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## Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws

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TRUSTS FOR PURPOSES:  
POLICY, AMBIGUITY, AND ANOMALY IN THE UNIFORM LAWS

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# TRUSTS FOR PURPOSES: POLICY, AMBIGUITY, AND ANOMALY IN THE UNIFORM LAWS\*

ADAM J. HIRSCH\*\*

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## I. INTRODUCTION

Most testators are bent on providing for their families, and bequests to close relatives dominate the typical estate plan. Nonetheless, some testators harbor the different, or additional, concern of leaving funds for the furtherance of some purpose or cause, in which they feel an interest—be it broadly philanthropic (poverty relief, for example) or narrowly egocentric (say, construction of a monument). Bequests of this sort are often clothed in a trust, setting out some purpose which the trustee is directed to accomplish or promote with the allocated funds.<sup>1</sup> Historically, the common law divided trusts for purposes into three sub-categories: those for charitable purposes, serving the public interest; those for noncharitable purposes, accomplishing merely private ends; and those for purposes deemed by lawmakers to violate public policy.

The *Restatement of Trusts*, promulgated in 1935 under the stewardship of Professor Austin Scott, established the modern American doctrines following under each of these heads.<sup>2</sup> Trusts for charitable purposes are effective and fully enforceable by the state attorney general, as representative of society at large. These trusts can per-

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1. For discussions of estate planning options open to the testator minded to accomplish a charitable purpose, see JOHN R. PRICE, PRICE ON CONTEMPORARY ESTATE PLANNING § 8 (1992); Carolyn C. Clark & Glenn M. Troost, *Forming a Foundation: Trust vs. Corporation*, 3 PROB. & PROP., May-June 1989, at 32; Gail K. Neuharth, *A Primer on Private Foundations*, 12 PROB. & PROP., Nov.-Dec. 1998, at 33; and for the testator who seeks to effectuate a noncharitable purpose, see William F. Fratcher, *Bequests for Purposes*, 56 IOWA L. REV. 773 (1971); Nancy G. Henderson, *Drafting Dispositive Provisions in Wills*, (pt. 2), 43 PRAC. LAW., July 1997, at 15, 20-21; David Howard, *A Will to Live*, PETLIFE, Oct.-Nov. 1997, at 50; Barbara W. Schwartz, *Estate Planning for Animals*, 113 TR. & EST. 376 (1974).

2. On the legal history of purpose trusts prior to the *Restatement*, see Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 35-44 (1999).

sist for as long as the testator wishes, even in perpetuity.<sup>3</sup> Trusts for noncharitable purposes, on the other hand, are unenforceable by the attorney general on the ground that they do not affirmatively benefit society. Because a purpose trust has no “beneficiary” in the traditional sense, no one else has standing to sue the trustee in equity for its specific performance. Nevertheless, the trustee does have a power to carry out a noncharitable purpose trust, and alternative beneficiaries (either remaindermen, residuary legatees, or heirs) retain standing to sue for the trust’s termination, in the event that the trustee balks. Accordingly, trusts for noncharitable purposes are styled *honorary* trusts: that is, trusts which the trustee is honor bound, though not legally bound, to perform. These are limited in duration to the period of the Rule Against Perpetuities.<sup>4</sup> Finally, trusts for purposes contrary to public policy are neither enforceable nor even permissible for any space of time—they are simply void *per se*.<sup>5</sup>

This trio of doctrines has persisted without challenge in the United States for over half a century. But lately, and for the first time, the Commissioners have taken up these issues; they have done so within the compass of a massive, and in many respects innovative, revisitation of the substance of probate law, the revised Article II of the Uniform Probate Code of 1990 (with technical amendments in 1993), expounding model rules of legislation rather than adjudication.<sup>6</sup> Despite controversy over a number of its novelties,<sup>7</sup> this document has made slow but gradual headway; its purpose trust provisions have already had an impact on the law in a number of states.<sup>8</sup>

The Commissioners’ decision to promulgate a corpus of rules applicable to trusts for purposes was taken with little fanfare,<sup>9</sup> and it

3. See RESTATEMENT OF TRUSTS §§ 348, 364-65, 391 (1935); RESTATEMENT (SECOND) OF TRUSTS §§ 348, 364-65, 391 (1959).

4. See RESTATEMENT OF TRUSTS §§ 124 & cmts., 418 & cmts. (1935); RESTATEMENT (SECOND) OF TRUSTS §§ 123-24 & cmts., 418 & cmts. (1959).

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

6. See UNIF. PROBATE CODE, pt. 9 (amended 1993). Trusts for purposes were addressed neither in the original, 1969 version of the Uniform Probate Code, *see id.* app. VII, nor in earlier model acts, *see* LEWIS M. SIMES & PAUL E. BAYSE, PROBLEMS IN PROBATE LAW, INCLUDING A MODEL PROBATE CODE (1946); UNIFORM TRUSTS ACT (1937), 7B U.L.A. 763 (1985 & Supp. 1997).

7. *See, e.g.*, Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639 (1993); Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148 (1995); Patricia G. Roberts, *Adopted and Nonmarital Children—Exploring the 1990 Uniform Probate Code’s Intestacy and Class Gift Provisions*, 32 REAL PROP. PROB. & TR. J. 539 (1998).

8. *See infra* note 13.

