Reforming Cy Pres Reform*

by

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I. Introduction[1]

The ancient doctrine of cy pres, by which courts use their equitable powers to modify the purposes of charitable trusts,[2] has come in for renewed scrutiny of late. This perennial favorite of scholarly dissection has recently attracted popular attention in two sensational cases, that of the oil heiress Beryl Buck's bequest to the San Francisco Foundation[3] and that of the New York Yacht Club's America's Cup Race[4]. These cases underscore the long-lamented flaws of existing cy pres doctrine and give renewed impetus to scholarly re-examination of the doctrine.

Cy pres has long been attacked as insufficiently attuned to societal needs, as not flexible enough to permit the kind of judicially supervised updating of charities needed to ensure the socially optimal use of charitable assets.[5] Recently, the doctrine has been attacked from a diametrically opposed position, as being insufficiently attuned to donors' intent.[6] The debate between these two positions points to the compromise of which the doctrine itself is a corollary, the effort to balance the public benefits of charitable gifts against donors' desires for perpetual control of the donated property.

As a general rule, the state can (and does) limit dead hand control, striking a balance between property owners' desire to exercise control from beyond the grave and a perceived societal interest in having the use of resources determined by the living.

Under the rule against perpetuities, property owners can dictate the use and enjoyment of the societal wealth they amass during life for roughly a century after their death.[7] In the case of gifts to charity, however, the state strikes a more generous bargain with donors. Donors get to extend their control indefinitely, with state assurance as well as permission -- the state not only allows perpetual dead hand control; it monitors and enforces it.

The reason for this relative generosity in the case of charitable gifts is an implicit quid pro quo: in exchange for perpetual donor control, society gets wealth devoted to recognizably "public" purposes. Wealth that donors would otherwise pass to private individuals for "private" purposes is in a sense devoted to the public domain. To put it somewhat differently, the restraints that are allowed to endure are not wholly idiosyncratic; they must advance purposes that the courts, as custodians of the commonweal, certify as publicly beneficial.[8]

The doctrine of cy pres is designed to maintain this balance between dead hand control and public benefit over time, to ensure that the original bargain between the donor and society is kept reasonably current. Should a change in circumstances after the gift threaten either side of the bargain -- the execution of the donor's purpose or the public's benefitting from it -- courts may modify the trust to restore the balance. Under current cy pres doctrine, however, this power of modification is closely circumscribed. The degree of frustration must be relatively great, the donor must have at least implicitly assented to the change, and

the degree of change must be relatively small. This last condition gives the doctrine its name -- in modifying the trust's purpose, the court must remain as close as possible (cy pres comme possible, in the Norman French of the early equity courts) to the donor's original purpose.

It is these conditions that cy pres reformers find unduly constraining. I agree with them in that, but disagree with them fundamentally on how the balance between public benefit and dead hand control should be re-struck. On the one hand, I believe their reform leaves too much deference to donor control. On the other hand, I believe their reform places too much confidence in the courts as guarantors of the public benefits charitable trusts are supposed to provide. As a result, their reform measures are unstable compromises between dead hand control and unfettered judicial discretion. This is inevitable, as long as the alternatives are limited to two: continued dead hand control and court-administered modification. The way out of this dilemma, I suggest, is to consider a third alternative: eliminating legal enforcement of dead hand control and leaving the disposition of charitable assets up to the discretion of their trustees, subject only to the constraint that they be used for charitable purposes.

Part I identifies the dilemmas cy pres reformers inevitably face in trying to work within the bipolar framework of traditional cy pres doctrine, in which any diminution of dead hand control brings a corresponding increase in state intervention. Part II suggests that the need for legal enforcement of dead hand control

is not nearly as critical as cy pres reformers have assumed. Part III argues that the notion of charitable efficiency, the standard by which reformers hope to expand the parameters of cy pres modification while constraining judicial discretion, is not up to the task. Building on these criticisms of cy pres reform, Part IV outlines my alternative, suggesting how the elimination of legally enforced dead hand control could both avoid the old dilemmas and strengthen the independence of the third sector. This suggestion is not, of course, without problems of its own; Part V addresses these.

II. The Twin Problems of Reformed Cy Pres.

To see the twin problems of reformed cy pres in proper perspective, we must step back a bit and look at what I will call pure cy pres. Pure cy pres as I am about to set it out is more a heuristic device than an accurate statement of existing law; the cy pres doctrine as currently applied in the United States has already moved too far in the direction of reform to serve as a useful starting point for analysis. Nor is an accurate historical reconstruction quite what we need. What we need is a model that shows how cy pres would work if its sole function were to maintain as strictly as possible the compromise of which we have seen it to be the corollary, the implicit bargain between dead donors and society's living members. Having seen that, we can then go on to see why reformers asked more of the doctrine, and why within its traditional framework they had trouble making it meet their demands.[9]

A. The Pure Cy Pres Model.

The operation of pure cy pres would be a fairly straightforward, three-step process, with a minimum of play in the joints. First, the court would determine whether one side or the other of the bargain between society and the donor had failed. On the donor's side, it might fail because the donor's original intent cannot be carried out. To use the standard phrase, it becomes impossible, in a fairly literal sense. Polio is eliminated, as in the case of the March of Dimes, or the Thirteenth Amendment frees the slaves, as in the case of the Francis Jackson's famous abolitionist bequest,[10] or the federal Constitution forbids a local government to continue operating a segregated park, as in the case of the charitable bequest of Senator Bacon.[11] On public side, the bargain fails when the donor's purpose ceases to be legal, or charitable, and thus does not confer the public benefit that was the implicit condition of allowing it to continue in perpetuity. This would be the case, for example, with respect to charitable trusts involving invidious racial discrimination.[12]

Short of some such failure, the trust would on as the donor intended; in the face of such failure, the court would reach the second step of the analysis. For the assets in question to be applied to a new charitable purpose, it would have to be shown that the donor's charitable intent was general rather than specific, i.e., that the donor would have preferred having the assets applied to some other charitable purpose rather than paid over to specified private or charitable default takers or, in the absence of

specificity on that score, into the hands of heirs or residuary legatees. Here again, there need not be much room for doubt; in the absence of pretty clear evidence of general charitable intent or an express provision for a gift over to another charitable purpose, the charitable trust would fail and its corpus pass back into private hands.

If there were evidence of general charitable intent, the court would reach the third step of the process, from which the doctrine derives its name. The court at this stage is to modify the terms of the trust, departing from the original, frustrated purpose only so much as is necessary or, to look at it the other way, staying as close as possible to that purpose.

B. The Reformist Critique of the Pure Model.

Were cy pres to be applied in the pure form I have described, it need encounter few if any operational difficulties. To be sure, interpretive issues would arise at each level in each case, but the doctrine would give conscientious courts and anxious donors more than adequate guidance -- as much guidance, I would submit, as most common law rules.

The problems for reformers would lie elsewhere, not in the system's procedural machinery, but in its substantive outcomes. In brief, it would be oriented too much toward the donor wishes and too little toward the public's benefit. What is, in the eyes of reformists, a patently inefficient charity can continue unmodified if that is the donor's wish, or, worse, if the donor's wish to the contrary cannot be proved. And even if the donor's wishes can be

shown to have been frustrated or to fall outside the contemporary scope of charity, there is the further hurdle of having to show that the donor would have wanted to keep the donated assets in the charitable sphere rather than to have them pass to private default takers. Finally, even if the donor's original intent could be shown to have been frustrated and even if a general charitable intent could be established, pure cy pres would only permit the smallest possible modification of the donor's original purpose. Such a change, from the reformist perspective, might well be from bad to less bad, but could not by its own terms be from bad to best, from wasteful to socially optimal. This poses the central problem for reformists: how to reformulate cy pres doctrine to redress its perceived inadequacy without upsetting the terms of the underlying bargain between donors and society.

C. The Reformists' Dilemmas.

Cy pres as actually applied by the courts involves each of the three determinations I ascribed to pure cy pres: whether the frustration requirement has been met, whether there is general charitable intent, and how far from the donor's original purpose to depart. At each of these steps, cy pres reformers have two options, both of which are problematic. One is to look to donors' subjective intent, in the hope of finding an actual preference for charitable efficiency on the part of donors themselves. In the event that their purposes become inefficient, would they feel that their side of the original bargain had been frustrated? If so, would they want the funds to remain in a charitable use? And if

so, how far from their original purposes would they want the court to go in the name of efficiency?

There are two problems here. First, the donor's subjective intent is almost by definition not known; if it were known, and it were inclined toward efficiency, there would be no problem paying homage to efficiency in the traditional cy pres model. Worse, however, than the situation in which the donor's attitude toward efficiency is not known, is that in which it is known to be indifference or even disdain. Here cy pres reformers face a second, and more serious, problem. Rather than have their original charitable designs re-tailored to fit reformists' tastes for efficiency, donors might prefer to have their donated assets either mothballed in their outworn patterns or handed down to private, noncharitable recipients.

