IMMORTALITY AND THE LAW

The Rising Power of the American Dead

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CONTROLLING PROPERTY (PART 2): TRANSFERS FOR CHARITABLE OR OTHER PURPOSES

Rather than giving their money to people, individuals sometimes want to commit their wealth to fulfill a particular purpose. During life there are virtually no limits to what people can do with their money: they can give to political candidates, support the work of educational and religious institutions, build monuments to themselves or others, and promote causes they believe in. People can also do things with their money that others might consider strange or inappropriate. They can use dollar bills as cigarette paper and smoke them, buy perfectly good houses and tear them down, and spend lavishly on their pets. Indeed, short of supporting activities that are against the law, people are free to spend their money in whatever manner they choose.

And after death? While during life the law takes a largely hands-off approach to people’s choices, this is not true for transfers after death. Indeed the law’s treatment of postmortem transfers for a purpose is highly disparate depending on the particular purpose being promoted. Whereas transfers for charitable purposes are strongly encouraged and given financial benefits, other types of transfers fare less well. Some purposes are tolerated only in limited circumstances, while still others are forbidden outright as against public policy—even when these same actions would have been allowed during the person’s life.
Transfers for Charitable Purposes

People commonly seek to direct their wealth to charitable purposes at death. There are a number of reasons for this. First, many people have a general desire to benefit society. Charitable transfers at death enable people to fulfill those desires at a time when they know they no longer need the resources for their own support. In addition, donating to charity is a way of expressing one’s identity. Finally, some charitable bequests are inspired by a desire to secure a form of immortality. For some religious believers, this can come in the form of preserving their souls (by financing good deeds or the saying of Masses), while for others it can come in the form of buildings and programs at universities and other large charitable institutions or their own private foundation. Rockefeller, Ford, Carnegie, Stanford, Harvard, Yale, MacArthur, Pew, and Duke are all names known to us today because of the charitable organizations that live on doing the work originally inspired by the founder.

The desire to make—or remake—one’s identity has no doubt provided a strong inspiration for much charitable giving. Thus, it was reputedly the erroneous publication of an obituary that prompted Alfred Nobel to establish his eponymous charitable foundation. Nobel had made his fortune from the development of dynamite and other armaments. When his brother was killed, a newspaper mistakenly thought it was Alfred and published his obituary, which began, “Le marchand de la mort est mort” (The merchant of death is dead), and continued, “Dr. Alfred Nobel, who became rich by finding ways to kill more people faster than ever before, died yesterday.” Shortly after this obituary was published, Nobel rewrote his will to devote the bulk of his estate to create the Nobel Foundation, which grants annual prizes to those who have conferred the greatest benefits to humanity. These annual prizes have enabled Nobel’s name to be linked with some of the most respected individuals of each generation.

The law governing charitable giving has undergone a dramatic transformation throughout U.S. history. From the early days of the Republic through much of the nineteenth century, transfers for charitable purposes were viewed with suspicion, and the law was at times actively hostile to
these transfers. This aversion was expressed in two forms: state statutes (called “mortmain,” meaning dead hand in French), which limited individuals’ ability to make transfers to religious and other charitable organizations, and court decisions that prevented individuals from establishing perpetual charitable trusts.

Since the beginning of the twentieth century, however, the treatment of charitable bequests has enjoyed a dramatic turnaround. First, mortmain statutes have been virtually eliminated. Second, individuals are free to establish trusts lasting forever for any charitable purpose they choose. Most significantly, today these transfers are actively subsidized by the federal government in the form of tax benefits—at least for the wealthiest Americans.

What Is Charitable?

The law provides special benefits to transfers for charitable purposes. This raises the question: What makes a purpose charitable? Although “charitable,” in its colloquial sense, refers to being generous to those in need, in the context of the law, the word has both a more particular and a broader meaning. First, for a transfer to be considered charitable, it must be to an organization with a charitable purpose. Thus, even though a bequest to a needy family might be “charitable” in the colloquial sense, it would not qualify as a charitable bequest because it is not for the benefit of an organization. Second, the concept of charitable within the law is also broader than the colloquial meaning because it need not be for the benefit of the needy. Indeed, the law considers a broad range of purposes that are considered beneficial to society in general to be charitable.

There is no clear definition of what constitutes a charitable purpose. The most commonly cited guidance is the Restatement of Trusts.4 It provides a somewhat circular definition that a purpose is considered charitable “if its accomplishment is of such social interest to the community as to justify permitting the property to be devoted to the purpose in perpetuity.” The restatement lists the range of purposes that have been recognized as charitable, including “the relief of poverty, the advancement of education and of religion, the promotion of health, the accomplishment
of governmental or municipal purposes, and other purposes the accomplishment of which is beneficial to the community."

Although some of these categories, such as education and religious organizations, are fairly well delineated, the catchall category "beneficial to the community" is more difficult to apply since what one person sees as beneficial to the community another might see as serving no such purpose. Consider the English case involving the Irish playwright George Bernard Shaw.

Shaw was interested in simplifying the written English language. He wrote many of his manuscripts in the form of shorthand developed by Sir James Pitman, and he thought it would be useful to have an English alphabet that was phonetic and therefore simpler to use. To that end, Shaw left the residue of his estate (he began receiving significant royalties after his play *Pygmalion* was adapted by Alan Jay Lerner and Frederick Loewe into the tremendously successful musical and movie *My Fair Lady*) to a trust to develop a new phonetic English alphabet of forty letters in which each letter could be pronounced in only one way. Shaw believed that this new English alphabet would be extremely useful to writers and readers of the English language, but the court did not agree. In *In re Shaw* the court ruled that the Shaw alphabet trust was neither for the advancement of education nor beneficial to the community and therefore was not a charitable trust.

The concept of what constitutes a charitable purpose is often deeply affected by when it is being evaluated. In 1865, for example, the Massachusetts highest court ruled that a bequest to trustees (two of whom were Lucy Stone and Susan B. Anthony) "to secure the passage of laws granting women, whether married or unmarried, the right to vote, to hold office, to hold, manage and devise property, and all other civil rights enjoyed by men" was not charitable because its purpose could not be accomplished without changing laws. Just about one hundred years later another court ruled that a trust to help further passage of the proposed Equal Rights Amendment (a proposed amendment to the U.S. Constitution providing equal rights regardless of sex) did have a valid charitable purpose.

Questions about what constitutes a charitable purpose are not merely relics of history. More recently, a Texan named Charles Walker left a
handwritten will that included an ingenious plan to make millionaires of all Americans. The will provided as follows:

I hereby direct my Executor to sell [a parcel of land] for cash and to invest the proceeds in safe and secure tax-free U.S. government bonds or insured tax-free municipal bonds. This trust is to be called the James Madison Fund to honor our fourth President, the Father of the Constitution. The ultimate purpose of this fund is to provide a million dollar trust fund for every American 18 years or older. At 6% compound interest and a starting figure of $1,000,000.00, it would take approximately 346 years to provide enough money to do this.\(^\text{10}\)

Although it recognized that Walker’s intent was generous and benevolent, the court nonetheless ruled that the purpose was not “charitable” because “Walker intended nothing more than to financially enrich the American public” and there was no evidence that this would promote the social interest of the community.\(^\text{11}\)

Despite these cases, the overall trend is for courts to be liberal in their determination of what constitutes a charitable purpose. In recent years, charitable status has been recognized for trusts with purposes as diverse as promoting excellence in quilting and preserving Huey military aircraft (its members will educate all generations in the history of the American-made Huey in Vietnam and its fifty years of service in the U.S. military).