9. The drafters of the revised Code have produced a raft of articles publicizing and advocating its sundry innovations. *See, e.g.*, Lawrence W. Waggoner, *The Uniform Probate*

has attracted correspondingly little notice; no commentator heretofore has subjected the Commissioners' efforts to critical review. That is the ambition of this Article. The task is particularly relevant just now, because another body of Commissioners, charged with producing the Uniform Trust Act, will speak to the matter of purpose trusts and must decide whether or how closely to follow their predecessors' lead.<sup>10</sup> And a new generation of Restators is also clearing its collective throat: The *Restatement (Third) of Trusts*, currently in progress, must either take its cue from Professor Scott or rework the doctrines he enshrined in the original *Restatement* and the *Restatement (Second)*.<sup>11</sup>

Yet the task is not entirely welcome, however well-timed. Plowing across the landscape of a code can be tedious. In undertaking close analysis of rather arid statutory provisions, the risk of *longueurs* runs high.<sup>12</sup> And while a glance at the uniform laws on point reveals a number of improvements over the common law, which are a pleasure to highlight, the same sections also betray significant lapses of thought and even of technical virtuosity that no one can delight in elaborating.

Still and all, there are important lessons to be learned from this exercise—lessons for today's drafters, immersed in these particular trust doctrines; and lessons for tomorrow's drafters—to be addressed at the end of this Article—regarding the code-making enterprise generally.

## II. SCOPE AND EFFECTIVENESS

The provision of the Uniform Probate Code that addresses trusts for purposes is an optional section.<sup>13</sup> It covers any "trust . . . for a . . .

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*Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309 (1996) [hereinafter Waggoner, *Poorly Drafted Trusts*]; Lawrence W. Waggoner, *The Revised Uniform Probate Code*, 133 TR. & EST., May 1994, at 18; Lawrence W. Waggoner, *Spousal Rights in Our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP., PROB. & TR. J. 683 (1992). Nonetheless, trusts for purposes are nowhere to be found within this body of promotional literature.

10. The new Uniform Trust Act is presently in the discussion-draft stage. See UNIF. TRUST ACT (Discussion Draft, Feb. 9, 1999). As currently drafted, it does follow the Uniform Probate Code in many respects, as we shall see. See also *infra* note 168.

11. The substantive body of the *Restatement (Third) of Trusts* (following accelerated publication in 1992 of its provisions on the fiduciary duties of trustees) is now in the tentative draft stage. See RESTATEMENT (THIRD) OF TRUSTS (Tentative Draft No. 2, Mar. 10, 1999). The draft remains incomplete, however, and some aspects of purpose trust law (for example, charitable trusts) have yet to be addressed, even tentatively.

12. I have elsewhere offered a more extensive theoretical inquiry into the problem of purpose trusts. See Hirsch, *supra* note 2.

13. See UNIF. PROBATE CODE pt. 9, sub-pt. 2, general cmt., § 2-907 (amended 1993). Of the eleven jurisdictions that have thus far adopted the revised Article II of the Uniform Probate Code, four (Hawaii, Minnesota, North Dakota, and South Dakota) chose not to include the optional section. The optional section appears today (with stylistic and other revi-

lawful noncharitable purpose.”<sup>14</sup> That brings up the first notable aspect of the Commissioners’ treatment of this subject matter: the limited nature of their coverage. Instead of comprehending the full range of purpose trusts within the Uniform Probate Code, the Commissioners confined themselves to one slice of the problem, omitting from the Code’s purview charitable trusts. The explanation is not far to seek. The Code was never intended to provide a thorough reformulation of the law of trusts, but merely a revision of “certain procedures to facilitate [their] enforcement.”<sup>15</sup> Testamentary trust law in all its minutiae is ostensibly a separate subject, left by the drafters for another day.<sup>16</sup> But whatever the convenience of these lines of demarcation, their conceptual arbitrariness is plain enough<sup>17</sup>—all the more so in the present context, given the Commissioners’ negative phraseology: The Code’s provision concerning trusts for *noncharitable* purposes leaves the student hunting in vain through the table of contents for their affirmative counterparts.

This omission is by no means fatal, of course. The Uniform Probate Code is a “common law code” rather than an all-embracing code in the civil law tradition.<sup>18</sup> In the absence of relevant provisions, the

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sions) in seven codes: ALASKA STAT. § 13.12.907 (Michie 1998); ARIZ. REV. STAT. ANN. § 14-2907 (West 1995); COLO. REV. STAT. § 15-11-901 (1998) (with substantive revisions noted *infra* notes 59, 69, 165); MICH. COMP. LAWS ANN. § 700.2722 (West 1995 & Supp. 1999) (effective Apr. 1, 2000); MONTANA CODE ANN. § 72-2-1017 (1997); N.M. STAT. ANN. § 45-2-907 (Michie 1978 & Supp. 1995); and UTAH CODE ANN. § 75-2-1001 (1993 & Supp. 1998). For other state statutes covering noncharitable purpose trusts, see *infra* notes 50, 61, 65, 126, 128, 165. Some of the language found in the optional section (especially in its process provisions) was borrowed, more or less verbatim, from a preliminary model proposed by an advocate outside the Uniform Conference of Commissioners. See Letter from David Rees to Richard Wellman & Larry Waggoner (Oct. 24, 1989) (on file with author) [hereinafter Rees Proposal]; see also UNIF. PROBATE CODE § 2-904[(e)][(f)] (Discussion Draft, Dec. 1-3, 1989) (making reference to the Rees Proposal); *infra* note 172. This preliminary model was accompanied by notes which, though not included in the brief comment following the optional section of the Uniform Probate Code as ultimately promulgated, nonetheless express the rationales motivating the language proposed. That this language was subsequently adopted by the Commissioners without significant revision suggests that the drafters of the Code found the rationales expressed in the notes persuasive, and so they will be quoted below as suggestive, if not dispositive, of the policies and legislative intent of the Commissioners in adopting the optional section and in framing it as they did.