Both these problems with the search for a donor's subjective preference for efficiency suggest the second approach open to reformists. That approach is to invoke efficiency without proof of donors' real preferences, either as what "average" or "reasonable" donors would have wanted had they foreseen the situation, or as what society, in making the original deal, would have required as a condition of doing the deal. In the former, weaker form, the appeal to efficiency is intent-honoring; in the latter, stronger form, it is not. In either version, however, imposing the criterion of efficiency without establishing that to be the donor's subjective intent produces a dilemma of its own.

Once prospective donors know of the weak, intent-honoring

version, they can anticipatorily opt out, in favor of either continued eccentricity (up to the outer limits of charitability) or lapse in favor of private beneficiaries, neither of which is particularly appealing to cy pres reformers. But if the strong, intent-overriding version is applied, donors may simply opt in favor of private giving or consumption rather than charitable giving in the first place, an even worse prospect from the reformers' perspective.

Still within the rubric of applying an objective measure of efficiency, there is a somewhat disingenuous third approach, an unhappy synthesis of the first two (i.e., the strong and the weak versions). Under this third approach, courts would impose the strong, irrebuttable presumption of efficiency, or something close to it, all the while insisting that it is what donors really want, even in the face of pretty clear evidence to the contrary. Present law is often faulted with falling into this position, both by those concerned with infringement of donors' real wishes[13] and by those eager for the law to espouse the stronger presumption more overtly and aggressively,[14] and their charge is not without foundation.[15] The supposed advantage -- not to say virtue -- of this position would be to pay lip service to subjective donor intent out of one side of the judicial mouth while advancing social goals out of the other. But to the extent that this approach becomes known, or perhaps even suspected, it will incur not only the cost of the strong presumption, in terms of turning away charitable donors, but also the cost of candor of, and confidence in, the judiciary.

D. Summary and Transition.

In the face of these dilemmas, cy pres reformists tend to come out somewhere in the middle, calling for a modest extension of cy pres's applicability to the more egregiously wasteful of charities.[16] In so doing, however, they are both too optimistic and too pessimistic: too optimistic, in their hope of giving viable content to the notion of charitable efficiency, and too pessimistic, in their fears of disregarding donors' intent. They wrongly assume, on the one hand, that diminishing legal protection of dead hand control will bring shame or disaster to the cause of charity, and, on the other hand, that the concept of charitable efficiency will make a modest degree of reform feasible. We must now examine each of these assumptions in some detail.

III. The Reformists' Overly Pessimistic Assumption -- The Dangers of Diminished Legal Protection for Donors' Intent.

The suggestion that donor intent be denied legal enforcement raises three related objections. The first is that disregarding donors' intent is inherently wrong, either because it deprives donors of property rights or because, more generally, it involves the breaking of commitments, irrespective of the consequences.[17] These consequences are the concern of the second and third objections. The second is that disregarding donor intent will have an adverse effect on charitable giving; once donors know their intentions can be disregarded by their donees without legal penalty, they will be less inclined to give.[18]

The third objection is concerned with the adverse consequences

not for charitable contributions, but for overall social productivity. The fear here is that potential donors, realizing that one option for expending the wealth they accumulate, setting up charitable gifts subject to their perpetual, state-enforced control, is no longer available, will be discouraged from earning the money in the first place. As a result, society will be deprived to that extent of their labor and its fruits. In the terms of economic analysis, prospective donors, faced with this diminution in the subjective value of what they receive for their labor, will be inclined at the margin to consume more of their labor as leisure and sell less of it to others in the market.[19]

A. Bringing the Objections into Focus.

All three of these objections get much of their purchase from two related misunderstandings. The first is the confusion of the legally unenforceable with the legally prohibited. To say that a restriction on the use of charitable funds (or, if you prefer, a commitment to use charitable funds in a particular way) is not legally enforceable is not to say that the law forbids honoring the restriction (or commitment). To take a painful example, consider the status of racially restrictive covenants in real estate deeds in the wake of Shelley v. Kraemer.[20] After Shelley, such covenants were no longer enforceable in court. But that did not mean, as a matter of either logic or law, that they were unenforceable privately, by moral suasion and neighborhood pressure, for example.[21] They eventually did become illegal as well as legally unenforceable, but only by special legislative action.[22]

The second misunderstanding is the confusion of moral with legal obligation. To say that dead hand controls on charitable gifts should not be legally enforceable is not to say that these controls should not be heeded by the recipients of the gifts on moral grounds. Most of us feel compelled, morally or socially or otherwise, to keep a wide range of commitments that are not legally binding upon us. We feel bound to give to the church or synagogue of our choice (and sometimes even to attend its services); we feel remiss if we don't respond to our alma maters' calls to alms.[23]

B. Answering the Three Objections.

With these two misunderstandings removed, we can take up each of the three objections in turn. The third objection -- the danger to overall social productivity -- is the least compelling, and can be dispensed with rather quickly. Even if donors were unable make gifts to charity subject to perpetual, legally enforceable use restrictions, the range of their options for disposing of their wealth either during life or at death would not be diminished very much. They could still use their wealth in ways that, as a matter of fact, seem to be more popular than making restricted charitable gifts: personal consumption, private gifts, and unrestricted charitable gifts. Given these remaining, and probably far more popular, options, it is unlikely that wealth accumulators would be much deterred in the amassing of their fortunes.[24]

What, then, of the objection that disregarding donor intent is inherently wrong? This objection, as I suggested above, has two

forms: the first focuses in particular on property rights, the second focuses, more broadly, on honoring commitments. The suggestion that disregarding donors' intent is wrongful because it interferes with their property rights in some absolute, natural law sense must, for present purposes, be put in its place rather than rebutted, for it proves too much. Society, through the legal system, restricts dead hand control dramatically in non-charitable transfers through the rule against perpetuities and allied doctrines. Unless we are to revisit long-standing and deeply entrenched limits on dead hand control across the whole field of property law, we must, for present purposes, take the general legitimacy of restricting dead hand control as given.[25]

The wrongfulness argument in its other form, which focuses on the general obligation to honor commitments, loses much of its force as soon as we distinguish moral from legal obligation. Not only do we feel obliged on non-legal grounds to honor legally unenforceable commitments; through a variety of non-legal mechanisms, obligations of this kind are quite frequently enforced, both in the context of charitable giving and in other contexts.

Charitable organizations frequently use more or less formalized (and more or less subtle) extra-legal pressures to encourage their members to make contributions.[26] These enforcement mechanisms may well be more effective than recourse to the legal system, even when that recourse is available. Hence, in a neighboring precinct of the nonprofit sector, social clubs post the names of delinquent members on the dining room door. And in the

heartland of charity, educational institutions have created elaborate systems of moral obligation loans. Students receive financial aid in return for commitments -- explicitly designed not to be legally enforceable -- to make offsetting "contributions" after their graduation.[27] Charitable trusts themselves developed in the absence of technical enforceability in the English law courts. Settlors initially had to rely on social, and eventually ecclesiastical, pressures on the titular owners of the donated property, the predecessors of modern trustees, for enforcement of their charitable wishes.[28]

The same absence of legal enforceability, of course, was initially true of private trusts as well,[29] and extra-legal enforcement mechanisms remain important well beyond the bounds of the nonprofit sector. Ellickson, for example, has noted the role that informal notions of neighborliness play in land use control.[30] The alternative dispute resolution movement can be seen as an effort, often supported by the state and even the courts, to get a wide range of disputes outside formal judicial fora, sometimes even out of the purview of state resolution entirely. Indeed, at the most general level of analysis, it can be objected that focusing on the state as the sole source of legal obligation and enforcement, the legacy of legal positivism, is a fundamental jurisprudential mistake. Jurisprudences in opposition to positivism insist that the legal system itself should be conceived of as including the kinds of non-state enforcement mechanisms I have so far been labeling "extra-legal" because they do not directly invoke the

authority or power of the state.[31]

There are, moreover, several factors that suggest such a system of non-state enforced compliance would serve donors to charity. Here the trustees of a particular charity face one of the fears of cy pres reformers: a policy of departing too far from donors' wishes risks alienating future donors. This is the message, for example, that parishioners send their clergy through collection plate boycotts. The very fact that trustees would be thus chastened in the use of legal power to depart from donor wishes should diminish the fear of cy pres reformists about giving trustees that power. Indeed, the wilier charitable trustees are, the more appropriate guardians they may be for the henhouse of charitable donations, whose inhabitants produce golden eggs.[32] And, of course, trustees would not be left entirely to their own devices; their discretion would be corralled by the outer limits of charity and non-profit status, and the government will still be around to enforce cruder forms of vulpine behavior through the non-distribution constraint.

In addition to protecting their organizations' access to future donations, trustees have other reasons for not exercising too cavalierly a legal power to depart from donor-imposed restrictions. For one thing, their organization's reputation for fair play and even-handedness may be an important element of its appeal to those who are not donors. Thus, for example, the sponsors of the America's Cup race may have enough of an incentive to preserve a sense of fair and open competition not to need

judicial oversight in interpreting the terms of their Deed of Gift that deal with qualification of challengers and conditions of competition.[33] To shift sports, who wants to play ball with those who cheat on the line calls?