The law of charitable trusts is all or nothing: if the purpose is recognized as charitable, the trust will receive the myriad of benefits conferred on charitable trusts, regardless of the relative societal value afforded by the trust. The legal scholar Lewis Simes described this phenomenon as follows: “There are no degrees of charitableness. Exactly the same privileges and immunities are accorded in the creation of the great foundations, whose purposes are sometimes stated to be to distribute the income for the benefit of mankind, as are accorded to a bequest to maintain a hospital for ailing Siamese cats.”\(^\text{12}\) On the other hand, if the purpose is not recognized as charitable, not only will the special benefits be denied, but in most cases the bequest will fail altogether owing to the requirements imposed on private trusts.\(^\text{13}\) If the bequest fails, the property generally passes to the donor’s next of kin.
Charitable Bequests in the United States: A Historical Perspective

Charitable giving in America was formerly not treated with the deference it is today. The law was deeply ambivalent about charitable giving—particularly in perpetuity—and imposed a number of restrictions. These restrictions took two forms: mortmain statutes, which limited transfers at death to religious and charitable organizations, and court cases, including from the Supreme Court, which set aside individuals' attempts to devote their property to charitable purposes in their wills.

Mortmain Statutes

From the nineteenth century through much of the twentieth century, it was common for states to have mortmain statutes allowing spouses and children to set aside deathbed gifts to religious organizations and other charities. Mortmain statutes restricted charitable giving by either disallowing charitable bequests in wills made shortly before the donor's death or by prohibiting charitable gifts in excess of a designated fraction of the donor's estate.

Mortmain statutes were ostensibly enacted to address concerns that as people get closer to death, they may be inclined to direct their estates to a religious or charitable organization to ensure their eternal salvation. Mortmain statutes were thus considered to fulfill two purposes: to protect testators (as well as their rightful heirs) against the testator's improvidence, and to deter clergy and representatives of other charitable organizations from exerting undue influence on the frail and elderly. Religious bigotry was undoubtedly also associated with these statutes. As historian Lawrence Friedman has described it, "A faint odor of anti-Catholicism also hung over these laws—the fantasy of the evil priest, extorting ransom for the Church from the dying man, as the price of absolution."15

Beginning in the 1970s some states' mortmain statutes began to be successfully challenged on a variety of constitutional grounds, and other states simply repealed their mortmain statutes. As a result, the only mortmain statute still in effect today is one in Georgia. The Georgia statute has very narrow applicability. It applies only to wills made within ninety days of the person's death where the decedent is survived by a spouse or
descendants and the gift to charity is in excess of one-third of the de­
cendent's estate. The Georgia statute is further limited in that it does not
apply to the extent that the value of the estate exceeds two hundred thou­
sand dollars.¹⁶

The Precarious History of Charitable Trusts

People often seek to devote their property to a particular chari­
table purpose. Beginning in the sixteenth century English law allowed
this through the device of the charitable trust—the technical term for the
situation where a person gives property to another with instructions to
use that property for a particular charitable purpose. Charitable trusts
could be established either during life or at death through a bequest in a
will. After the Revolutionary War, the newly created American states were
in an upheaval over whether to continue to follow the law of England or
create a new American law that better reflected the values of the new de­
mocracy. The charitable trust, associated as it was with privilege, the dead
hand, and massive wealth held in perpetuity, was viewed with particular
suspicion.¹⁷ There was particular concern about problems that could arise
from religious establishments controlling large amounts of property in
perpetuity. As James Madison wrote:

But besides the danger of a direct mixture of Religion and the
civil Government, there is an evil which ought to be guarded
ag[ain]st in the indefinite accumulation of property from the ca­
pacity of holding it in perpetuity by ecclesiastical corporations. . . .
The growing wealth acquired by them never fails to be a source
of abuses. A warning on this subject is emphatically given in the
example of the various Charitable establishments in G.B. [Great
Britain] the management of which has been lately scrutinized.
The excessive wealth of ecclesiastical Corporations and the mis­
use of it in many Countries of Europe has long been a topic of
complaint. In some of them the Church has amassed half perhaps
of the property of the nation. . . . In the U.S. there is a double
motive for fixing limits in this case, because wealth may increase
not only from additional gifts, but from exorbitant advances in
the value of primitive one. In grants of vacant lands, and of lands
in the vicinity of growing towns & Cities the increase of value is often such as if foreseen, would essential control the liberality confirming them. 18

These concerns were not without merit. In addition to the experiences of Great Britain (where before the English Reformation the Church owned much of the land), the history of Mexico provides an example of difficulties that can arise when organizations with perpetual life acquire large amounts of land in developing countries.

Catholic missionaries came to Mexico with the sixteenth-century Spanish conquistadors. The clergy played a strong role in the communities, and it was not uncommon for people at death to give large amounts of their land to their local churches. Over the centuries, the power of the Catholic Church grew along with the Church's landholdings; by the mid-nineteenth century, the Church owned half of the land in Mexico. This extensive land ownership by the Church meant that there was less land available for private ownership, which in turn inhibited the development of a strong middle class. 19 The extraordinary wealth of the Church also enabled it to play a powerful role in the country's political evolution. The Church actively opposed Mexico's independence from Spain. 20 Only after Church land was seized by President Benito Juarez in the mid-nineteenth century did the Church's political power begin to diminish.

The issue of the validity of charitable trusts in American law came about in the wake of the American Revolution when many state legislatures struck all British statutes from their laws. These included the English Statute of Charitable Uses, which had explicitly authorized charitable trusts. Although some states subsequently enacted their own statutes, others did not, leaving open the question of whether bequests for charitable purposes would be recognized. The issue at last came before the United States Supreme Court in 1819 in the case of Philadelphia Baptist Association v. Hart's Executors. 21

Silas Hart, a Virginia resident who died in 1795, had made a bequest in his will to the Baptist Association of Philadelphia. Hart’s will directed that the bequest was to be used to educate Baptist youth for the ministry. Virginia was one of the states that had struck all British laws without enacting its own statute authorizing charitable trusts. The question before
the Court was whether Hart's wishes would be given effect. Although
the Court noted that Hart's philanthropic intentions would have been
upheld under the English Statute of Charitable Uses as well as under
prior Virginia law, it ruled that the statute had fallen in December 1792,
when the state legislature struck all statutes and acts of Parliament from
Virginia law. Because there was no statute on point authorizing charitable
trusts, the bequest was set aside and the property was instead given to
Hart's heirs. The opinion was written by Chief Justice John Marshall,
with Justice Joseph Story concurring.