14. UNIF. PROBATE CODE § 2-907(a) (amended 1993).

15. *Id.* preamble.

16. But compare the Commissioners’ further submission that “[t]he concept of the Code is that the ‘affairs of decedents . . .’ is a single subject of the law notwithstanding its many facets.” *Id.* preamble, cmt.

17. This is hardly the only example of arbitrary omission from the Code premised on artificial conceptual distinctions. See Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1112 n.162 (1996).

18. Gaps in the Uniform Probate Code are to be filled by “the principles of law and equity.” UNIF. PROBATE CODE § 1-103 (amended 1993). This vague language is borrowed from the Uniform Commercial Code, see U.C.C. § 1-103 & cmt. (amended 1990); in the latter Code, courts have interpreted the language to refer to state law (despite the rather glaring absence of an explicit reference to it), rather than adopting as a uniform law whatever is the majority common law rule. See *In re Kravitz*, 278 F.2d 820, 822 & n.3 (3d Cir. 1960).

local law of charitable trusts remains intact. A trifle more troubling is the Commissioners' failure to define their terms. Neither the optional section, nor its comment, nor the separate definitional section of the Code sets out the indicia of what a "noncharitable" (or, conversely, a "charitable") purpose is.<sup>19</sup> Again, by implication, local law fills the gap. Hence, the Commissioners have constructed a uniform mechanism of noncharitable trust, without positing a uniform definition of the trust purposes it is intended to carry into execution. Just how concrete that definition ought to be remains a question—by tradition, the legal attributes of charity (and non-charity) have been open-textured<sup>20</sup>—but, in light of some arbitrary variations of local precedents,<sup>21</sup> the Commissioners might have seized the day to establish a common conceptual framework, with the end of eliminating whatever pointless disharmony exists among the states. At least by making an explicit reference in the Code to the application of local law, the Commissioners would have reassured us that they had weighed this opportunity but had found cause to decline it.<sup>22</sup>

The Commissioners also let slip the occasion to address issues lying at the other edge of purpose trust law—that is, the category of trusts contrary to public policy. Here, too, the Commissioners chose, more overtly though with annoying economy, to punt the matter

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Whether that was the original meaning of this phrasing is unclear: The U.C.C. provision derived in turn from earlier uniform laws, and it appears to have been carried forward thoughtlessly. See UNIF. SALES ACT § 73 (1906); UNIF. WAREHOUSE RECEIPTS ACT § 56 (1906); UNIF. NEGOTIABLE INSTRUMENTS LAW § 196 (1896). Also unclear is whether passage of section 1-103 of the Uniform Probate Code is intended to freeze into place pre-Code law to the extent it is needed to fill in the Code's lacunae, or whether state law within the Code's lacunae can continue to evolve subsequent to the Code's passage. For a suggestion of the second interpretation in connection with the U.C.C., see ROBERT A. HILLMAN ET AL., COMMON LAW AND EQUITY UNDER THE UNIFORM COMMERCIAL CODE § 1.04[2], at 1-7 (1985).

19. See UNIF. PROBATE CODE §§ 1-201, 2-907 (amended 1993).

20. See, e.g., *Evangelical Lutheran Charities Soc'y v. South Carolina Nat'l Bank*, 495 S.E.2d 199, 201 (S.C. 1997). "Continually broadening and changing, it is not only impossible but also unwise to attempt to define precisely the concept of charitable purpose, for its scope changes with the times so as to fulfill . . . evolving ideas of social benefit." EDITH L. FISCH, CHARITIES AND CHARITABLE FOUNDATIONS § 256, at 229 (1974) (footnote omitted). Also defending a flexible definition of charity, see, for example, Great Britain's Nathan Report, quoted in 4A AUSTIN W. SCOTT, THE LAW OF TRUSTS § 368, at 135 (William F. Fratcher ed., 4th ed. 1987 & Supp., Mark L. Ascher ed., 1997). I have elsewhere argued that the substantive distinction between charity and noncharity should be eliminated altogether. See Hirsch, *supra* note 2, at 52-69, 84-110.

21. See Mary Kay Lundwall, *Inconsistency and Uncertainty in the Charitable Purposes Doctrine*, 41 WAYNE L. REV. 1341 (1995).