Trustees, moreover, have to consider not only their organizations' reputations, but also their own. As Jonathan Macey points out, "[i]ndividuals develop reputational capital not only as experts in particular specialties (such as economists and lawyers), but also for general personal qualities such as honesty and scrupulousness."[34] This, in turn, creates strong, though extra-legal, constraints on the behavior of charitable trustees:

> [w]here a trust specifies that it is to be used for some general purpose such as the funding of scientific research or the elimination of poverty, there is in place a community of scientists and social workers with very clearly defined ideas and expectations regarding the appropriate bounds of proper conduct. Thus ... there is an (admittedly loose) set of standards for judging the performance of the trustees of such trusts.
>
> This set of standards, which might be called community standards, is bolstered by the fact that trustees who stray markedly from adherence to such standards are likely to face precipitous drops in the value of their own reputations in the relevant communities. This fear of loss of reputational capital is particularly acute where, as generally occurs, the trustees are drawn from the communities directly affected by the trust. Thus by choosing trustees whose personal reputation is at stake, [donors] can obtain some assurance that the trusts they create for the provision of public goods will be administered faithfully.[35]

Anecdotal evidence of trustees' concern to carry out precatory limitations in charitable bequests furnishes at least some empirical confirmation of this phenomenon.[36]

It might be objected here that, although individual charities and their trustees have an incentive to protect their individual

reputations, the example of a few unscrupulous violators of donors' intent might nevertheless harm the public perception of charity. No matter how much individual charities polish their reputations in this regard, a few bad apples will spoil the barrel. Much will depend here on what economists might call the elasticity of supply of charitable giving. If donors are strongly given to charitable giving, they might not diminish their gifts in the face of this prospect, but instead take steps, along the extra-legal lines suggested above, to ensure that the apple of their charitable eye does not go bad.[37]

If restrictions on charitable gifts have moral force, and if this moral force works, together with the kinds of informal enforcement mechanisms I have described, to ensure that donor's wishes are heeded, then has my argument thus far proved too much? If donors' wishes will invariably be obeyed without legal enforcement, removal of legal recourse would not only do no harm; it would also do no good. The answer to that is twofold. First, we recognize that, as a matter of ordinary morality, sometimes commitments may properly be broken.[38] And second, informal enforcement of commitments, relying as it often does on moral force, is likely to be weakest with respect to precisely those commitments that have lost their moral force.

Several circumstances in which commitments are generally thought to be weak as a matter of ordinary morality are relevant in this context. For one thing, commitments that are actively sought are more morally compelling than those that are only implicitly

assumed. Thus, we would think more harshly of an organization that breached a condition for which the donor actively bargained -- "I will leave you the bulk of my estate, but only if you use it to build a gym" -- than we would if the organization learned of the gift and the condition only after the testator's death. Even if accepting the latter gift is seen as an implicit acceptance of its terms, it is intuitively less firm a commitment. And the obligation to honor the commitment seems even less firm if there is evidence that the donor was mistaken in his or her assessment of the worthiness of the designated purpose.[39]

Dishonoring donor directions, moreover, is likely to be less morally troubling in the case of the dead than in the case of the living. For one thing, the living can be talked to, reasoned with, confronted with new facts, and thus brought around to changing their minds. For another, the dead may not be as constrained as the living in the social utility of their property dispositions. While the owner of property is alive, the opportunity cost of foregone personal consumption operates as a significant deterrent to truly pointless eccentricity in charitable giving and other dispositions of property. The dead are under no such constraints, and thus their more eccentric requests are less deserving of respect. It is hard, for example, to fault Kafka's friend and executor for disobeying Kafka's testamentary instructions to destroy his manuscripts.[40] This intuition is embodied in the law itself. The owner of an art collection may legally destroy it during life, but cannot compel a personal representative to execute

a testamentary direction to the same effect.[41]

The moral force of commitments may also diminish over time. This is attributable, at least in part, to our shared sense that the nearer wish fulfillments are, the dearer.[42] This insight underlies the economists' practice of discounting to present value, and something of this principle probably reinforces the rule against perpetuities. Beyond a point, the value to a donor, charitable or otherwise, of controlling the future probably diminishes to the verge of disappearance. It should not, therefore, strain our ordinary moral sentiments much to suggest that the wishes of long-dead donors carry declining moral force, particularly since those wishes are likely to be growing more onerous, or at best less beneficial, to the rest of us.[43] Sometimes, indeed, we will come to see them as inherently bad. The racial restrictions at issue in Shelley v. Kraemer, it is worth bearing in mind, have their analogues in the field of charity.[44]

The fact that ordinary morality recognizes situations in which commitments may be broken, situations in which charitable trustees may well find themselves with respect to restrictions imposed by donors, bears on all three objections to eliminating legal enforcement of such restrictions. Most obviously, morally justified departures from donors' wishes should count as exceptions to any notion that departures are, as a general rule, inherently wrong. Beyond that, the more that prospective donors realize that a decision to depart from past donors' conditions was morally

justified rather than arbitrary or overreaching, the less they will be deterred from either giving to charity or accumulating wealth.[45]

C. Summary and Transition.

If I am right in this section, cy pres reformers have been overly pessimistic in their worries about diminishing the legal enforceability of dead hand restrictions. Once the ready availability of extra-legal enforcement mechanisms is appreciated, these worries should be diminished, and cy pres reformers should be willing to loosen substantially the legal enforcement of dead hand restrictions in order to advance their goal of more efficient use of resources committed to charitable purposes. But that opportunity points to the second fundamental problem of cy pres reform, giving content to the notion of "charitable efficiency."

IV. The Reformists' Overly Optimistic Assumption: Giving Content to the Standard of "Charitable Efficiency."

Cy pres reform rests on the assumption that some method can be, or has been, devised for measuring how much bang is produced by the charitable buck, a metric now referred to as "charitable efficiency." But no one has yet devised such a metric, and none of the available candidates holds much promise. Furthermore, pursuing the goal of reformist cy pres without such a metric presents the prospect of standardless judicial modification of charitable trusts, a grim prospect for those who cherish the diversity and independence of the nonprofit sector.

The very word "efficiency" suggests a utilitarian calculus, as

does its scholarly application in the context of cy pres,[46] but this calculus is notoriously difficult to apply, even if it is accepted as appropriate in principle[47]. Are the pleasures of animals, and perhaps plants, to count?[48] Are all human pleasures to count the same, or are some higher or lower than others?[49] Is it right to sacrifice an innocent (and obviously unwilling) one to save a multitude?[50]

Economic analysis has tried to overcome these problems of utilitarianism,[51] and it is tempting to think that the "efficiency" of which cy pres reformers speak might be usefully equated with the technical economic concept of efficiency. As a matter of fact, it does not seem that this is what reformers have had in mind.[52] Nor is it likely that the economists' concept would quite work for the reformists.

To see why not, we must be clear about what economists mean by efficiency. Economic analysis avoids the problems of classic utilitarianism with a single, radically simplifying assumption: how much people value something (or, in classic utilitarian terms, how much pleasure it brings them) is to be measured by how much they are both willing and able to pay for it.[53] A transaction is socially optimal, or efficient, if it brings resources into the hands of those who value them most, in the stipulated sense of being willing and able to pay most for them.

An example will illustrate why this notion of efficiency will not work well as a standard for cy pres reform.

> Suppose that pituitary extract is in very scarce supply relative to demand and is therefore very

> expensive. A poor family has a child who will be a dwarf if he does not get some of the extract, but the family cannot afford the price.... A rich family has a child who will grow to normal height, but the extract will add a few inches more, and his parents decide to buy it for him. In the sense of value used in this book, the pituitary extract is more valuable to the rich than to the poor family, because value is measured by willingness to pay; but the extract would confer greater happiness in the hands of the poor family than in the hands of the rich one.[54]

Purchase by the wealthy family, to close the circle, is more efficient.

Richard Posner, author of the example, uses it to illustrate the limitations of economic efficiency as an ethical criterion, though he insists that the limitations are "perhaps not serious ones, as such examples are very rare."[55] Even if he is right about the relative rarity of such examples in the economy as a whole, they certainly bulk larger in the realm of charity, where the problem of allocating vital but scarce resources like health care, food, and shelter among the needy is more the rule than the exception.

The problem is that, in order to avoid the complexities of classical utilitarianism, economic analysis takes the existing distribution of wealth in society as a given, without questioning the equity of that distribution. This assumption, though perhaps harmless enough in many contexts, runs counter to the traditional role of a very large part of the charitable sector, which is to rectify perceived maldistributions of wealth or to ameliorate their consequences. Thus it would strain no one's conception of charity for a hospital charged with allocating Posner's pituitary extract

to award it to the poor child rather than, as the economic criterion of efficiency dictates, to the rich child.[56]

Another approach to defining efficiency would be to import a New Deal or Progressive Era notion of public policy, which played so prominent a role in the writings of the legal realists, and is at least implicit in the writings of those cy pres reformers who took their cue from these movements.[57] This would seem, too, quite compatible with (if not derivable from) the notion, deeply imbedded in the general law of charity, that charity's essential characteristic is the providing of public benefits.[58]

There are, however, serious problems with this approach. Most fundamentally, the New Dealish notion of a monolithic public policy identifiable by experts is in serious disfavor.[59] As particularly applied to the law of charity, it has been attacked as at best question-begging and at worse a cloak for unlimited judicial discretion. The notion of "public benefit," is, of course, still current in public utility regulation, and could be analogously applied to charitable organizations, identifying as charitable those organizations that reduce the burdens of government. This has occasionally been suggested, but is generally disfavored,[60] for two primary reasons. In the first place, it would apply rather awkwardly to the case of religious organizations[61]; in the second, it would undermine the element of pluralism and diversity that is taken to be an essential feature of the charitable sector.

