to district court).

287. See 760 ILL. COMP. STAT. ANN. 100/12 (West 1992 & Supp. 1998) (annual accounting to office of comptroller).

288. See MO. ANN. STAT. § 214.130 (West 1996) (deeming trust enforceable by "[a]ny court having equity jurisdiction within the county . . . upon the application of any person whatever"); MISS. CODE ANN. § 41-43-3 (1993) (stating that "on petition of any person having, or feeling, any interest therein," chancellor can remove trustee for maladministering trust).

289. Still other safeguards have been introduced here and there. In one state, a maladministering trustee is subject to fining. Half the fine goes to the prosecutor of the complaint, thereby giving private persons a mercenary incentive to monitor. See ME. REV. STAT. ANN. tit. 13, § 1222 (West 1981). In several states, the trustee must post a special bond with the court or other public authority, conditioned on the faithful performance of trust duties. See HAW. REV. STAT. § 441-37(c) (1993); 760 ILL. COMP. STAT. ANN. 100/9(c) (West 1992 & Supp. 1998); OKLA. STAT. ANN. tit. 11, § 26-205 (West 1994). In quite a few states, the trustee of an enforceable cemetery trust is limited to a corporate fiduciary, ecclesiastical society, or cemetery association. These bodies may face independent bonding requirements and also necessarily have reputational capital at stake. See ARIZ. REV. STAT. ANN. § 32-2194.27 (West 1992); CAL. HEALTH & SAFETY CODE § 8775 (West 1970); CONN. GEN. STAT. ANN. § 19a-299 (West 1997); DEL. CODE ANN. tit. 12, § 3552 (1995); 760 ILL. COMP. STAT. ANN. 90/2, 100/3 (West 1992 & Supp. 1998); IND. CODE ANN. § 23-14-53-1 (Michie 1995 & Supp. 1998); MASS. GEN. LAWS ANN. ch. 114, § 5 (West 1996); MO. ANN. STAT. § 214.130 (West 1996); NEB. REV. STAT. § 12-510 (1997); N.Y. EST. POWERS & TRUSTS LAW § 8-1.5 (McKinney 1992); OR. REV. STAT. § 97.730 (1997); TEX. HEALTH & SAFETY CODE ANN. §§ 712.001(5), 712.021(a) & (b), 712.030 (West 1992 & Supp. 1999); VT. STAT. ANN. tit. 18, § 5306 (1987); VA. CODE ANN. § 57-32 (Michie 1995); WIS. STAT. ANN. § 701.11 (2) (West 1981 & Supp. 1998); see also OKLA. STAT. ANN. tit. 11, § 26-202 (West 1994) (trustee appointed by district court). In a few states, the trustee may also be, or can only be, a municipal authority. See CONN. GEN. STAT. ANN. § 19a-299 (West 1997); IOWA CODE ANN. § 566.14 (West 1992); MO. ANN. STAT. § 214.130 (West 1996); N.H. REV. STAT. ANN. §§ 31:19-22a (1988 & Supp. 1998); OHIO REV. CODE ANN. § 517.15 (West 1993). One must observe, however, that in some jurisdictions, lawmakers have made bequests for care of a grave enforceable as noncharitable trusts and allowed anyone to serve as trustee, without establishing any safeguard whatever for their enforcement. Perhaps in these states the issue is consciously left for judicial development, though more likely the problem never occurred to the drafters. See COLO. REV. STAT. § 38-30-110 (West 1990); MICH. COMP. LAWS ANN. § 554.351 (West 1988 & Supp. 1997); MINN. STAT. ANN. § 307.05 (West 1985); N.J. STAT. ANN. § 8A:4-8 (West 1996); N.C. GEN. STAT. §§ 36A-49, 36A-146 (1997); W. VA. CODE § 35-5-6 (1997).

290. The Commissioners have recently crafted – though far from flawlessly – an optional section of the Uniform Probate Code that achieves this result, and several states by statute have adopted the section or a variation of the section. See UNIF. PROBATE CODE § 2-907 (amended 1993). I have critiqued the Commissioners' efforts and addressed the state statutes in another essay. See Hirsch, *supra* note 6.