22. In contrast with the Uniform Probate Code, the draft of the Uniform Trust Act does contain a definition of charity. See UNIF. TRUST ACT § 408(a) & cmt. (Discussion Draft, Feb. 9, 1999). This definition follows the *Restatement* verbatim. See RESTATEMENT (SECOND) OF TRUSTS § 368 (1959). Though the section of the draft Uniform Trust Act devoted to noncharitable purpose trusts does not explicitly define them, their definition follows by negative implication, as well as from examples and references to the *Restatement of Trusts* provided in the accompanying comment. See UNIF. TRUST ACT § 407 & cmt. (Discussion Draft, Feb. 9, 1999).

back to the states. Re-reading the language of the optional section, only a "trust . . . for a . . . *lawful* noncharitable purpose" is effective.<sup>23</sup> This qualification implies that some purposes will be found unlawful, and wanting elaboration within the Code as to what those might be, we look again to local precedents<sup>24</sup>—another lost opportunity to rethink the common law.<sup>25</sup>

Only in one particular do the Commissioners possibly venture into this region of purpose trust law—possibly, I say, because their language is ambiguous. Before examining the provision in question, we need to lay out a bit of background. Under the common law, as set down in the *Restatement*, a trust for a purpose is void if it is found to be "capricious."<sup>26</sup> According to the *Restatement*, capriciousness can turn on either qualitative or quantitative criteria: A trust is void if it fails to "satisf[y] a natural desire which normal people have with respect to the disposition of their property,"<sup>27</sup> and it is also void if the sum allocated to an otherwise reasonable purpose is "unreasonably large."<sup>28</sup> In the second case, some courts have claimed authority to pare down the corpus allocated to a purpose in order to bring it within the bounds of legal acceptability. In effect, these courts take a remedial approach to the problem, validating trusts for purposes *pro tanto*.<sup>29</sup> At the same time, courts have always had the responsibility

23. UNIF. PROBATE CODE § 2-907(a) (amended 1993) (emphasis added).

24. On the other hand, looking to BLACK'S LAW DICTIONARY 885 (6th ed. 1990), the word *lawful* is defined as "legal; . . . not illegal." On strict reading, then, "lawful" means *not forbidden by a law*, rather than (merely) contrary to public policy. Compare the Uniform Trust Act draft, under which "[a] trust may be created only if its purposes are lawful, [and] are not contrary to public policy. . . ." UNIF. TRUST ACT § 405 (Discussion Draft, Feb. 9, 1999). In short, the drafters of the Uniform Probate Code have left themselves vulnerable to construction litigation over whether trusts for any purpose not literally illegal are intended to be rendered effective by the language of the optional section quoted *supra* in text at note 23.

25. I have elsewhere argued that such a rethinking is warranted. See Hirsch, *supra* note 2, at 69-84. But the drafters of the Uniform Trust Act have also passed up this opportunity, thus far: For elaboration of what constitutes an invalid trust purpose, they refer back to the *Restatement*. See UNIF. TRUST ACT §§ 405 cmt., 407 cmt. (Discussion Draft, Feb. 9, 1999).

26. RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1959).

27. *Id.* The tentative draft of the *Restatement (Third) of Trusts* offers a change of tone, if not of tune: "A purpose is not capricious . . . if it satisfies a desire that many (even if not most) people have with respect to the disposition of their property." RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (Tentative Draft No. 2, Mar. 10, 1999).

28. RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. g (1959); see also RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. e (Tentative Draft No. 2, Mar. 10, 1999).

29. Courts in Pennsylvania, applying a state statute permitting trusts in perpetuity for grave care, have claimed authority to reduce to reasonable sums lavish bequests for such care. See *Devereux's Estate*, 48 Pa. D. & C. 491, 496-97 (Orphans' Ct. 1943); *In re Dreisbach's Estate*, 121 A.2d 74, 79 (1956); *Paletorph's Estate*, 24 Pa. D. & C. 215, 221, 224 (Orphans' Ct. 1914), *aff'd*, 94 A. 1060, 1066 (1915), *appeal dismissed*, 94 A. 1066 (1915). In some jurisdictions, statutes authorizing perpetual cemetery trusts limit the sum so bequeathed to a fixed monetary amount, or to a "reasonable" amount, and give the court authority to reduce bequests accordingly. See COLO. REV. STAT. § 38-30-110 (1997); N.J. STAT. ANN. §

to return (via resulting trust) property transferred over and above what is needed to carry out the stated or construed terms of a trust.<sup>30</sup>

And here is what the Commissioners have to say: "A court may reduce the amount of property transferred [for a purpose], if it determines that that amount substantially exceeds the amount required for the intended use."<sup>31</sup> To which principle do they mean to advert? The reference to the sum *required* for the *intended* use seems to contemplate the traditional resulting trust scenario of superfluous funding. But the reference to *substantial* excess seems an allusion to bequests for purposes too lavishly funded to satisfy the dictates of public policy. Such an approach would certainly comport with the Commissioners' modern impulse to cure flawed estate plans, giving effect to testamentary intent so far as that is possible.<sup>32</sup> Yet their language will admit of either interpretation, and the accompanying comment fails to clarify which situation they had in mind—assuming they had anything clearly in mind.<sup>33</sup> If in fact the

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8A:4-7 (West 1996); WIS. STAT. ANN. § 701.11(3)(a) (West 1981 & Supp. 1998); *see also* N.Y. EST. POWERS & TRUSTS LAW § 8-1.5 (McKinney 1992) (affirming the existing power of courts to determine reasonability, without expressly granting authority to reduce bequests); OR. REV. STAT. § 97.730 (1990) (same); ARK. CODE ANN. § 20-17-904(b)(1) (Michie 1991) (fixing a monetary limit on these bequests without expressly granting courts authority to reduce excessive ones); MD. CODE ANN., EST. & TRUSTS § 11-102(a) (1991 & Supp. 1998) (same).