Moreover, even if criticisms of the traditional public benefit theory of charity are answerable, there is a further problem with

trying to derive from that theory an intelligible concept of charitable efficiency. The traditional public benefit theory is designed to assess whether the overall purpose of an organization is charitable; it is an absolute test, and a test that focuses primarily on purpose rather than performance. To give content to their notion of efficiency, cy pres reformers need a measure of relative performance by organizations serving admittedly charitable purposes.

A comparison with the pure cy pres model will make this point clearer. Recall that, under the frustration component of that analysis, the threshold inquiry is whether either the donor or society's interest in the continuation of the trust is totally and absolutely precluded. Were it possible to come up with a viable public benefit theory of charity, the traditional cy pres doctrine would nicely complement it. When either the donor's purpose is impossible to fulfill or that purpose ceases to be charitable, the courts would be permitted to step in with mid-course corrections, albeit only very minor ones.

By contrast, cy pres reformers want the courts to be able to step in not only when the purpose has failed utterly, but also when it is not going sufficiently well, and with modifications that are not necessarily minimal. For that they need a measure of "well" which, unlike the standard of failure, cannot be directly derived from the notion of public benefit. The public benefit theory claims to give all that pure cy pres doctrine would require, a definition of "doing good." What the reformed cy pres theory

needs, and what the public benefit theory of charity does not purport to give, is a measure of "doing well at doing good."[62]

There are several possible responses to the absence of a clearly articulated standard of charitable efficiency, none of which is particularly satisfactory. The first would be to let the courts decide, to make this an equitable call in the classic sense, with the attendant risk that the standard will vary with the chancellor's foot. This may be the tack cy pres is now taking, if the resolution of the Buck Trust litigation is any indication.

There the supervisory court did not merely reject the trustee's cy pres petition requesting an expansion of the geographic scope of the trust to include the San Francisco Bay area. It took matters into its own hands, mandating that a substantial share of the trust's income be devoted to "major ... projects ... located in Marin County, the benefits from which will inure not only to Marin County but [also to] all of humankind."[63] As John Simon saw the matter:

> The result allows an agency of the state to become the grantmaking supervisor, thus undermining the decentralized, or "privatized," structure so carefully nurtured in our legal order.
> * * *
> The superior court has removed from the Buck Trust management and reserved to itself the right to decide how a major part of Beryl Buck's legacy will be used to help the nation or the world[64] ... Philanthropy has "gone public" with a vengeance.

Nor is "going public" the worst of it. Not only did the trial court "reject[] the trustees' assessment of efficiency"; it also "substituted its own philanthropic preferences."[65] Cy pres has not only gone statist; it seems to be going standardless as well.

Another alternative would be a "know it when we see it" standard based not on the judge's personal preferences as to charitable performance, but on the judge's assessment of public sentiment on that issue. This judicially administered populist cy pres would add little practical limit to judges's discretion, and would add another evil. Its very populism runs counter to the notion that charities are to be laboratories of counter-majoritarian experimentation in social betterment.

Yet another response to the absence of a clear standard of charitable efficiency, a response that implicitly takes account of the evils of unrestrained judicial and populist cy pres, would be a compromise measure, what might be called conservative reformed cy pres. This seems to be the position taken by Simes, who argued that charities should be reformable as "inexpedient," his equivalent of "inefficient," whenever "the amount to be expended is out of all proportion to its value to society."[66] "All out of proportion" seems calculated to restrict courts to dealing only with truly egregious waste, waste by a standard on which no reasonable people would disagree.

The problem with this lowest common denominator definition of waste is that it concedes a very large degree of arguable waste to the dead hand. Less, to be sure, than pure cy pres, with its threshold of impossibility, but much more than reformed cy pres would have to concede if it had a clear standard of efficiency to rein in judicial discretion (and, of course, if it were relieved of its fear of disregarding donors' intent). In order to protect the

diversity and independence of the charitable sector from judicial excess, conservative reformed cy pres makes an awkward alliance with the dead hand, the very force cy pres reform promised to combat.[67]

There is, however, yet another alternative in the face of the lack of an objective criterion of efficiency, an alternative that neither cedes unlimited discretion to supervisory courts nor defers unduly to the dead hand. Reformers can look, and to a promising but as yet limited extent have looked, to charitable trustees for guidance.[68] This approach has been limited so far to suggesting that the opinion of trustees deserves deference either because they are in a position to know what the donor would have wanted in the event of unforeseen circumstances short of impossibility, or because they are particularly expert in determining whether charities of the kind they serve are performing up to an objectively verifiable standard of efficiency. But it holds the promise for a deference to trustees that is not derivative, but direct. That is the possibility I want to explore now.[69]

V. Reforming Reformist Cy Pres -- The Communitarian Alternative.

Let us now take stock of where we are. We have seen that deference to dead hand control and the absence of a clear standard of charitable efficiency hem cy pres reformers in on two sides. On the one hand, deference to the dead hand requires reformers to limit the scope of their reform to intent-honoring changes, even if those would leave charitable assets in uses no living person sees as socially optimal. If they stretch what might be called "constructive" donor intent to include socially optimal changes,

they run into a problem on the other side: in the absence of a clear standard of "efficiency," permitting courts to reform trusts would concede excessive discretion to the courts, an instrumentality of the state, thus jeopardizing the much-vaunted independence of the third sector.

The focus on trustees, sharpened by Simon, offers a way between the horns of this dilemma but, as we have seen, still operates within the confines of the what Simon describes as "the binary," private versus public, perspective. The primary problem of dead hand control, the need to deal with changed circumstances, would be eliminated, directly and immediately, by placing ultimate decisions about changing the use of charitable assets in the hands of living trustees. If, as I argue in Part III, due deference can be given to the dead hand without making its grasp legally enforceable, then full legal title to property in charitable trusts could be given to trustees, in a new, but still fiduciary capacity. In the contemplation of the law, trustees would act, not as agents of the dead hand obliged to execute donors' intent, nor as subprefects for humanitarian affairs bound to maintain a state-dictated level of performance, but as custodians of the public good in a very different sense. Within the parameters of what the state, through common law or legislation, defines as charitable, they would be legally empowered to use the assets committed to their management in whatever way they determined would most advance the public good.

Here the absence of an objective standard of efficiency would

not pose a problem. On the one hand, trustees would not need it to guide their actions. They could rely on their best assessment of the donors' wishes in that regard, or of universal, societal standards, or they could rely on their own standards, limited, to the extent they themselves deem fit, by deference to the expressed wishes of donors. And this last suggests the second reason trustees would not need an objective standard of efficiency. Since they, and not an arm of the state, would be the ultimate arbiters of charitable efficiency, they (and we) need not fear that the courts will, under an ill-defined standard, impose their own judgments.

This approach would not, it bears emphasizing, eliminate the regulatory role of either the state on the one hand or private donors on the other. The state, for its part, would continue to play two critical policing functions. First, the state would establish and patrol the outer limits of charitability, as it traditionally has. The new freedom of charitable trustees to change the use of the assets in their hands would have to operate within the bounds of charity, whatever the state determined those bounds to be.[70] Second, the state would set and monitor standards of fiduciary duty, i.e., the duty of care and the duty of loyalty. The latter would be particularly important; without constraints on self-dealing, the assets of charities would simply be the private property of trustees. (Though no more so than under current law without similar constraints.)

Nor would donors be left entirely out of the picture. As we

have seen, they could still assert moral claims on the honoring of the restrictions they place on their gifts, and they would still have non-legal means of enforcing their wishes, not least of which would be the threat, implicit or explicit, of cutting off further support.

So far, I have suggested only that the approach I am offering here, which I will call the communitarian alternative,[71] will avoid problems to which reformed cy pres analysis is inherently subject. There is, I am convinced, a more positive way of seeing things. On this view, we would turn the assets of charity over to trustees, not in default of finding a way to give greater control to the donor or the state, but in preference for the intermediate position.