Although this decision was rather technical, it was backed by the repu­
tations of Marshall and Story, two of the most influential jurists of the
era, and had an enormous impact on lower courts, which for the next
hundred years regularly set aside charitable bequests. In this era courts
were generally suspicious of allowing "every private citizen the right to
create a perpetuity for such purposes as to him seem good." In one of
the most notorious cases, a New York court set aside a four-million-dollar
bequest from Samuel Tilden (former governor of New York and almost-
resident of the United States) to establish the Tilden Trust to fund a
public library in New York City. The New York courts refused to give
effect to the bequest and instead awarded the money to Tilden's heirs.25
The public outcry over this decision was so strong, however, that the
New York legislature responded by enacting the Tilden Act in 1893 vali-
dating charitable trusts in New York.26

The ongoing power of the Hart decision was particularly surprising in
light of the Supreme Court's reversal of itself, twenty-five years later, in
the case of Vidal v. Girard's Executors, holding in 1844 that a charitable
trust could be upheld even in the face of statutes abolishing English law.27
Yet not until the early twentieth century were charitable trusts generally
recognized throughout the United States.28

What explains this shift in legal opinion about the validity of charitable
trusts? On a doctrinal level, the shift has been explained as a result of a
deepening understanding of English legal history and the technical ques-
tion of whether charitable trusts were the product of English statutory
law (which had been repealed in many states after the Revolution) or
principles of equity and common law (which continued to apply). This
explanation, however, fails to take into account the larger social context
in which this transition occurred.29
The late nineteenth century was a time when individuals in the United States began amassing wealth at levels never before seen in history. At the same time, it was an era of growing public awareness of larger societal ills, particularly those suffered by immigrants in the rapidly expanding American cities. In the end, the combination of societal problems in need of resources and the possibility of devoting a portion of this growing private wealth to the problems of the day outweighed earlier concerns about the unfettered growth of perpetual charitable organizations. This transformation was also eased by the simultaneous development of another entity with perpetual existence: the corporation. The public’s growing familiarity with perpetual organizations in the context of business also likely served to decrease people’s apprehension regarding perpetual charitable trusts.

Charitable trusts today have both legal and social acceptance. Few worry about the societal costs of charitable trusts and large dynastic wealth owned by nonprofit organizations (even though the wealth of the Bill and Melinda Gates Foundation is greater than that of many countries). Charitable trusts are touted as win-win institutions, serving the dual purposes of providing resources to address social problems as well as giving people a way to “live on” after death. Despite this appeal, charitable trusts are not without their issues, particularly those raised by the fact that they exist in perpetuity and that they are heavily subsidized through the tax system.

Charitable Bequests Today: Immortality Achieved

The contemporary law of charitable bequests affords unequaled opportunity for Americans to live on after death through charitable bequests. Mortmain statutes limiting charitable gifts at death have been virtually abolished, and the charitable trust is accepted throughout the country, allowing “every private citizen the right to create a perpetuity for such purposes as to him seem good.”

Charitable bequests enable people to live on in a variety of ways:

• In some religions, a person’s soul can be helped into eternal life through particular human activities, such as the saying of Masses in his or her name. People regularly seek to give money to religious organizations to say Mass in their names. Although these types of bequests have been
outlawed in England for a long time, they have been consistently supported under American law as a valid charitable bequest.

- A person's name can be given continued existence through charitable naming opportunities. A common benefit of charitable giving is that the donor's name is publicly associated with some aspect of the charitable institution. Sometimes these naming opportunities are for aspects of an institution's physical plant—everything from a building to a wing to a room down to a single brick in a walkway. At other times the naming is of a particular program or a whole institution. Regardless of the size of the gift, the law of contracts enforces these agreements and plays a role in ensuring perpetual advertisement of the person's generosity.

- A person's charitable plan can be given continued existence through the charitable trust. Whether the plan is general in nature (for example, for the betterment of humanity) or specifically targeted (for example, to provide scholarships to children from a particular background or geographic area or provide resources to cure a particular disease), the law of charitable trusts promises to enforce a donor's plan for as long as he or she likes, even in perpetuity.

The Law of Charitable Trusts

A charitable trust is created when a donor transfers property to a trustee (a trustee is simply the name of the individual or entity charged with holding trust property and carrying out the donor's wishes) and directs the trustee to use the property to carry out a charitable purpose. The charitable work could be performed by the charitable trust itself, but just as commonly the charitable trust directs money to other charitable organizations. A charitable trust can be established during life or at death; regardless of when it is established, however, the law of charitable trusts enables people to continue to exert their will long after their bodies cease to exist.

Two defining features of the law of charitable trusts make them particularly effective in allowing a donor to achieve a form of immortality: the focus on enforcing the donor's intent, as opposed to serving broader societal values, and the ability for charitable trusts to exist in perpetuity.
FOCUS ON DONOR INTENT The defining principle infusing American law of charitable trusts is to give effect to the donor’s wishes as expressed in the donor’s charitable plan. (This is different from English law, in which there has been greater emphasis on the use of trusts to promote social welfare.) This value is effectuated through the multitude of technical rules governing charitable trusts—from the obligations of the trustees to the ability (and lack of ability) of courts to amend charitable trusts.

The primary obligation of the trustee is to carry out the donor’s intent—regardless of whether the donor is dead or alive and regardless of whether the money could arguably be put to better uses. If the trustee fails to carry out its duties, the state attorney general is authorized and obligated to ensure that the donor’s intent is carried out. Each state attorney general’s office maintains a charities division devoted to this purpose. Thus, if a donor transfers ten million dollars to a bank as trustee and directs the bank to invest the money and use the income to provide scholarships for people of a particular community, then the bank is legally obligated to do so. If the trustee tries to do something with the money other than providing scholarships pursuant to the donor’s plan, then the attorney general’s office is obligated to step in and enforce the donor’s wishes.

The donor’s plan is supported even when the money could arguably be put to better uses. In one case, a donor named Beryl Buck left her estate in trust to benefit “the needy in Marin County, California and for other non-profit charitable, religious, or educational purposes in that county.” In the period after her death, a number of things happened that caused the trustee to request expanding the beneficiaries of the trust to include other counties in the San Francisco area. First, a growth in the affluence of Marin County (which had become known as the hot-tub capital of the world) diminished the number of “needy” in the county. Second, because of a corporate buyout, the size of the Buck Foundation grew exponentially in value from nine million dollars, when the trust was established, to three hundred million dollars. The trustees took the position that had the donor known about this posthumous surprise, she would have spread her bounty more widely. In rejecting the trustees’ request, the court ruled that as long as it was possible to carry out the donor’s
wishes as expressed in her trust, the trustee was obligated to do so, regardless of whether there were other, more compelling uses for the money.

American law further acts to fulfill the donor's wishes by giving courts limited authority to modify the terms of a trust (rather than allowing the trust to fail). Under the doctrine of "cy pres" (the term derives from the French expression "cy-près comme possible," as near as possible), if a charitable purpose becomes "impossible, impracticable or illegal" to fulfill, and if the donor expressed a general charitable intent, then a court can modify the terms of the trust to put in place an alternate scheme that will carry out the donor's original charitable scheme as nearly as possible. A classic example of a trust that might be suitable for cy pres would be where a donor has created a trust to provide care to individuals who suffer from a particular disease and the disease is subsequently eradicated. Under American law, if the court finds that the donor had exhibited a general charitable intent, then a court could put in place an alternate charitable scheme that would most closely approximate the donor's original intent. In our example this might be a diversion of the assets to be used for the care of individuals suffering from a similar illness.

The application (and nonapplication) of cy pres is done with a constant focus on the donor's intent regardless of how much time has passed. This focus on donor intent occurs both for purposes of determining whether to apply cy pres and then again for purposes of implementing cy pres.