30. *See* RESTATEMENT (SECOND) OF TRUSTS §§ 430-32 (1959). For cases in which courts reduced excessive bequests for noncharitable purposes where they appeared a product of changed circumstances or mistaken overallocation, or where construed as intending smaller allocations than literally stated in the will, see *Clark v. Portland Burying Ground Ass'n*, 200 A.2d 468, 471-73 (Conn. 1964); *Security Trust Co. v. Willett*, 97 A.2d 112, 112-13 (Del. Ch. 1953); *In re Backes' Will*, 30 N.Y.S. 394, 395-96 (Sur. Ct. 1894); *In re Boardman*, 20 N.Y.S. 60, 61-62 (Sur. Ct. 1891); *Emans v. Hickman*, 19 N.Y. Sup. Ct. 425, 426-28 (1877); *In re Gorey's Will*, 170 N.Y.S. 635, 635-36 (Sur. Ct. 1918); *In re Turk's Will*, 221 N.Y.S. 225, 235-36, 239-40 (Sur. Ct. 1927), *appeal denied*, 226 N.Y.S. 111 (App. Div. 1927); *In re Welch*, 172 N.Y.S. 349, 350-51 (Sur. Ct. 1918); *In re Young's Estate*, 157 N.Y.S. 494, 495-96 (Sur. Ct. 1915); *Convey Estate*, 70 Pa. D. & C. 612, 613-14 (Orphans' Ct. 1950); *Lyon Estate*, 67 Pa. D. & C.2d 474, 481-83 (Orphans' Ct. 1974); *Wood Estate*, 12 Pa. D. & C.2d 577, 578-79 (Orphans' Ct. 1957); *cf.* *Hammond v. Stinger*, 258 S.W.2d 46, 47-48 (Ark. 1953) (finding insufficient proof of overallocation to warrant a resulting trust); *Earney v. Clay*, 516 S.W.2d 59, 67-69 (Mo. Ct. App. 1974) (same).

31. UNIF. PROBATE CODE § 2-907(c)(6) (amended 1993). Prior to the technical amendments of 1993, this provision had applied only to trusts for pets. *See* UNIF. PROBATE CODE § 2-907(b)(8) (9th ed. 1991); *see also* UNIF. PROBATE CODE app. X, § 2-907(b)(8) (amended 1993) (technical amendments).

32. Surely we can surmise that a testator would prefer that a reasonable sum go for a purpose in lieu of an unreasonable sum. For other rules within the Code serving to revise defective wills, see UNIF. PROBATE CODE § 2-503 (amended 1993) (advocating correction of mistakes of formalization); *id.* § 2-903 (advocating correction of mistaken violations of the Rule Against Perpetuities).

33. No discussion of this language by a Commissioner is to be found either in a published document or within the Commissioners' unpublished archives. But very similar language appeared in the preliminary proposal for a trust-for-pets section, made by a non-commissioner, and was later grafted into the optional section, whether thoughtfully or no. To that preliminary proposal there was attached the following note: "The only possible public misapprehension of such a statute would be on the basis of the anecdotal, sometimes

Commissioners did by this provision intend to speak to the problem of extravagant funding, codifying the *Restatement* rule as to substance<sup>34</sup> but supplementing it with a remedy, then their decision to ignore the other substantive dimension of trusts contrary to public policy seems all the more arbitrary: Why should the code define the quantitative, but not the qualitative, attributes of this (ineffective) variety of trust?

The one construct dealt with expressly and directly by the optional section is the intermediate category of noncharitable purpose trust. This the optional section acknowledges as valid.<sup>35</sup> Particularly auspicious is the scope of that acknowledgment. Here, we must again preface the discussion with a bit more background. Before the *Restatement of Trusts* was first promulgated in 1935, the leading authority on the effectiveness of noncharitable purpose trusts was a British case, *Morice v. Bishop of Durham*,<sup>36</sup> where Sir William Grant, as Master of the Rolls, put forward the view—later dubbed the “beneficiary principle”—that a trust was void unless some party had standing to enforce its terms against the trustee. On this basis, he struck down a trust for indefinite noncharitable purposes to be chosen by the trustee, lacking direct beneficiaries with the authority to sue the trustee for breach of trust.<sup>37</sup> However hallowed, Grant’s opinion was philosophically hollow—for the same lawmakers who require a trust to be enforceable by somebody in order to subsist also decide just which somebodies are (and aren’t) invested with that authority. If a trust is void for want of an enforcer, that is true be-

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sensational, instances of a disposition that is far too large for the purpose. It is necessary to give the power . . . to cut these back in extreme cases.” Rees Proposal, *supra* note 13. This suggests the notion of exorbitance rather than superfluity, though we cannot be confident that anyone thought about this distinction when the language was copied into the Code. The discussion draft of the revised Uniform Trust Act includes provisions clearly confined to the problem of superfluous funding. See UNIF. TRUST ACT §§ 406(c) cmt., 407(3) (Discussion Draft, Feb. 9, 1999).