The principle argument in favor of the communitarian approach is political, in the broad sense. The communitarian position both recognizes and values the existence of communities smaller than that of the territorial state. This position is aggressively communitarian: under it, every gift to charity either enhances an existing community, in the case of gifts to existing charitable organizations, or creates a new one, in the case of new charitable trusts.[72]

There is no way to prove that this communitarian perspective is superior to more the statist or individualist solutions, or compromises between the two, that can be offered within the framework of traditional cy pres analysis. Indeed, political liberalism in its classic form is hostile to bodies intermediate

between individuals and the state,[73] and preferential treatment of nonprofits has been attacked on that very ground.[74]

On the other hand, enhancing the position of such intermediate bodies comports well with standard defenses of the third, or nonprofit, sector as both intermediate between, and independent of, the private sphere on the one hand and the public sphere on the other. By displacing state-enforced deference to donors, the communitarian approach recommended here further distances the nonprofit sphere from the two alternative spheres. Moreover, it strengthens the third sector in three related, but less obvious, ways. First, in denying state enforcement to donors' wishes, it presses donors to create alternative enforcement mechanisms, mechanisms that are perforce outside the state, and thus more likely to be within the third sector itself. Second, since under the communitarian approach the donee organization will have ultimate say whatever the alternative enforcement mechanism, donors' dealings with them will predictably involve less monologue and more dialogue. And finally, after death has removed the donor from the dialogue, the deference will be dynamic rather than static, permitting organic development of the community in the place of dead hand direction.[75]

In addition to these political considerations, there is also an economic factor that weighs in favor of the communitarian approach. Henry Hansmann has convincingly argued that nonprofit organizations are sometimes more efficient suppliers of goods and services than for-profit firms in the face of what he calls

contract failure, the inability of patrons to monitor the output. In industries characterized by various forms of contract failure, those who patronize nonprofit suppliers are more likely to get what they pay for at the offered price. Non-profits, forbidden by their very nonprofit status to distribute net profits to equity owners, have less of an incentive than for-profit firms to increase net revenues by trading on patrons' inability to monitor output.[76]

When demand for their output is rising, however, nonprofits may not be able to expand at an optimal rate. Their sources of capital are limited to loans, retained earnings, and contributions. Unlike for-profit firms, the non-distribution constraint, their defining legal characteristic, precludes their attracting capital in the form of equity investments.[77] If trustees were allowed to move assets from the charitable purposes to which they are presently devoted to new ones, a significant new source of capital would be available. Within the charitable sector, capital would be free to move to where rising consumer demand suggests it is most needed.[78]

VI. Problems with the Communitarian Approach.

The primary problem with the communitarian approach is its central premise, that legal enforcement of dead hand control can and should be removed. Assuming we have crossed that hurdle, there are several less serious problems that warrant addressing.

A. Membership and Citizenship.

Eliminating the legal enforcement of dead hand control raises the more general issue of the proper scope of state review of the

internal affairs of nonprofit organizations. Most of my examples tend to minimize this problem, because they imply that the charity is governed by a small number of trustees, and that these trustees are acting unanimously, or at least without serious discord. Both these implications are, unfortunately, somewhat misleading. Sometimes the trustee is itself a large nonprofit corporation, perhaps with multistate operations and a hierarchical structure, as in the case of religious denominations and federated charities like the United Way. And sometimes, alas, members of such charitable communities may conduct themselves, well, uncharitably.

How is the state to respond to a charge by one of the organization's constituents that another has violated the organization's own internal regulations? What if, for example, the donor argues not that his of her donation is being illegally diverted from its original purpose, but that the decision to change the use was not made in accordance with the organization's own procedures for making such decisions? This, as others have noted, is an ancient, and perhaps intractable, problem.[79] It poses a trilemma with the autonomy of private, non-governmental organizations on one side, the sovereignty of the state on another, and the civil rights of individual citizens on the third.[80]

I cannot fully resolve these problems here. For present purposes, the best that I can do is to point out that implementing my proposal -- eliminating legal enforcement of use restrictions -- does not require a resolution of the broader issues. My suggestion is only that one substantive issue be removed from state

determination. Consistent with that suggestion, donors and others with grievances against nonprofits could be left with recourse to the civil courts for redress of procedural complaints and even of substantive complaints not bearing on changes of the use of donated property for charitable purposes. Indeed, my suggestion presupposes, as I indicated above, that the state will enforce the standard fiduciary duties of care and loyalty.

B. Paradoxical (and Perverse) Effects on Innovation.

Might the elimination of legally enforceable dead hand control, which is calculated to allow charities greater flexibility and wider room for innovation, actually produce the opposite effect? This potential problem has two aspects, one facing innovative donors seeking to found new charities, the other facing novel organizations seeking donations. The problem for innovative donors is that, once they themselves cease to control the organizations they create, as they must at death, they have no assurance under my proposal that their innovative charitable wishes will be carried on.

Here, I am afraid, we face an unavoidable dilemma; we must place our hopes for innovation ultimately with either the organization's founder, as present law implicitly does, or with the community he or she founds, as my proposal does. The latter, at least, has time on side. Even the most original ideas will inevitably become time-worn, particularly in the details of their implementation. And the more innovative donors, those who have created the great charitable foundations,[81] themselves seem to have

realized this. The charitable foundations tend either to have statements of purpose virtually coterminous with the outer parameters of charity, like the Rockefeller Foundation's "advancement of humanity," or to specify particular charitable purposes that cover a wide front, like education or health care or the arts. Perhaps, too, the founders of the great foundations anticipated that, at least with respect to organizations of the magnitude that they created, informal controls would quite satisfactorily secure their wishes.[82] And finally, in return for permitting them to devote societal resources to purposes at the farthest margins of charitability, it hardly seems too much to ask that donors leave behind not just their instructions, but a cadre of supporters willing to carry them out. If that proves to be too much in a particular case, perhaps we should see it less as the stifling of innovation and more as the perishing of the unfit.

The problem for new organizations seeking donations is that, without the ability to make legally binding promises to use donated funds for the purposes for which they were solicited, such organizations will be at a disadvantage relative to older, established charities that can point to their track record of deference to donor wishes. New organizations, that is to say, will be less able convincingly to invoke informal enforcement mechanisms to overcome potential donors' reluctance to make what would be, under my proposal, unrestricted gifts to charity.

It is important to keep this relative disadvantage in perspective. Whether or not my proposal is adopted, the central

problem of new organizations will be their very novelty and their lack of a track record. It is hard to imagine that their present ability to make legally binding commitments to denote solicited funds to a particular charitable purpose helps much with this. For one thing, contributors may be only cursorily familiar with the law, if that. For another, even if they know of the law, the costs of enforcing it on their behalf are obviously high. And even if the cost of enforcement is borne by the public, the prospect of catching the truly fly-by-night is slim. Finally, the real deterrent to giving to such organizations will never be that they may denote their receipts to other charitable purposes, or even that their insiders will simply grab the money and run.[83] More likely, it will be the fear that, even if they are entirely conscientious, they may be inept or misguided. As long as donors act on the ancient maxim "by their fruits shall ye know them," transplants, upstarts, and offshoots will be at a decided disadvantage no matter how well rooted their commitments are in legal obligation.

C. Skewing Effect on Expenditures.

Faced with the loss of legal enforcement of charities' promises to use donations as they dictate, donors might try to lock in expenditures up front to avoid frustration in the future. This might have two undesirable effects. First, it might divert donations from endowments to bricks-and-mortar projects, and second, it might encourage present building at the expense of the future. In both instances, donors would be trying to have their

wishes quite literally set in concrete.

It is not likely, however, that this urge would have much more rational basis than under the present regime of dead hand control. Owing to fungibility of money, "contributions earmarked for one purpose, even if scrupulously set aside, may simply free the [donee] organization to use an equivalent amount of its own funds for other purposes."[84] There are, that is to say, already great incentives in favor of bricks and mortar. In addition, donors would have available to them the full range of informal enforcement mechanisms described above to ensure that their contributions are used as they desire.

D. Constitutional Problems.

Would the elimination of legal enforcement of dead hand control violate constitutional restrictions on the taking of private property or the impairment of contracts? Here we must distinguish between prospective and retrospective application. Retroactive application would technically deprive donors and their successors in interest of reversionary interests that may become possessory under present law if the donor's original charitable purpose failed. Even if this deprivation were held to require compensation,[85] that would not impose much of an impediment to the reform I recommend. The likely value of these reversionary interests would be low, given the remoteness prospect of their ever becoming possessory,[86] and could thus be taken in eminent domain or analogous proceedings at little cost.[87] Moreover, prospective application, the elimination of legal enforcement of restrictions

made on future gifts, should present no takings problem at all. Present property owners would be left with far more latitude in the use and disposition of their property than the Supreme Court has held in other contexts to be necessary to withstand a takings clause attack.[88]

Conclusion

Reformers have long argued that the doctrine of cy pres is due for an overhaul. But their insistence on staying within the existing bipolar framework, balancing sacrosanct donor direction against presumptively state-determined conceptions of the public good, has limited reform to marginal tinkerings.

All the while, the notion of the charity has evolved away from a monolithic concept of the public good, toward an appreciation of the virtues of pluralism and diversity. At the same time, the need for charity to respond rapidly to social change has become increasingly clear. The idea of state-determined performance standards is at odds with the first of these developments; the tradition of rigid dead hand control, with the second. If we come to see charities as living altruistic communities acting in their own right, rather than as servants of two competing masters, individual donors on the one hand and the state on the other, the traditional doctrine of cy pres will have no role.

Or cy pres may have one final, paradoxical role -- presiding over its own demise. Cy pres, formerly applied on a piecemeal basis to rid particular charities of outworn restrictions, could finally work to free the entire charitable sector from two general

constraints that have outlived their utility: dead hand control and statist definition of the public good. Cy pres, the ancient source of incremental charitable reform, thus contains the seeds, not so much of its own destruction, but of its own transcendence.