Under American law, a court will modify a charitable trust only if the donor is found to have had a general charitable intent. This differs from English law, which allows a trust to be modified under cy pres without proving a general charitable intent on the donor's part. The effect of this more restrictive application of cy pres is that assets of a charitable trust in the United States are more likely to be returned to the donor's heirs, sometimes providing them a surprise windfall long after the donor has died.

A case in point is the Supreme Court case of Evans v. Abney. This case arose from a controversy surrounding the will of Augustus Bacon, a four-term senator from Georgia. In 1911 Senator Bacon wrote a will transferring property in trust to the City of Macon, Georgia, for the creation of a public park—to be known as "Baconsfield," in memory of his sons—for "the sole, perpetual, and unending use, benefit and enjoyment of white
women, white girls, white boys and white children of the City of Macon.”³³ In his will, Bacon explained the reason for the racial limitation:

I take occasion to say that in limiting the use and enjoyment of this property perpetually to white people, I am not influenced by any unkindness of feeling or want of consideration for the Ne­groes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection. I am however without hesitation in the opinion that in their social relations (white and negro) should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed together and in common.

Fifty years later, public sentiment had changed drastically, and what had seemed unremarkable in Bacon’s time—racially segregated parks—became socially and legally unacceptable. The racial restriction was challenged, and in 1966 the Supreme Court ruled that the park could not continue to be operated on a discriminatory basis. This left open the question of what was to happen to the park. The two options available were to amend the trust under the doctrine of cy pres to remove the racial restriction, or to not apply cy pres, in which case the trust would fail and the parkland would be given to Bacon’s living heirs. In deciding whether to apply cy pres, the Court did not consider public policy or the equities of the case but rather limited its inquiry to what its understand­ing was of whether Senator Bacon (who had been dead for more than fifty years) would have preferred. In exploring Senator Bacon’s intent, they did not imagine what he would have wanted had he continued to live to contemporary times but rather what he would have wanted in 1911 had he known that the restriction would not have been upheld. The Court decided that Senator Bacon was more interested in his bigotry then he was in making a charitable bequest to the City of Macon and therefore that the trust should fail and the property should revert to his heirs. After the heirs received the property, they sold it to developers, and Baconsfield became an office park.³⁴

The donor’s wishes also play a dominant role when courts apply cy pres. Under American law, the doctrine of cy pres requires that if a charita-
ble trust needs to be modified (because the original purpose becomes impossible to fulfill), then the modification must be made as close as possible to the donor’s original intent. The effect of this is that when courts do apply cy pres, they tend to authorize only the most minor changes to the donor’s plan. The cost of protecting donor’s intent has often been gross inefficiencies since courts are directed to focus primarily on the donor’s intent and to pay only minimal attention to current societal needs.

A good example of some of the inefficiencies that can result from the narrow application of cy pres is the trust established by Milton Hershey (the founder of the Hershey chocolate company) and his wife, Catherine, “for the residence and accommodation of poor white male orphans.” Hershey’s wife died in 1919, and in his grief over his wife’s death, Milton Hershey transferred thousands of acres of land and all of his stock in the chocolate company (then valued at more than sixty million dollars) in trust for the creation of the orphanage.35

After the trust was established, problems arose. Orphanages were no longer seen as the best way of providing care to children who had lost their parents, and racial and gender restrictions were no longer socially acceptable. Although cy pres was used to address some of these issues (changing the purpose from an orphanage to a residential school and lifting the race and gender restrictions), another problem could not be so easily addressed. The size of the Hershey Trust grew from sixty million dollars at the time of its inception (already an enormous amount) to more than eight billion dollars in 2008.36 It has been hard for the trustees to spend all of the trust income on the residential school. Even after spending ninety-three thousand dollars a year to educate, house, clothe, feed, and nurture each of its twelve hundred students, the school still had a reserve fund of more than $850 million from all the money it could not spend over the years.37 In 1999 a request was made to spend twenty-five million dollars of the accumulated income to create an institute to train teachers in educating at-risk children. In denying the request, the court ruled that even though the trust was consistently unable to spend its annual income, the money could not be spent for another purpose because “our discretion is not unfettered and, if exercised, must be within the limits approximating the dominant intent of Hershey.”38
Intent in Perpetuity. Not only is the law of charitable trusts devoted to fulfilling the donor’s intent, but it is committed to doing so in perpetuity. The law allows the donor’s wishes to be carried out in perpetuity in a number of ways. First, charitable trusts are not subject to the Rule against Perpetuities, the common law rule that traditionally limited the duration of noncharitable trusts to approximately ninety years. Until late into the late twentieth century (when many states began abolishing their Rule against Perpetuities), charitable trusts provided the only opportunity for Americans to control their property after death without being subject to a time limit. Thus, in 1955, Lewis Simes, the great scholar of trust law, described the charitable trust as follows: “It gives full scope to the control of the dead hand, far beyond that which is possible anywhere else in the law. By this device, the vanity of the dead capitalist may shape the use of property forever.”

Second, donors are encouraged to impose their wishes in perpetuity by establishing private charitable foundations. Private charitable foundations are a form of charitable trust that do not engage in charitable activities directly but merely hold money for disbursement to other organizations that do. In addition, a private foundation is typically funded by a small number of people. The Bill and Melinda Gates Foundation, the Ford Foundation, and the John D. and Catharine T. MacArthur Foundation are examples of some of the largest private charitable foundations, but there are many smaller ones as well. Private charitable foundations, like other charitable trusts, are not subject to any time limitation.

Federal tax law encourages donations to these perpetual entities by granting an up-front deduction for the full amount of money transferred to the foundation, even though there may be a significant lag time before the money is eventually disbursed for charitable purposes. How much lag time is there between the time of the deduction and the time of the distribution for charitable use? A lot. These organizations are required to spend only 5 percent of their asset value each year. Moreover, in meeting this 5 percent minimum, a private charitable foundation is allowed to count trustees’ salaries and other administrative expenses as part of its charitable spending. Thus, if the assets of the foundation are valued at a million dollars, the trustees are only obligated to spend fifty thousand dollars each year. Moreover, since administrative expenses, includ-
ing trustees’ salaries, also count toward this minimum, if the trustees are making an annual salary of thirty thousand dollars and the trust has ten thousand dollars of other administrative expenses (such as rent or legal or accounting fees), the trust need only commit ten thousand dollars of trust assets to charitable purposes. Yet the full one million dollars still qualified for the charitable deduction at the time of transfer.

The value of the 5 percent rule is that, provided the charitable foundation can earn at least 5 percent in income, the principal can be preserved and the organization can be assured of perpetual life. The cost of this perpetual life, however, is that fewer dollars are being currently spent on charitable purposes. In 2003 legislation was proposed that would have required foundations to devote the full 5 percent of asset value toward true charitable expenditures, barring foundations from counting operating expenses (such as rent and salaries) toward the 5 percent minimum. If that law had passed, then a trust with a value of a million dollars would have been required to devote the full fifty thousand dollars to charity in order for transfers to that trust to qualify for the charitable deduction. But private foundations successfully fought this legislation by arguing that its effect would be to destroy perpetual life for charitable trusts. They argued that if they earned only 6 percent each year and had administrative expenses of 2 percent, then the obligation to spend 5 percent on charitable giving would reduce their capital and could eventually deplete their resources to nothing. The lobbying was successful, and the bill didn’t pass.