34. Cases (though few of recent vintage) in several jurisdictions have given effect to extravagant trusts for noncharitable purposes in spite of the *Restatement* rule. See *Clark v. Portland Burying Ground Ass’n*, 200 A.2d 468, 470 (Conn. 1964) (dicta); *Snouffer v. Peoples Trust & Sav. Co.*, 212 N.E.2d 165, 171-72 (Ind. Ct. App. 1965); *Morrow v. Durant*, 118 N.W. 781, 784 (Iowa 1908); *Detwiller v. Hartman*, 37 N.J. Eq. 347, 352-53 (1883); *In re Getman’s Will*, 291 N.Y.S.2d 395, 397, 401 (App. Div. 1968); *In re Baeuchle’s Will*, 82 N.Y.S.2d 371, 377 (Sur. Ct. 1948), *aff’d*, 94 N.Y.S.2d 582 (1950), *aff’d mem.*, 93 N.E.2d 491 (1950); *In re Boardman*, 20 N.Y.S. 60, 61 (Sur. Ct. 1891) (dicta); *Emans v. Hickman*, 19 N.Y. Sup. Ct. 425, 427 (1877) (dicta); *Meksras Estate*, 63 Pa. D. & C.2d 371, 372 (Orphans’ Ct. 1974) (dicta); *Kalbach’s Estate*, 10 Pa. D. & C. 195, 198 (Orphans’ Ct. 1927); *Estate of Smith*, 181 Pa. 109, 114-15 (1896); *Bainbridge’s Appeal*, 97 Pa. 483, 486 (1881); see also *Mellick v. President and Guardians of the Asylum*, 37 Eng. Rep. 818, 820 (M.R. 1821) (English law). Enactment of the optional section in these states would, by hypothesis, function to preempt this case law.

35. In Great Britain, by contrast, the validity of noncharitable purpose trusts is thoroughly unclear. See Hirsch, *supra* note 2, at 35-40.

36. 32 Eng. Rep. 656 (M.R. 1804), *aff’d*, 32 Eng. Rep. 947 (Ch. 1805).

37. See *id.* at 658.

cause lawmakers have declined to pick one out, not because of the inexorable logic of the beneficiary principle.<sup>38</sup> At any rate, *Morice* did refuse to give effect to the trust at issue, and the case was subsequently cited by a number of pre-*Restatement* American courts for the proposition that trusts for noncharitable purposes, both definite and indefinite, were ineffective.<sup>39</sup>

When the first *Restatement of Trusts* appeared, it formally reaffirmed the beneficiary principle<sup>40</sup> but got round it by reforming trusts for definite noncharitable purposes into honorary trusts (akin to powers), immune from Grant's edict:<sup>41</sup> Since a power is not specifically enforceable it requires no beneficiary with standing to enforce its terms. On the other hand, the first *Restatement* continued to follow the narrow holding of *Morice*, deeming trusts for indefinite noncharitable purposes void per se.<sup>42</sup> Why the Restators chose this course can only be guessed: Scott knew full well that the public policies underlying the two cases were identical,<sup>43</sup> and he could have circumvented the beneficiary principle in the second instance in the self-same manner as he had in the first. Possibly Scott was motivated by a tactical desire to avoid where possible the holding in *Morice* without presuming to overrule so celebrated an opinion.<sup>44</sup> The result was a doctrinal inconsistency,<sup>45</sup> which Scott left in place until 1957, when he tweaked the *Restatement (Second)* to extend the remedial apparatus applicable to trusts for definite noncharitable purposes also to those for indefinite ones.<sup>46</sup> Alas, this relatively late reform has not gained acceptance with anything approaching the mod-

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38. For a further discussion, see Hirsch, *supra* note 2, at 91-94.

39. The pre-*Restatement* courts established no general rule on point, however. For a discussion of the early case law, see Hirsch, *supra* note 2, at 41-44.

40. As did its successor. See RESTATEMENT OF TRUSTS § 112 (1935); RESTATEMENT (SECOND) OF TRUSTS § 112 (1959).

41. See RESTATEMENT OF TRUSTS § 124 (1935).

42. See *id.* § 123 & cmt. c.

43. See Austin W. Scott, *Control of Property by the Dead* (pts. 1 & 2), 65 U. PA. L. REV. 527, 540-41 (1917); AUSTIN W. SCOTT, EXPLANATORY NOTES ON TRUSTS 30 (American Law Institute, *prepared in connection with* RESTATEMENT OF TRUSTS (Tentative Draft No. 1, 1930)).

44. The phenomenon of lawmakers chipping inconsistent exceptions off of, rather than overturning outright, rules perceived to be generally unsound has a long history in the common law. The resulting distinctions, motivated merely by tactical considerations, tend to be transient, foreshadowing the rules' eventual demise, which then also obliterates the inconsistencies (as, indeed, proved to be the sequence of events here). For a jurisprudential discussion, see MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 70-74, 105-18, 136-40 (1988).

45. I am not the first to have noticed it. See George E. Palmer, *The Effect of Indefiniteness on the Validity of Trusts and Powers of Appointment*, 10 UCLA. L. REV. 241, 277 (1963).

46. See RESTATEMENT (SECOND) OF TRUSTS §§ 123, 124 (1959).

ern judicial consensus on trusts for definite noncharitable purposes;<sup>47</sup> and in light of the Restators' flip-flop, the law applicable to indefinite noncharitable purposes in jurisdictions lacking post-*Restatement (Second)* precedents remains distressingly uncertain.