Appendix

In an earlier piece I suggested that all truly nonprofit organizations, with the sole exception of mutual benefit organizations, embody an essential element of altruism, and that this element of altruism is a sufficient criterion of charitability for purposes of federal income tax exemption. Atkinson, Altruism in Nonprofit Organizations, 31 B. C. L. Rev. 501 (1990). Part of my purpose in thus liberalizing the definition of charity was (with apologies to Chairman Mao) to let a thousand flowers bloom, to permit a broader and healthier range of experimentation in the field of charity than existing law allows.

That, however, posed a problem that I noted, but did not address at length, in the final pages of that paper: what about organizations that are devoted to purposes that are not illegal, but are silly or frivolous or stupid? "It could be argued," I admitted there,

> that the permissiveness of the altruism theory threatens to ... permit a luxuriant crop of useless, if not noxious, weeds to grow in the garden of charity. This problem is compounded, so the argument would run, by the fact that the lives of charities are unlimited; mutant charities should be chopped down before they take root, not allowed to go on bearing their insipid -- or baneful -- fruit forever.

Id. at 636. In response, I suggested that the vices of eccentricity would, to my mind at least, seldom overshadow the virtues of diversity. I concluded that traditional cy pres doctrine might apply as an ultimate control mechanism, but I had deep misgivings on that score:

> As the list of useless purposes to be weeded out grows

> longer, it threatens to become a requirement that only certain favored purposes be allowed to thrive. Once the shears are in hand, all it takes is an overzealous gardener to carve the rambling vegetation of a country retreat into the strictly classical geometry of the topiary at Versailles.

Id. at 637.

The problem, I now realize, was a false dilemma. We need not choose between the rigor mortised hands of eccentric donors and the long (and perhaps overly energetic) arms of the state to trim the outer borders of charity. In this paper I explore a third alternative, placing the fate of charitable organizations' assets squarely in the hands -- the helping hands, I earlier hoped they would be -- of the organizations themselves. Thus it may be less that this discussion is an appendix to the present paper, and more that the present paper is an extended footnote to the altruism piece. I should note, however, that virtually all of the criticism of reformed cy pres theory that I set out in Parts II and III of this paper apply whether you accept my expansive, altruism theory of charity or the narrower, traditional theory. Rather than insist that the world be seen from my own admittedly idiosyncratic perspective, I deal almost exclusively in this paper with the standard definition of charity, amorphous and ultimately unsatisfactory though I and others believe it to be. The broader definition of charity onto which my proposal for cy pres reform might be grafted is, accordingly, buried in footnotes.

1. The appendix to this paper is a supplementary introduction for those familiar with my earlier forays into the nonprofit field.

2. Under the related doctrine of deviation, a court may alter the administrative or procedural, as opposed to substantive, provisions of a trust. As in other contexts, this distinction between substance and procedure is difficult to maintain. Scholars have criticized the distinction on that ground, and on the additional ground that courts sometimes use the doctrine of deviation outside its technically proper realm of application as a means of effecting substantive changes in trusts without meeting the more rigorous requirements of the cy pres doctrine. DiClerico, Cy Pres: A Proposal for Change, 47 B.U.L.Rev. 153, 154-55 (1967); Johnson and Taylor, Revolutionizing Judicial Interpretation, 74 Iowa L.Rev. 545, 565-66 (1989). This debate need not concern us further, since the extreme limitation I recommend as to dead hand control would make the distinction between cy pres and deviation obsolete.

3. Ms. Buck left a gift valued at from $7-10 million at the time of her death in 1975 to the San Francisco Foundation for use in Marin County, one of the nation's most affluent counties. When the value of the gift increased to approximately $340 million, the Foundation sought to have the geographic scope of the gift expanded to include other counties in the Bay area. The result, according to one of the Foundation's advisors, was

> [h]yperbole, calumny, and apocalyptica.... The petition [for modification] was characterized as a threat to the sanctity of wills and the health of philanthropy, and as an offence against capitalism, the American way of life, and God."

Simon, American Philanthropy and the Buck Trust, 21 U.San Fran. L. Rev. 641, 641 (1987). For further commentary on the Buck case, see Malone, McEachron, and Cutler, The Buck Trust Trial -- A Litigator's Perspective, 21 U.San Fran. L. Rev. 585 (1987); Maloney, The Aftermath, 21 U.San Fran. L. Rev. 681 (1987); Comment, Cy Pres Inexpediency and the Buck Trust, 20 U.San Fran. L. Rev. 577 (1986); Note, Relaxing the Dead Hand's Grip: Charitable Efficiency and the Doctrine of Cy Pres, 74 U.Va.L.Rev. 635 (1988).

4. The America's Cup litigation involved a series of cases to determine what types of craft were appropriate entries under the Club's Deed of Gift, a trust instrument that sets out the rules of the race. For a detailed account of the course of litigation, see Johnson and Taylor, Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contracts and Dynamic Interpretation to Cy Pres and America's Cup Litigation, 74 Iowa L. Rev. 545, 555-60 (1989).

5. See, e.g., L. Simes, Public Policy and the Dead Hand 121-132 (1955). (add other classic critics.)

19. This parable of the lost talents comes from the Gospel of the law and economics crusade, Posner, Economic Analysis of Law 481 (3rd ed. 1986). See also Macey, Private Trusts for the Provision of Private Goods, 37 Emory L. J. 295, 297 (1988) Though I refer to labor in the text as the most intuitively clear example, a parallel substitution effect could occur with respect to capital: consumption would tend to displace savings and investment. Posner, accordingly, uses the more general term "accumulate wealth," which covers both selling one's labor and investing one's capital.

20. 334 U.S. 1 (1948).

21. See L. Hansberry, A Raisin in the Sun (1958), for a poignant depiction of both the social pressure and the moral force that backed such restrictions in the immediate aftermath of Shelley.

22. Under the federal Fair Housing Act of 1968 and earlier in some states under their own statutes. R. Boyer, H. Hovencamp, and S. Kurtz, The Law of Property 394, 436 (4th ed. 1991).

23. (If this is someone else's pun, I'm embarrassed and apologetic; perhaps the originator should be as well.)

24. Two other points about the problem of deterring wealth accumulation ought to be noted. The first is that, to an extent disputed among economic analysts themselves, dead hand control creates costs that may offset its beneficial stimulation of productivity. Cf. Posner, Economic Analysis 481-84 (arguing that containing these costs, particularly those associated with locking resources into unforeseeably undesirable uses, economically justifies the traditional cy pres doctrine) with Macey, Private Trusts 303-06 (arguing that donors without cy pres intervention can deal at least as efficiently with these costs).

The second point to note is that even if interfering with dead hand control is a significant deterrent to productivity and is, to that extent, at odds with the goal of wealth maximization, that is hardly the end of the story. Wealth maximization is neither the only social value (if it is an intelligible value at all, see Dworkin, Is Wealth a Value?, 9 J Legal Stud. 191 (1980)) nor the social value most commonly associated with charities. As I discuss more fully below, text at note (?), charities have traditionally been concerned at least as much with wealth distribution as with wealth accumulation.

25. For a discussion of the natural law arguments in favor of free testation and legally protected dead hand control, see Hirsch and Wang, A Qualitative Theory of the Dead Hand at 5-6, 11-12 (unpublished manuscript, 1992). For a brief survey of the general arguments against natural law normative theories, see Atkinson, New Wine in Old Wineskins, __ Md. L. Rev. __ (forthcoming 1992) (particularly Part II, "A Metaethical Interlude").

26. (cites.)

27. See Note, Moral Obligation Financial Aid Programs: A Section 170 Analysis, 84 Columbia L. Rev. 1402 (1984).

28. 4A Scott, The Law of Trusts 27-28. The absence of technical legal enforceability was in some respects advantageous to the earliest known charitable beneficiaries in England, the Franciscan friars, because it lent some credibility to the claim that their collective vow of poverty remained inviolate. Id.

29. S. Milson, Historic Foundations of the Common Law 87 (1981); A. Simpson, A History of the Land Law 53-54 (1986).

30. In his early treatment, Ellickson was not very sanguine about the use of informal mechanisms in large, mobile, and generally unneighborly countries like the United States, Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls 40 U. Chi. L. Rev. 681, 685-86 (1973). Subsequent empirical studies led him to acknowledge a much larger role. Ellickson, Of Coase and Cattle: Dispute Resolution among Neighbors in Shasta County, 38 Stanford L. Rev. 623 (1986); R. Ellickson, Order without Law: How Neighbors Settle Disputes (1991).

31. This is the view, for example, of sociological jurisprudence. See E. Ehrlich, Fundamental Principles of the Sociology of Law. It also finds expression in the works of the Legal Realists, see, e.g., K. Llewellyn and E. Hoebel, The Cheyenne Way (1953), and their epigone of the "New Haven School" of McDougal, Lasswell, and Reisman, see, e.g., Reisman Law from the Policy Perspective, reprinted in M. McDougal and W. Reisman, International Law Essays 1 (1981). (maybe cite E. Burke on manners, from Ellickson at 685 n. 16: "Manners are of more importance than laws ....")

32. Cf. San Francisco Examiner columnist Cyra McFadden's reference to the San Francisco foundation's management of the Buck Trust as "a classic case of foxes in charge of the hen house," quoted in Note, Phantom Selves: The Search for General Charitable Intent in the Application of Cy Pres Doctrine, 40 Stanford L. Rev. 973, 986 (1988).