Problems with Perpetual Charitable Trusts

The perpetual charitable trust is such a presence in our society that it is hard to imagine any other type of charitable giving. However, periodically throughout both English and American history, people have questioned the value of establishing charitable trusts in perpetuity. Legal scholar Evelyn Brody has traced some of these critics. 40

The Victorian novelist Anthony Trollope illustrated the corruption and waste that can ensue from perpetual charitable trusts in The Warden (1855), which concerns a medieval trust established in 1434 for the support of twelve retired wool-carders (a wool-carder was a person who cleaned wool in preparation for spinning). Although the value of this trust grew enormously over the years, the purposes for which it had been established
did not—particularly since wool-carders had been replaced by machines in the eighteenth century. In fact, as Trollope illustrates, through time the true beneficiaries were the trustees who received management fees far greater than the amount afforded the so-called beneficiaries of the trust.41

In the year 1434 there died at Barchester one John Hiram, who had made money in the town as a wool-stapler, and in his will he left the house in which he died and certain meadows and closes near the town . . . for the support of twelve superannuated wool-carders, all of whom should have been born and bred and spent their days in Barchester; he also appointed that an alms-house should be built for their abode, with a fitting residence for a warden, which warden was also to receive a certain sum annually out of the rents of the said butts and patches. . . . From that day to this the charity had gone on and prospered—at least, the charity had gone on, and the estates had prospered. Wool-carding in Barchester there was no longer any; so the bishop, dean, and warden, who took it in turn to put in the old men, generally appointed some hangers-on of their own; worn-out gardeners, decrepit grave-diggers, or octogenarian sextons, who thankfully received a comfortable lodging and one shilling and fourpence a day, such being the stipend to which, under the will of John Hiram, they were declared to be entitled. . . . Such was the condition of Hiram’s twelve old men when Mr Harding was appointed warden; but if they may be considered as well-to-do in the world according to their condition, the happy warden was much more so. The patches and butts which, in John Hiram’s time, produced hay or fed cows, were now covered with rows of houses; the value of the property had gradually increased from year to year and century to century, and was now presumed by those who knew anything about it, to bring in a very nice income; and by some who knew nothing about it, to have increased to an almost fabulous extent.

In 1880 the English reformer Courtney Kenny wrote an essay outlining the fundamental problems with perpetual charitable trusts. Perpetuity, Kenny observed, creates the paradox “that whilst charity tends to do
good, perpetual charities tend to do evil.” The main problem with perpetual endowments for charities is that “the inevitable tendency of endowed charities to be either neglected or perverted as time runs on. Hence it is utterly inexpedient to narrow their resources during their youth, for the purpose of augmenting their superfluities in their decrepitude.”

In the United States, the arguments against perpetual charitable endowments were made most forcefully by Julius Rosenwald, who has been described as “the greatest 20th century donor you’ve never heard of.” Julius Rosenwald made his wealth as one of the early owners and developers of Sears, Roebuck and Company. Like many other titans of wealth, Rosenwald became a philanthropist late in life. Through his philanthropic work, Rosenwald was responsible for the establishment of more than five thousand schools to serve rural black communities in the South. He also donated large sums of money to the University of Chicago and was the major contributor to Chicago’s Museum of Science and Industry (and resisted attempts to have the building named the Rosenwald Museum). Unlike other philanthropists of his day, however, Rosenwald was adamantly opposed to making his charitable grants in perpetuity. When he gave two million dollars to the University of Chicago, he did so only on the condition that the money not be added to the university’s endowment (the university instead created a special account for the Rosenwald donations, which were exhausted by 1942). When he established his private foundation, he included a provision in the trust that all assets must be spent within twenty-five years of his death. In the end, the Rosenwald Fund had donated over seventy million dollars to public schools, colleges and universities, museums, Jewish charities, and black institutions before funds were depleted in 1948.

In addition to engaging in philanthropy himself, Rosenwald had another personal mission: to discourage other philanthropists from tying up their philanthropic bequests in perpetuity. He laid out his arguments in a series of articles beginning with an article published in the Atlantic Monthly in 1929 called “Principles of Public Giving.” This essay has been described as the most important article written by a philanthropist since Andrew Carnegie wrote “The Gospel of Wealth” in 1889.

In urging his fellow philanthropists not to tie up their wealth in perpe-
tuity, Rosenwald directly took on people’s desire to preserve their reputations in perpetuity:

I am certain that those who seek by perpetuities to create for themselves a kind of immortality on earth will fail, if only because no institution and no foundation can last forever. If some men are remembered years and centuries after the death of their last contemporaries it is not because of endowments they created. Harvard, Yale, Bodley, and Smithson, to be sure are still on men’s lips. But those names are now not those of men but of institutions. If any of these men strove for everlasting remembrance, they must feel kinship with Nesselrode, who lived a diplomat, but is immortal as a pudding.44

What is wrong with perpetual charitable giving? At first glance, perpetual charitable giving appears to be ideal. After all, if charitable giving is good, isn’t it even better for there to be more of it? Yet this analysis is based on two false premises: first, that giving in perpetuity creates more total charitable dollars than giving outright, and second, that people can address problems in the future as effectively as they can address problems in their own time. Both assumptions are questionable.

Many people undoubtedly choose to establish perpetual charitable trusts in the belief that more philanthropic dollars will ultimately be available by spending only income and preserving the principal in perpetuity. It is not surprising that people would assume that an infinite stream of payments (which is provided by setting aside principal and spending only income) will ultimately be greater than immediately spending the underlying income, and anyone familiar with the story of the goose that laid the golden eggs knows the importance of preserving principal. Fairy tales notwithstanding, however, this assumption of relative economic values does not necessarily hold true because it fails to consider the time value of money. The time value of money reflects the fact that because of lost earning capacity, a dollar one year from now is worth less than a dollar today. In many cases, setting principal aside and spending only income (even in perpetuity) produces less overall wealth than spending principal today.

Consider the example of a person with a million dollars to commit to
charity. If it is spent immediately, then society gets the immediate full value of the one million dollars. What if instead the million is set aside in a private charitable foundation earning 5 percent each year and the foundation commits to spending all of its income on charitable endeavors (leaving aside the issue that it would likely need to spend a portion of that income on administration costs)? After how much time will the operating charities get the million dollars? One might initially calculate that it takes twenty years of fifty-thousand-dollar payments to equal one million dollars. Yet this fails to take into account the time value of money and the fact that each fifty-thousand-dollar payment is worth less in current dollars as each year passes. Thus, if fifty thousand dollars were to be paid one year from now (as opposed to today), and if the prevailing interest rates were 5 percent, then that fifty thousand one year from now would be worth only $47,619 in today’s dollars. The fifty thousand distributed two years from now would be worth only $45,331 in today’s dollars. How long would it take for the sum of these annual payments to equal a million dollars in today’s dollars? Surprisingly, the answer is never. After a hundred years the sum of the present value of the annual payments is about $940,000, but owing to the diminished present value of payouts made far in the future, the next century of payments adds just ten thousand dollars in value in today’s dollars, and no matter how far into the future one projects, the sum never equals the value of one million dollars today.