Enter the Commissioners. Drafting against this historical backdrop, their original, 1990 version of the optional section was a disappointment: The section covered only a trust "for a lawful noncharitable purpose," apparently excluding from the purview of the Code trusts not designated for a particular purpose.<sup>48</sup> Fortunately, the Technical Amendments of 1993 scrapped this limitation, and the optional section now gives effect to trusts for noncharitable purposes, be those purposes "specific" or ones "to be selected by the trustee."<sup>49</sup> Hence, the Code now mirrors the *Restatement* in affirmatively treating both sorts of trusts symmetrically.<sup>50</sup>

In this respect, ironically, the Commissioners have run the same course as the Restators, though in a much compressed span. But the amended optional section's merger of definite and indefinite purposes is especially propitious, for it comes within a *code*. Hence, unlike the *Restatement (Second)*, it serves unequivocally to overrule ill-considered and uncertain case law on point.

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47. For cases giving effect to honorary trusts for definite noncharitable purposes, see Hirsch, *supra* note 2, at 48 n.62; the most recent decision on point is *Phillips v. Estate of Holzmann*, No. 98-765, 1998 WL 889239 (Fla. 3d DCA Nov. 25, 1998). By contrast, case law on the validity of honorary trusts for indefinite noncharitable purposes is today more or less evenly divided. See Hirsch, *supra* note 2, at 48 n.62.

48. UNIF. PROBATE CODE § 2-907(a) (9th ed. 1991); see also UNIF. PROBATE CODE app. X, § 2-907(a) (amended 1993) (technical amendments).

49. UNIF. PROBATE CODE § 2-907(a) (amended 1993). The discussion draft of the Uniform Trust Act now follows suit (earlier drafts having neglected to address the matter). See UNIF. TRUST ACT § 407(1) & cmt. (Discussion Draft, Feb. 9, 1999); cf. UNIF. TRUST ACT § 2-105(b) (Discussion Draft, Oct. 13, 1997).

50. Trusts for indefinite noncharitable purposes are made effective expressly by statute in two non-Uniform Probate Code jurisdictions. See CAL. PROB. CODE § 15204 (West 1991); NEV. REV. STAT. ANN. § 163.004(2) (Michie 1993); see also MONTANA CODE ANN. § 72-33-205 (1997) (additional validating statute in a jurisdiction that also adopted the optional section, see *supra* note 13). Another curiosity in the 1990 version of the optional section was language indicating that it applied not only to intended trusts for noncharitable purposes but also to trusts "for a noncharitable corporation or unincorporated society." UNIF. PROBATE CODE § 2-907(a) (9th ed. 1991). These apparently were to be treated as honorary trusts, rather than as enforceable ones, as they had always been under the *Restatement*. Compare *id.*, with RESTATEMENT (SECOND) OF TRUSTS § 119 (1959). The technical amendments struck this reference to corporations and societies from the optional section. See UNIF. PROBATE CODE § 2-907(a) (amended 1993); *id.* app. X, § 2-907(a) (technical amendments); see also Executive Committee of the National Conference of Commissioners on Uniform State Laws, Technical Amendments to the Uniform Probate Code Article II (Feb. 6, 1993), at 106-07 ("Explanation of Technical Amendments") (admitting vaguely that "[t]he original description of an honorary trust was too broad") (unpublished document, on file with author) [hereinafter Technical Amendments].

## III. PROCESS

The optional section also speaks—although none too fluently—to the process of purpose trusts. Having restricted themselves to non-charitable purpose trusts and having pronounced them to be effective, the Commissioners went on to draft a blueprint for their internal machinery. Is the legal vehicle they have contrived well engineered?

The optional section first purports to distinguish two different sorts of purpose trust on the basis of substantive disposition. A trust for the performance of a “noncharitable purpose” in general is designated an “[h]onorary [t]rust.” This sort of trust “may be performed by the trustee.”<sup>51</sup> A trust for the care of a domestic or pet animal in particular comes under the separate heading of a “[t]rust for [p]ets.” Such a trust “is valid.”<sup>52</sup> That this second sort of trust is meant to differ from the first, as an enforceable instrument, seems underscored by the rule of construction that follows. In determining testamentary intent with respect to provisions for an animal, the bequest “must be liberally construed to bring the transfer within this subsection.”<sup>53</sup> Courts begin with a rebuttable presumption that the testator intended a trust, rather than a “merely precatory or honorary . . . disposition.”<sup>54</sup>

And so, at first sight, it appears the Commissioners mean to codify the *Restatement* with one exception,<sup>55</sup> treating intended trusts for

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51. UNIF. PROBATE CODE § 2-907(a) (amended 1993).

52. *Id.* § 2-907(b); see also *infra* note 127 (discussing the boundaries of this category).

53. UNIF. PROBATE CODE § 2-907(b) (amended 1993).

54. *Id.* The discussion draft of the Uniform Trust Act includes an equivalent rule of construction. See UNIF. TRUST ACT § 406(a) (Discussion Draft, Feb. 9, 1999). The reference to liberal construction indicates that the plain meaning rule will not apply here. The optional section goes on to state that extrinsic evidence is admissible to establish testamentary intent in this regard. See UNIF. PROBATE CODE § 2-907(b) (amended 1993). The notes accompanying the preliminary proposal for this phrasing state that it is intended to “anticipate and cure the in-artful language that will certainly be used in many cases. A gift might be made ‘to’ the animal, or to the new owner of the animal without further explanation.” Rees Proposal, *supra* note 13. I would certainly concur in the waiver of the plain meaning rule in these cases—and, indeed, in all cases, given its fundamental want of soundness. See Hirsch, *supra* note 17, at 1115-25. Whether a presumption ought to exist in favor of construing bequests for pet-care as trusts, however, is doubtful: The alternative estate plan, whereby a testator bequeaths the pet itself to a caretaker in whom she has confidence and then (if necessary) makes a bequest of funds outright to that person, informally understood to be for the pet’s care, has going for it the simple virtue of common sense. That may well be what a testator has in mind by an ambiguously worded bequest. See *Estate of Russell*, 444 P.2d 353 (Cal. 1968); see also *supra* note 1 (estate planning discussions).