33. See Johnson and Taylor, Revolutionizing Judicial Interpretation, at 563-65.

34. Macey, Private Trusts, at 320.

35. Macey, Private Trusts, at 320.

36. My source for the anecdote I have in mind here is John Simon. I would be happy to add other names (and willing, though reluctant, to delete his).

37. Hansmann makes a similar point in discussing the possibility that removal of the federal tax exemption of charitable organizations would result in increased gifts made in an effort to offset the revenues charities would loose to taxes. Hansmann, The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation, 91 Yale L.J. 54, 66 (1981).

38. It is important to be clear here on precisely what claims I am making for ordinary morality. I do not mean to suggest that such precepts of ordinary morality as honoring commitments and keeping promises have any foundation other than the common assent of those who acknowledge them, or that such precepts have any binding force beyond that class. I have no answer to anyone who rejects those precepts, who says they are based only on social convention and are thus not binding on those who choose to disregard such conventions. Indeed, I argue at some length elsewhere that efforts to place ordinary morality or any moral system on a firmer foundation than the assent of its adherents are deeply misguided. Atkinson, The New Role Morality for Lawyers __ Md. L. Rev. __ (forthcoming 1992). The following moral analyses, then, are directed to the community of those who, even if only implicitly, adopt conventional views about the sanctity of commitments.

39. See, e.g., Wilbur v. Owens, where the court applied the doctrine of cy pres to modify a trust for the publication of the testator's "Random Scientific Notes," in which the court found no scientific merit, to allow Princeton to use the bequest for scientific and philosophical research.

40. (cite recent review from NYT or NYRB)

41. See, e.g., Board of County Commissioners v. Scott, 88 Minn. 386, 93 N.W. 109 (1903); W. McGovern, S. Kurtz, and J. Rein, Wills, Trusts and Estates at 154 (1988). And the law's indulging this intuition has the imprimatur of economic analysis, or at least the imprimatur of one of law's leading economic analysts. Posner Economic Analysis at 485 (indicating approval of the Scott result). But cf. Ellen Porges, Note, (?) Yale L. J. (?) (198?) (urging legal protection of art in the hands of the living).

42. Some people may have a peculiar fascination with, derive enjoyment from the prospect of, influencing the very distant future. This is evident, for example, in the case of time capsules. Their purpose is frustrated if they are opened before the appointed day, a day valued for its seductively distant remove from the present. Something similar, perhaps, is true of the directions "Do not open until Christmas." These examples are, I would suggest, in the nature of exceptions that prove the rule, a conclusion supported by comparing the popularity of Christmas gifts to that of time capsules with longer fuses.

43. See Hirsch, A Qualitative Theory of the Dead Hand, at 15:

> [U]se restrictions (of all sorts) are apt to grow marginally more costly with the passage of time, as the state of the world diverges from the benefactor's expectations. Simultaneously, the marginal benefit to the benefactor of imposing the restriction should diminish over time, dropping off sharply after the first or second generation.

44. See note (?), supra.

45. See Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967) (the more (or less) property owners' sense of fairness is affronted by a regulation devaluing their property, the more (or less) demoralized they will be as prospective investors in property.)

46. (cite Simes, etc.)

47. (For critics of classic utilitarianism in principle, cite Kantian, deontological tradition and perhaps non-hedonistic schools of consequentialism, perhaps following Ross, The Right and the Good.)

48. With Singer's detailed argument that they should, in Animal Liberation, cf. Posner's biting observation that "[a] philosophy that does not distinguish sharply between people and sheep should be congenial to people with collectivist or interventionist sympathies," Utilitarianism at 115 n. 46.

49. Mill's answer was clear: "It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied." Utilitarianism at 14 (Library of the Liberal Arts ed. 1957). His justification for the distinction on utilitarian premises is, however, another matter:

> And if the fool, or the pig, are of a different opinion, it is because they only know their own side of the question. The other party to the comparison knows both sides.

Id.

50. For a fuller but still fairly concise account of this and other faults of utilitarianism, see Posner, Utilitarianism, at 111-17.

51. This is the point of Posner, Utilitarianism. (and, at least in part, Posner, Economics of Justice.)

52. The reformist notion of "efficiency" antedates the advent of economic analysis of law. Cf. the publication date of Karst, The

Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility, 73 Harv. L. Rev. 433 (January 1960) with Posner's observation that "economics had no real impact on legal theory (save in a few fields like antitrust law where the legal norm was explicitly economic) until the 1960s." Utilitarianism at 105-06.

53. Posner, Utilitarianism, Economics, and Legal Theory, at 119 (defining his notion of value), 127-35 (testing his notion of value against the standard objections to utilitarianism). For a less sanguine assessment of this substitution, see Leff, Economic Analysis of Law: Some Realism about Nominalism, 60 Va. L. Rev. 451, 456-59; Dworkin, Is Wealth a Value?, 9 J. Legal Studies 191 (1980) (especially Part VII).

54. R. Posner, Economic Analysis of Law 11-12.

55. Id. (footnote omitted).

56. Economic analysis does offer the prospect of an efficient redistribution of wealth. For an unpacking of this highly counterintuitive concept, which bases the optimal level of wealth redistribution on the amount of redistribution that the wealthy are willing and able to pay for, see Atkinson, Altruism in Nonprofit Organizations, at 521 n.69.

57. See, e.g., Comment, A Reevaluation of Cy Pres, Yale L.J. (1939); Fisch, The Cy Pres Doctrine and Changing Philosophies, 51 Mich. L. Rev. 375, 384 (1953) ("The transition from stress on the dead hand to interest in public benefit is in accord with Pound's legal philosophy."); Chester, Cy Pres: A Promise Unfulfilled, 54 Ind. L. J. 407, 414-16, 425 (1979) (noting the influence of Pound and the Realists on reformist cy pres).

58. For criticism of this theory of charity in its traditional form, see Atkinson, Altruism at 605-09, Hall & Colombo, The Charitable Status of Nonprofit Hospitals: Toward a Donative Theory of Tax Exemption, 66 Wash. U. L. Rev. 307, 364-85 (1991); and Hansmann, The Rationale for Exempting Nonprofit Organizations, at 66-74.

59. (cites, including Seidenfeld's forthcoming Harv. L. Rev. piece on civic republican administrative law and Ackerman's Clean Air, Dirty Coal.)

60. Cf. the majority opinion in Bob Jones University v. United States, 461 U.S. 574 (1983), which verges on this approach, with Justice Powell's concurring opinion, which criticizes the majority for taking that position. See also Hall and Colombo, Nonprofit Hospitals, at 345-63.

61. See Dale, Rationales for Tax Exemption 4 (unpublished manuscript) (Feb. 1, 1988); (perhaps add Powell concurrence in Bob Jones).

62. For the source of this phrase, and more on the problem it describes, see Kanter and Summers, Doing Well While Doing Good: Dilemmas in Performance Measurement in Nonprofit Organizations and the Need for a Multiple-Constituency Approach, in W. Powell, ed., The Nonprofit Sector: A Research Handbook 154 (1987).

And there is a further problem for those willing to indulge my altruism theory of charity, briefly recapped in the Appendix, as an alternative to the narrower traditional theory. Even if a viable notion of "doing good well" could be derived from the public benefit theory of charity, that would hardly be cause for celebration. Just as, in the orthodox theory of charity, the purpose of charity is set by public standards, so in its cy pres equivalent, the acceptable level of performance would be assessed by public standards. On the one hand the public would define what the public good is; on the other, the public would define how well the public good must be performed. Consistent with my broader vision of charity, I would rather see both standards, the definition of what the public good is and the appropriate measure of how well it is being served, set by nonprofit organizations themselves, subject only to the outer limit of the nondistribution constraint that defines the frontier of the nonprofit sector. For my elaboration of that perspective in theory of cy pres, see Part V, infra, "Reforming Reformist Cy Pres."

63. Simon, American Philanthropy and the Buck Trust 665, quoting the court's Order No. 23259 (July 31, 1986, Cal. Super. Ct., Marin Co.).

64. Simon, American Philanthropy and the Buck Trust 660-61.

65. Id. at 660. See also Note, 20 San Fran. L. Rev. at 584, "As the intent of the settlor becomes less determinative of the trust's uses, the bias of the trustee or of the state becomes more controlling." Cf. Gettleman and Hodgman, Judicial Construction of Charitable Bequests: Theory vs. Practice, 53 Chicago-Kent L. Rev. 659 (1977) (generally applauding liberalization of cy pres, but expressing fear that it may work in favor of large and established charities at expense of small and novel ones).

66. Simes, Dead Hand Control, at 139.

67. Thus, for example, in responding to the charge that charitable efficiency of an intuitively utilitarian sort would suggest serving the needs of starving Ethiopians and East Indians before relatively better off indigents in the San Francisco Bay area, John Simon invoked the orthodoxy of deference to the dead hand: cy pres modification is to leave a trust as close as possible to the donor's original intent. Simon, American Philanthropy and the Buck

Trust 664.