In addition to the limited economic value of perpetual charitable giving, there is another more deep-rooted problem. The perpetual charitable trust is founded on an assumption that people can make intelligent decisions about the use of resources in the distant future. It is not surprising that people would have this perception. The psychologist Daniel Gilbert has explained how humans are hardwired to make decisions on the assumption that the future is going to be essentially the same as the present (or, in the words of relief pitcher Dan Quisenberry, the future is the same as the present, only longer). Yet by looking back in time we can see how flawed this thinking is. Imagine the smartest person living five hundred years ago (Leonardo da Vinci, perhaps)—is there any question that no matter how extraordinarily smart that person was in his own time, his ability to make an intelligent allocation of resources in the twenty-first century would be extremely limited? Now extend that even farther back
to a thousand or two thousand years ago. Does it really make sense for current policy to be dictated by plans established by someone living in the year 200? Yet that is precisely the situation that we are dictating for the future with perpetual charitable trusts.

Of course, this inquiry highlights the fundamental flaw of these perpetual entities. Namely, they are based on an assumption that the United States and its current system of laws will continue to exist in perpetuity. And yet in all of human history, few empires have lasted even a thousand years, let alone ten thousand or one hundred thousand.

Meanwhile, there are serious consequences to this system that encourages saving for tomorrow (and the next century and next millennium) instead of spending for today. Real problems are not being adequately addressed. Issues of environmental degradation, war and peace, hunger, infectious diseases, education, and multi-generational cycles of substance abuse and poverty are all problems in need of immediate resources. Yet in the pursuit of perpetuity, fewer resources are being devoted to these pressing issues.

Who benefits from this choice to direct charitable dollars to perpetual trusts instead of outright charitable gifts? The biggest beneficiaries are the trustees, who are paid large trustee salaries, and the supporting institutions, such as banks and other financial services companies, who are paid fees for managing this accumulating wealth.

Many people are surprised to learn that people often receive payment for serving on the boards of directors of private foundations (particularly in light of the hundreds of thousands of less well-off Americans who donate their time to serve on the boards of nonprofit organizations). These fees can be substantial—it is not uncommon for a trustee of a private foundation to be paid a hundred thousand dollars annually. A 2003 study analyzing tax returns of 238 private foundations revealed that in a single year, these organizations spent nearly $45 million on trustee fees—the bulk of which was paid to their own predominantly wealthy boards of directors. For some of these trusts, the money spent on trustee fees and other administrative expenses exceeded the amount spent on charitable endeavors.

Banks and financial service companies are the other beneficiaries. Assuming a modest 1 percent fee, the six hundred billion dollars currently in
private foundations generates more than six billion dollars in management fees every year. Although perpetual charitable foundations may be a bad deal for society, they provide inordinate benefits to the financial services industry in the form of perpetual management fees.

Despite these problems, perpetual charitable organizations continue to be the preferred format for charitable giving. When people establish charitable foundations, they generally do so in perpetuity. In a 2004 survey of private foundations, only 9 percent of respondents said that their foundation would not exist in perpetuity. This could be intentional on behalf of donors (an explicit desire to have their foundations address the problems of tomorrow as well as today), or perhaps it is because when they seek professional advice, the perpetual foundation is the one most likely to be presented to them. Regardless of the motivation, the results are undisputable: the vast majority of charitable foundations are established in perpetuity, and American law does nothing to discourage this.

Nonetheless, there has been some notable and powerful dissent against the tide of perpetuities. When billionaire investor Warren Buffet committed to contribute roughly thirty billion dollars to the largest private foundation in existence—the Bill and Melinda Gates Foundation—he did so on the condition that none of the donations be added to the principal and that all of Buffet’s contributions be spent within one year of contribution. Moreover, the Gates Foundation itself recently amended its charter to provide that it would end within fifty years after the death of the last of its trustees, Bill Gates, Melinda Gates, or Warren Buffet.

The law could be revised in a number of ways to make private foundations less focused on their perpetual existence and more responsive to societal needs. First, the law could require (as was proposed in 2003) that the 5 percent minimum payout rules must be satisfied with transfers to charity and not trustee fees and other administrative expenses. This would discourage private foundations from spending such a significant portion of their annual expenditures on administrative expenses. More directly the tax law could provide explicit limitations on the duration of private foundations or could provide that donors do not get their charitable deduction until the money is actually transferred for charitable purpose. Regardless of the method chosen, until the law takes a more concerted step to discourage perpetuities, we can expect more charitable dollars to be
committed to perpetuating their own existence rather than toward their stated charitable goals.

*Subsidized Charitable Giving*

For most of history, charitable giving has occurred independent of any government support. However, for the past century charitable donations (both while living and at death) in the United States have been subsidized by the government through the charitable deduction.

During life, this subsidy is limited; the charitable deduction is available to offset only approximately half of a person’s taxable income. Charitable transfers at death, however, are under no such limitation. Any individual, no matter how wealthy, can avoid all estate taxes by taking advantage of the unlimited charitable deduction. In 2007 the hotel real estate magnate Leona Helmsley effectively eliminated the estate tax liability on her five-billion-plus-dollar estate by transferring the bulk of her assets to the Harry and Leona Helmsley Charitable Trust.

People often think of government expenditures solely in terms of direct monetary outlays by the government for particular programs, such as national defense, Medicaid, and Medicare. Yet it has long been recognized that another way the government spends its resources is through the tax system. Some tax deductions (as well as exclusions and credits) can be the equivalent of direct government expenditures and are termed “tax expenditures.” As explained by the Senate Budget Committee in the 1970s: “Tax expenditures are revenue losses that occur as a result of Federal tax provisions that grant special relief to encourage certain kinds of activities by taxpayers or to aid taxpayers in special circumstances. The net result of these provisions is equivalent to the simultaneous collection of revenue and a direct budget outlay of an equal amount.”

When the government grants tax benefits for money spent purchasing a fuel-efficient car, it is the same as if the government were assisting the purchaser of the car by contributing to the cost of the purchase price. Similarly, tax expenditure analysis enables the home mortgage deduction to be appropriately analyzed for what it is: a federal grant to people who take out loans to purchase a home that is not available to people who rent or to people who own their homes outright.

In the context of charity, tax expenditures operate like matching grants.
As one scholar explains: "The charitable deduction makes the government a partner in every gift-giving venture; a taxpayer in the (hypothetical, but arithmetically convenient) 50 percent bracket, for instance, can be seen as joining forces with the government to give equal amounts to the cause chosen by the taxpayer (with characteristics or minimum qualifications set by the government)."49

When a taxpayer who would otherwise be subject to a 45 percent tax rate makes a deductible transfer of a hundred dollars to the American Red Cross and gets a reduction in his or her taxes of forty-five dollars, it is the same as if the taxpayer were contributing fifty-five dollars to the Red Cross and directing the government to make a matching grant of forty-five dollars to the Red Cross.

The charitable deduction is a particularly costly expenditure. The *New York Times* reported in 2007 that "the charitable deduction cost the government $40 billion in lost tax revenue last year, according to the Joint Committee on Taxation, more than the government spends altogether on managing public lands, protecting the environment and developing new energy sources."50

Legal scholar Saul Levmore supports the charitable deduction as an efficient way for the government to get information from the populace regarding which programs it ought to support. He analogizes the charitable deduction to the taxpayer checkoff regarding financing elections but regards the charitable deduction as superior because it is likely to reflect a more thoughtful choice since it requires the donor to make a cash outlay.

Although the charitable deduction does give the government information about how some taxpayers would like to direct governmental resources, there are nonetheless serious policy concerns with using this as a directive for governmental expenditures, particularly in the estate tax context.