IV. Conclusion

This Article has argued that the traditional fault lines running through the law of purpose bequests are misplaced. Save for the tiny sphere of bequests for antisocial purposes, bequests for purposes of all sorts merit facilitation; what is more, lawmakers may quite reasonably gather them into the same regime of substantive legal doctrine. The prevailing disjunctions within that doctrine are unjustified from the standpoint of public policy.

The key to this conclusion lies in the scope of our outlook. Lawmakers and commentators have to stop thinking about bequests for purposes as isolated constructs. They ought to look at them by comparison to ordinary bequests for persons and, more particularly, by the light of public policies that underlie testation and dead hand control in general. So viewed, the classical distinctions drawn between purposes which do and do not further the public interest appear inconsequential: Either way, bequests for purposes can stand on the same footing as bequests for persons and need not lean upon "the crutch of charity"²⁹¹ for policy support. In this same larger context, the structural distinction between bequests for social and personal purposes stands out as more significant, leading us along separate channels of policy inquiry. But even these ultimately converge analytically; at the end of the day, one finds no reason to treat purpose bequests differently on this basis either.

Absorbing bequests for purposes into a single legal category would also generate meta-benefits arguably no less significant than the primary ones. Unification, after all, serves to simplify the law. Simpler law is easier and less costly to abide by.²⁹² On top of that, the removal of boundary lines has the salutary effect of precluding uncertainty and argument over where the lines fall. Were purpose bequest doctrine unified, litigation over whether a particular bequest met or failed to meet the criteria of charity would become a thing of the past.²⁹³

291. *In re Endacott*, [1959] 3 All E.R. 562, 570 (C.A.).

292. It is also fairer, in the sense that better counselled and more poorly counselled individuals are placed on a more equal footing. See generally Mary L. Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 613 (1988) (framing principle of "equal [estate] planning under law").

293. For a recent example, see *Evangelical Luth. Charities Soc'y v. South Carolina Nat'l Bank*, 495 S.E.2d 199 (S.C. 1997). On the traditional fuzziness of this boundary-line, along with the parallel ill-definition of the line separating noncharitable from superstitious bequests, which also prompts litigation, see *supra* note 185. The one area in which the traditional distinctions are arguably merited, in spite of the litigation that ensues as a consequence of them, is gratuitous transfer taxation – although this matter too is controversial. See *supra* note 67. In any event, here a federal statutory definition could readily be implemented, and the traditional fuzzy line could with relative ease be transformed into a bright-line, minimizing litigation.

But would such a merger simultaneously entail meta-costs? Responding to British proposals to authorize trusts for noncharitable social purposes,²⁹⁴ effectively rendering the traditional distinctions inconsequential, one commentator warned that charity's "death" as a "meaningful category within any branch of the law" would "be ultimately destructive," depriving English law of "moral values that should not be jettisoned."²⁹⁵ A provocative thought, this: Would the end of charity as an autonomous legal concept weaken the moral fiber of the community at large? The notion seems farfetched – lay persons, after all, observe social norms as well as legal norms, and the disappearance of "charity" from *Black's Law Dictionary* will not dislodge it from *Webster's*. But if the charitable impulse of lay persons is unlikely to flag, what of law-persons? Would the replacement of "charitable" gifts with the neutral concept of "purpose" gifts tend to dim a thousand other points of light within our law? Would hard cases continue to make bad decisions in a legal universe where charity is dead? One would like to believe that lawmakers, for all their professional immersion, continue to draw inspiration from social norms, and that the abandonment of doing-good as a doctrinal construct, for sound policy reasons, would not smother the principle as a doctrinal value, let alone a jurisprudential ideal. Legal values well up from below – they need not shine constantly upon lawmakers from some analogical sideline, such as trust law, in order to leave their mark.

Still, as always in our law, the answers we adduce to pointed questions merely point us on to further questions. As critics of the law, our lot is to follow along, gamely and without surcease.

294. See *supra* note 196.

295. CHESTERMAN, *supra* note 4, at 406-09; see also *id.* at 227-29.