68. Simon, Buck Trust at 658-61. Scott envisioned the trustees as having both an advisory role and a veto power over liberalized cy pres:

> I would contend ... that even if the precise purposes for which the property was given are not actually impossible of accomplishment, even if changes are not imperatively demanded, yet if the trustees consent to certain changes, and the court is of the opinion that such changes are not unreasonable in view of the general purposes of the donors and of the changes time has brought to pass, in view, in short, of all the circumstances, the court should authorize such changes. I contend, in other words, that the consent of the trustees is a most important factor in determining what changes are justifiable. The trustees are peculiarly fit to determine such questions. They hold and administer the property; they and they alone represent both the donors and the beneficiaries.

Scott, Education and the Dead Hand, 34 Harv. L. Rev. 1, 17 (1920). See also DiClerico, A Proposal for Change, at 179, 197 (adopting Scott's position).

69. This approach is clearly adumbrated, but never made wholly explicit, in Simon, Buck Trust, at 658-60. Nothing that Simon says there indicates that he has yet despaired of giving content to the reformist notion of charitable efficiency, or that he would grant as much discretion to trustees as I suggest in the next section. Quite the contrary. But that suggestion is entirely consistent with his general description, id., of the third sector's mediating position between the purely private and the purely public. There is, however, the risk that the relationship between the radical proposal I set out below and the pregnant ambiguity of my mentor, Professor Simon, will suggest that between Diogenes's classic cynicism and Socrates's more subtle teachings: Diogenes was seen, even by contemporaries, as "Socrates gone mad." M. I. Finley, "Diogenes the Cynic," in Aspects of Antiquity 89, 96 (1960).

Scott considered the suggestion and rejected it out of hand: "I would not contend that absolute power should be given to the trustees to divert charity funds to any charitable purpose they may select." Scott, Education and the Dead Hand, 34 Harv. L. Rev. 1, 17 (1920).

70. Those bounds could, but need not, be as broad as the nondistribution constraint that defines the nonprofit sphere. In other words, any organization that is truly nonprofit could be recognized as charitable. For my proposal that charity be defined almost that broadly (excluding only mutual benefit organizations), see the Appendix.

71. One reason for choosing this name is that community foundations, by the terms of their charters, enjoy a similar power to alter the use of funds entrusted to them. Bogert, The Law of Trusts and Trustees 465-66, 467; Sugarman, Community Foundations, in 3 Commission on Private Philanthhropy and Public Needs, Giving in America 1689, 1693 (1975). It is not yet clear how far this power extends. But by its own terms, which tend to track liberalized cy pres doctrine on the issue of frustration, the power is not nearly as expansive as the one I suggest. See Note, Relaxing the Dead Hand's Grip, 74 U.Va.L.Rev. at 647.

Another reason for the choice of names is to emphasize links with communitarian political thought.

72. Cf. the opposite approach, evident in some cases and noted by some commentators, that every gift to a nonprofit organization creates a trust for the purpose for which the organization was organized and operating at the time of the gift. Pacific Home v. Los Angeles County, 264 P.2d 539 (1953). Under this approach, for example, a California charity that operated a hospital was forbidden to rent its hospital to a for-profit corporation and use the proceeds to finance neighborhood clinics, on the assumption that its donors had relied on a provision in its charter stating that its primary purpose was to operate a hospital. Queen of Angels Hospital v. Younger, 66 Cal.App.3d 359, 136 Cal. Rep. 36 (Cal. Ap. 1977). See also Holt v. College of Osteopathic Physicians and Surgeons, 394 P.2d 932 (1964) (minority trustees of osteopathy college, a charitable corporation, stated cause of action in seeking to enjoin as a breach of trust conversion to teaching of allopathic medicine).

73. See Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1057 (1980) (liberal opposition to inherent sovereignty of cities on these grounds).

74. Diamond, Of Budgets and Benevolences: Philanthropic Tax Exemptions in Nineteenth Century America 18-19, published in Conference: Rationales for Federal Income Tax Exemption (NYU 1991) (liberal opposition to tax exemption of nonprofit organizations).

75. This relationship between donor and donee organization is analogous to the Roman Catholic, as opposed to the Protestant, relationship between divine revelation and the believing community. In the Catholic tradition, doctrine is thought of as developing organically within the church along lines not logically inferable from the original revelation. (cite Newman.) In the Protestant traditions of Luther and particularly of Calvin, the original revelation is the ultimate source of authority for the community. (See, e.g., Bainton, The Reformation of the Sixteenth Century.)

This analogy was suggested to me by John Simon's observation that "[o]nce the donor is gone, the trustees serve as the donor's vicar." Simon, Buck Trust at 658. In pursuing Simon's analogy, I do not mean to suggest that the theological and cy pres questions

be answered, as well as asked, in the same way. On that score, suffice it to say that much may turn on the one in whose stead the vicar is standing.

76. Hansmann, The Role of Nonprofit Enterprise, 89 Yale L.J. 835 (1980).

77. Hansmann, The Rationale for Exempting Nonprofit Organizations from Corporate Income Taxation, 91 Yale L.J. 54 (1981). Cf. Kanter and Summers, Doing Well while Doing Good at 154-55 (nonprofit organizations' sense of commitment to particular charitable missions limits their redirection of resources to new areas as quickly as for-profits, which are guided only by higher rates of return). As I argue below, however, nonprofits could be freed to change their particular mission, and on that basis to redirect their resources.

78. It is tempting to suggest another economic reason for giving trustees free rein as to the use of assets in the charitable sector: the savings in avoiding cy pres litigation. To know whether there is a net savings here, however, we would have to take several other factors into account. At the most basic level, we would need to know whether the reduction in litigation expenses was being more than offset by the costs of other, informal enforcement mechanisms of the kind discussed in Part III. And, at a more refined level of analysis, we would need to know whether the new regime of trustee control resulted in a more efficient allocation of resources, in the strict economic sense, than the old system of judicially enforced donor control. Efforts to resolve that issue are likely to be as convoluted, and as ultimately inconclusive, as the current debate over whether the existing cy pres doctrine is more or less efficient than an alternative more deferential to donors. Cf. Posner, The Economic Analysis of Law 481-84 (arguing for efficiency of present doctrine) with Macey, Private Trusts for the Provision of Private Goods 303-06 (arguing for the greater efficiency of more deference to donors).

79. Ellmann, Driven from the Cathedral. The title of Ellmann's article is an allusion to the Roman proconsul Gallio's refusal to hear charges brought by Jewish religious authorities against the apostle Paul. As reported at Acts 18:14-16:

> Gallio said to the Jews, "If it were a matter of wrongdoing or vicious crimes, I should have reason to bear with you , O Jews; but since it is a matter of questions about words and names and your own law, see to it yourselves; I refuse to be a judge of these things." And he drove them from the tribunal.

The classic article on the general problem is Chafee, Internal Affairs of Associations Not for Profit, 43 Harv. L. Rev. 993 (1936).

80. Thus, in the case of Paul, the Roman proconsul might claim to waive Roman's sovereign right to hear Paul's case, thus recognizing the autonomy of the Sanhedran, but at the expense of any claim Paul might have asserted as Roman citizen to a civil trial. When, as it turned out, Paul was ultimately granted his appeal to Caesar, Acts 25:12, the latter's sovereignty and the former's civil rights were vindicated at the expense of the Sanhedran's autonomy.

81. For a defense of private foundations as significant sources of innovation, see J. Simon, Charity and Dynasty under the Federal Tax System, 5 Prob. Law. 1 (1978); M. Fremont-Smith, Foundations and Government, especially 49-53 (1965) ("Foundations in a Pluralistic Society").

82. Their confidence in such informal control mechanisms does not appear to have been misplaced. See W. Nielsen, The Big Foundations 279 (1972) (describing extensive degree of control founders of great foundations were able to exercise through such means as family control of governing boards).

83. For a detailed study of extensive recent efforts at the state and local level to regulate charitable solicitations, and the generally hostile reception those efforts have received in the Supreme Court, see (Dale/ NYU study).

84. Atkinson, Altruism, at 584.

85. Scott deals dismissively with objections raised along these lines to traditional cy pres reform:

> The legislature has power, of course, by general acts to liberalize the doctrine of cy pres, applicable to all trusts, whether created before or after the enactment.

4A Law of Trusts at 556 n. 7. But what I am suggesting is much farther-reaching than what he had in mind. Cf. Preseault v. Interstate Commerce Commission, 110 S.Ct. 914 (1990) (recognizing that reversionary interests in abandoned railroad rights of way may be protected by the takings clause) with Dartmouth College v. Woodward, 4 U.S. 518, 642 (1819) ("Their [donors'] descendants may take no interest in the preservation of this consideration.").

86. This is all the more true now that the federal tax laws forbid the retaining of partial interests in donated property except in narrowly circumscribed circumstances, including when the likelihood of reversion is remote.

87. There should be no problem with the constitutional requirement that takings of private property be for a "public use"; that requirement is now deemed coterminous the states' very broad police powers. See Hawaii Housing Authority v. Midkiff, 104 S.Ct. 2321 (1984).

88. See, e.g., Andrus v. Allard, 444 U.S. 51 (1979) (prohibition of the sale of Native American artifacts made from the feathers of endangered birds held not to be a taking of the artifacts because their owners were left with other rights, including the right to possess and to transfer gratuitously).