Most significantly, the matching grant program is only available to the charitable donations of the very wealthy. For income tax purposes, it applies only to those who itemize their deductions, and for gift and estate tax purposes, it applies only to individuals with estates that are larger than $3.5 million. Thus, if a person with a multimillion-dollar estate, subject to a 45 percent tax, makes a one-hundred-thousand-dollar charitable dona-
tion, that donation is functionally equivalent to the donor making a fifty-five-thousand-dollar donation and the federal government making a forty-five-thousand-dollar donation to the charity chosen by the wealthy donor. However, if that same hundred-thousand-dollar donation is made by someone who is not otherwise subject to the estate tax (because his or her estate is less than $3.5 million in 2009), then the charitable bequest offers no financial benefit to the donor's estate, and there is no functional federal contribution to the donor's chosen charity. In this way, the matching grant program is highly distorted because it considers only the preferences of the wealthiest Americans.

This matching grant for the preferences of the wealthy is particularly troubling because wealthy Americans tend to make very different types of bequests than their fellow citizens. Whereas most Americans direct their charitable dollars to religious organizations, approximately three-fourths of all bequests reported on estate tax returns go to either private foundations or educational institutions. This type of giving by the wealthy raises the question of whether the charitable deduction is the most efficient use of taxpayer dollars because charitable gifts to private foundations and educational institutions both raise policy concerns.

Private foundations receive almost half of all charitable bequests. As discussed above, private foundations are a form of charitable trusts that do not generally engage in charitable work themselves but instead disperse a portion of their assets each year to support the work of other charitable organizations. The vast majority of private foundations are designed to exist in perpetuity and therefore only spend a small portion of their asset value each year on charitable endeavors. Thus, although a taxpayer who transfers a million dollars to his or her charitable foundation will get an up-front deduction worth $450,000 (effectively a $450,000 matching grant from the federal government), the foundation will only be required to spend about fifty thousand dollars each year. Since this fifty thousand is just as likely to be spent on administrative expenses as it is on charitable grants, this further lessens the likelihood that charities will ever receive the full benefit of the million dollars.

The second largest group of recipients of beneficence from wealthy individuals is educational institutions. Although education plays an important role for all sectors of society, the allocation of resources by the
wealthy raises other issues. Rather than distributing this wealth broadly, a disproportionate share of these bequests goes to a small number of selective, socially prestigious schools. Legal scholar Miranda Perry calculates that twenty-five private colleges and universities (out of almost seventeen hundred private colleges and universities) and ten socially prestigious private schools (out of more than twenty-seven thousand such institutions) received approximately 23 percent of all education bequests reported on 2005 estate tax returns.\textsuperscript{52} It is unlikely that the population as a whole would support federal matching grants for Exeter Academy while so many public schools are failing to meet the needs of the larger population. Political scientist Rob Reich has argued that this type of educational philanthropy can actually impose a societal detriment by increasing the gap between the wealthy and the poor, particularly in the context of education.\textsuperscript{53}

Finally, even when charitable dollars are oriented toward the truly needy it is still questionable whether it is in society's interest to allow private individuals to effectively direct so many federal resources toward their chosen causes. The Gates Foundation has given a significant amount of its grants to improve the lives of the poor in developing countries. Although this is important work, the effect of the charitable deduction is that the American public has effectively underwritten several billion dollars' worth of foreign aid by private individuals—even though polls show Americans are ambivalent about using tax dollars for such assistance.\textsuperscript{54}

Transfers for Other Purposes

In the preceding section we explored how transfers for charitable purposes are supported and encouraged in the law. Not only are people allowed to make transfers for charitable purposes, but beyond that the law supports the implementation of people's charitable plans in perpetuity, and the wealthiest Americans have their charitable bequests subsidized by the government through the charitable deduction.

What about transfers for purposes other than those that are considered charitable? Some of the common noncharitable purposes that people seek to fulfill are the care of a pet, the maintenance of a grave, or the publication (or destruction) of personal papers. Does the law respect such
requests? Here the law is far less generous. These transfers for noncharitable purposes are at best tolerated in limited circumstances, but just as often they are disallowed.

Sometimes people want to spend money for certain purposes that are neither charitable nor considered against public policy. Some of the more common goals that people want to accomplish are maintaining a grave-site, building a monument, or caring for a pet. During life, these purposes are easily accomplished: people regularly hire others to perform these services, and if the person hired fails to perform these services in a satisfactory manner, the person simply hires someone else. However, after death people are dependent on the law to ensure that their wishes are carried out. To what extent can someone continue to exert influence on the world by leaving money to be used to accomplish a noncharitable purpose?

As discussed in chapter 2, the legal mechanism for leaving instructions with respect to the use of property is the trust. At first glance it might appear that a trust is the perfect vehicle for accomplishing these goals. Yet there is a practical problem with the use of trusts for noncharitable purposes: how to ensure that the money is spent in accordance with the settlor’s wishes. Trusts that are established for the benefit of individuals can be enforced by the individual beneficiary. Trusts that are established for charitable purposes can be enforced by the state attorney general, who is both authorized and obligated to enforce charitable trusts. But when a person tries to establish a trust for the benefit of a dog or for the building of a monument, who will ensure that the trustee does what he or she is supposed to do? A dog cannot enforce a trust for its own benefit, and the attorney general has no obligation to enforce trusts that do not serve the public benefit. For this reason, trusts for noncharitable purposes were not recognized in nineteenth-century America and are still not recognized today in England. The effect of this rule is that if someone left money for a particular noncharitable purpose (such as the care of a dog or a grave), the trust could not be fulfilled even if the named trustee was willing to do so. However, in the early twentieth century, American law broke from English law by explicitly recognizing certain types of noncharitable purpose trusts.

The 1935 Restatement of Law provided that when property is trans-
ferred for a specific noncharitable purpose, although it will not be treated as a trust (since there is no beneficiary to enforce it), the person receiving the property has the option to apply the property to the designated purpose or surrender it to the estate (in which case the bequest would fail). This provision for the first time allowed noncharitable trusts to be fulfilled, provided that the time period for the trust was limited by the Rule against Perpetuities. These trusts have come to be called "honorary trusts." The term is a misnomer, however, because they really aren't trusts at all.

Honorary trusts are recognized throughout the United States today. However, they do not provide the same assurances as private trusts and charitable trusts that their settlor's wishes will be carried out. Thus, although Leona Helmsley provided in her will that twelve million dollars should be set aside for the care of her dog, the court later reduced that amount to a mere two million.

Capricious Purpose

Although people are allowed to spend at whim during life, the law applies its own limiting standards for transfers at death. The stated reason for this is that bequests for capricious purposes need to be curtailed because unlike lifetime consumption, they are uninhibited by the restraint of self-interest. As one scholar puts it: "However much the dead possess, it too is more than they can spend; hence they can squander it with abandon." Because of this concern that people are more likely to make inappropriate choices at death than they are during life (since they won't have to suffer the consequences of a bad choice), the law provides that if property is transferred to someone to fulfill a capricious purpose, no trust is created and the person has no power to apply the property to that purpose. Moreover, if the individual does so, he or she is liable to the estate. This provides an incentive for someone in receipt of property to get court approval before following the directions laid out by a decedent if there is a chance the purpose will be found to be capricious.

It is not always easy to determine what constitutes a "capricious" purpose. Indeed, the Restatement of Trust Law, the compilation and analysis of law prepared by the American Law Institute, acknowledges that it is not just difficult but impossible to draw a clear line between purposes...
that are capricious and those that are not. The use of the word “capricious” (which means impulsive or unpredictable) suggests that the determination is made by considering the level of care taken by the donor in his decision-making. The Restatement of Trust law seems to support this subjective standard when it states that “a purpose is not capricious merely because no living person benefits from its performance.” However, the next phrase belies this subjective standard by stating: all that matters is that “it satisfies a natural desire which normal people have with respect to the disposition of their property.”58 Use of the terms “natural” and “normal” reveal that the applicable standard is determined by reference to objective social values (or more accurately the subjective values of the judge rendering the decision regarding what is socially valuable) rather than the thoughtfulness of the person making the bequest.

Case law in the area suggests that courts are indeed applying their own standards of appropriateness. Thus courts have invalidated trusts for the purpose of turning a person’s house into a museum and for the publication of a person’s writing or scientific theories that the court viewed to be without merit.

This last category has proved to be most affected by the idiosyncrasies of the judge ruling on the case as courts are often asked to consider whether the publication promotes a public benefit (and therefore qualifies as charitable, with all of its benefits under the law) or whether the purpose is capricious, and therefore against public policy. This tension was evidenced in a 1982 case involving the will of a woman who sought to establish a trust for publication of her book Linda about her daughter, who had died at a young age from cancer. The lower court ruled that the trust did not have a charitable purpose since the book had “no literary value” and its dissemination would produce “no public benefit.” On appeal, although the court received evidence that the book was “ungodly bad,” it nonetheless ruled that publication of the book was “charitable” regardless of the work’s literary merit.59

In a similar case—with drastically different results—Theodore Schroeder sought to use his estate to publish his writings after death. Schroeder was a lawyer who retired in 1904 to devote himself to writing. In 1911 he privately published a book, Obscene Literature and Constitutional Law, which argued for the abolition of laws against obscene language.
Schroeder was a prolific writer and wrote hundreds of articles on many issues. The articles were frequently critical of religious practice in general and the Mormon Church in particular. Schroeder considered himself a "controversialist," and many of his articles bore provocative titles, such as "Divinity in Semen," "Shaker Celibacy and Salacity," "Phallic Worship to Secularized Sex," "Mormonism and Prostitution," and "Was Joseph Smith, 'The Prophet,' an 'Abortionist'?") At his death in 1953, Schroeder left a will that gave his entire estate in trust for the "collection and arrangement and publication of [his] writing."

In determining whether this constituted a valid charitable purpose, the Connecticut Supreme Court began by acknowledging that a trust to promote dissemination of a person's writings is normally considered to be charitable, regardless of the literary merit of the writing. But the court went on to provide as follows: "The law will not declare a trust valid when the object of the trust, as the finding discloses, is to distribute articles which reek of the sewer. The very enumeration of some of the titles which Schroeder selected for his writings brands them indelibly and a reading of the article which he called 'Prenatal Psychisms and Mystical Pantheism' is a truly nauseating experience in the field of pornography. The trust is invalid as being contrary to public policy."60

The court in Schroeder ruled that the purpose of the trust was so abhorrent that it was not only invalid as a charitable trust, but it was also not a valid private trust because it was against public policy. As a result, the court ruled that the money that would have been spent on publication of Schroeder's work would instead pass to his heirs—two first cousins in whom the court noted the decedent had "no interest."

Despite the court's assessment of Schroeder's writings, history has evaluated them differently. Schroeder's book and other essays—decried by the court as "reeking of the sewer"—have been reprinted numerous times in the half century since his death. Indeed, Obscene Literature and Constitutional Law has been reissued several times, most recently in 2002. Moreover, Schroeder's personal papers are currently held in the Rare Books and Manuscript Division of the New York Public Library.

The law regarding trusts for a purpose has been most consistent when it comes to the issue of bequests that provide for the destruction of prop-
CONTROLLING PROPERTY: TRANSFERS FOR CHARITABLE OR OTHER PURPOSES

Property. The Restatement of Trust law states that “it is capricious to provide that money shall be thrown into the sea or that a field shall be sowed with salt or that a house shall be boarded up and remain unoccupied.” Even though a person would be allowed to do any of these things during life with his or her own property, the individual could not direct someone else to do it after his or her death; and if that someone else did carry out those wishes, he or she would be liable to the estate for the economic loss from the destruction.

At first glance, ordering the destruction of property appears to be the clearest example of the type of instruction that can only be made capriciously (impulsively and with little forethought); however, there are many reasons why a normal person would have a natural desire to destroy property. For example, many people keep private letters and diaries during their lives but would not like to have them revealed to others after death. In that case it is quite natural for a normal person to request that these papers be destroyed. Jacqueline Susann, best-selling author of Valley of the Dolls, asked her executor to destroy her diary “so that its contents would never become public and embarrass those mentioned within it.” In a similar case (but one that was not subject to legal challenge), Jacqueline Kennedy Onassis gave her personal papers to her children and requested that they take whatever action was warranted in order to respect her wish for privacy by preventing “the display, publication or distribution, in whole or in part, of these papers, letters and writings.”

In another example, consider the case of an artist who produced some works that did not meet his personal standards (perhaps they were produced late in life as his capacity waned). In order to protect his reputation, as well as the value of his other works, the artist might want to have these substandard works destroyed at his death. This desire to destroy creative work that the artist perceives is substandard has a long history. The cases that are best known to us, however, are ones where this wish was not carried out. In 10 BC, Virgil wrote a will that contained a provision requesting that his executor burn the Aeneid. Similarly, Franz Kafka directed his executor, Max Brod, to destroy all of his unpublished written works, including the sole copies of his two then-unpublished masterpieces, The Castle and The Trial. Although neither wish was carried out, Virgil’s and Kafka’s desires were not necessarily capricious.
In many other countries, the right of an artist to destroy his or her work is explicitly protected under moral rights (called “droit morale”). Moral rights are based on the notion that an artist’s identity is closely tied to his or her artistic creations, and as such the artist has an interest in which creations are made public and which are destroyed. Moral rights are discussed in greater detail in the next chapter. Here, however, it is important to note that moral rights survive the artist’s death and that requests for posthumous control are much more likely to be requested.

American law does not look favorably on the destruction of property, regardless of how understandable the person’s desires might be. The law limits this type of destruction in two ways. First, the law provides that if property is transferred to someone to fulfill a capricious purpose, no trust is created and the person has no power to apply the property to that purpose. Moreover, if the person does, he or she is liable to the estate for doing so. This provides an incentive for a person in receipt of property to get court approval before following the directions laid out by a decedent if there is a chance that the purpose will be found to be capricious.

In addition to disallowing the destruction of this type of property, the law deters this type of destruction by imposing an estate tax on the full market value of the property—even if the testator has ordered the property destroyed. Thus, although Jacqueline Susann’s executor did in fact destroy her diaries, the Internal Revenue Service valued the diary at $3.8 million and taxed the estate accordingly. This imposition of estate taxes can create a significant estate tax liability, and in some cases the need to raise money to cover the estate tax liability can result in the executor’s inability to carry out the decedent’s wishes. There is also a certain irony in that the people who are most mindful of their privacy are likely to suffer the greatest estate tax liability because of the market appeal of highly personal letters of a private person.