55. A different exception to the common law has gained far more pervasive adoption under state statutes: That is the special process rules that often apply to trusts for the upkeep of a cemetery lot. See Hirsch, *supra* note 2, at 107-08; *infra* note 134. The Uniform Probate Code makes no separate provision for those, however. The matter was raised during the plenary reading of the optional section prior to its enactment in 1990. A Commissioner enquired whether the optional section overrode special rules regarding trusts for the

noncharitable purposes as honorary trusts unless they pertain to the care of a pet.<sup>56</sup> Yet, further inspection reveals that the administrative provisions of the optional section do not in fact function to distinguish “honorary trust” process from “trust for pets” process. A final subsection sets out the rules of trust administration under the optional section—yet it explicitly applies, without distinction, to *both* sorts of trusts differentiated in the preceding subsections.<sup>57</sup> Under this last subsection, if a trustee declines to carry out the purpose designated in the bequest, the court can replace her.<sup>58</sup> What is more, a testator has the authority to name an individual with standing to enforce the intended purpose of the bequest upon the trustee.<sup>59</sup> And so, quite to our surprise, we discover that under this subsection

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care of graves. The Reporter for the revised Article II, Lawrence Waggoner, replied that it did not: These would continue to be treated under separate state statutes. See National Conference of Commissioners on Uniform State Laws, Proceedings in Committee of the Whole, Uniform Probate Code Article II (July 15, 1990), at 135 (unpublished document, on file with author) [hereinafter Plenary Reading]. No thought seems to have been given to the possibility of establishing a uniform rule on point, despite the fact that the prevailing body of state legislation is quite a hodgepodge—and in some cases poorly drafted. See Hirsch, *supra* note 2, at 107-08 & n.289. Nor was the relation of the optional section to preexisting state statutes covering cemetery trusts remarked and clarified in the accompanying comment. See UNIF. PROBATE CODE § 2-907 cmt. (amended 1993). The discussion draft of the Uniform Trust Act also leaves the issue of trusts for the care of graves to state law, but at least it does so explicitly. See UNIF. TRUST ACT § 407 cmt. (Discussion Draft, Feb. 9, 1999).

56. To single out bequests for the care of an animal for special process consideration would break new ground. The Commissioners briefly justify their novel provision for animal care as “meet[ing] a concern of many pet owners by providing them a means for leaving funds to be used for the pet’s care.” UNIF. PROBATE CODE § 2-907 cmt. (amended 1993). One cannot but wonder whether the emphasis on pets stemmed in part from the fact that the Commissioners had received a thoughtful proposal on the subject and hence were prompted to give it consideration. See Rees Proposal, *supra* note 13 (observing, *inter alia*, that “[d]uring life, the animal owner needs to have the simple assurance of knowing that he will have fulfilled his obligation to the animal in the event of the owner’s death”).

57. “[A] trust covered by either of those subsections is subject to the following provisions. . . .” UNIF. PROBATE CODE § 2-907(c) (amended 1993).

58. “A court may order the transfer of the property to another trustee, if required to assure that the intended purpose is carried out.” *Id.* § 2-907(c)(7).

59. See *id.* § 2-907(c)(4). Under this subsection, if the testator fails to designate an enforcer, one can be “appointed by a court upon application to it by an individual.” *Id.* A curious limitation: The court apparently lacks authority to appoint an enforcer *sua sponte*. But, whether or not such an appointment is made, the court can act under another subsection to transfer the corpus to a different trustee if the original trustee fails to carry out the testator’s purpose. See *supra* note 58. Does this imply that the court itself must undertake to monitor the trust if no enforcer is designated and no application to appoint one is made? See also *infra* note 80. Conceivably, the court’s power to appoint an enforcer *sua sponte* could still be derived from the court’s general power to “make such other orders and determinations as shall be advisable to carry out the intent of the transferor and the purpose of this section.” *Id.* § 2-907(c)(7). Another shortcoming of the instant subsection is its failure to spell out the enforcer’s status (that is, as an officer of the court) and her liability in the event of negligent or faithless performance of her duties as trust monitor. Do the guards not have to be guarded? This subsection is slightly modified in Colorado. See COLO. REV. STAT. § 15-11-901(3)(d) (1998); see also UNIF. TRUST ACT §§ 406(b) & cmt., 407(2) (Discussion Draft, Feb. 9, 1999) (making further improvements); Hirsch, *supra* note 2, at 105 n.272 (suggesting a guardianship analogy).

trusts for *all* noncharitable purposes become effectively subject to specific performance. But why then did the earlier subsections characterize trusts for a general noncharitable purpose as “merely . . . honorary,” which the trustee “may . . . perform[ ]”?<sup>60</sup>

The key to the puzzle lies in the history. Under the original, 1990 version of optional section, the process rules which operated to make trusts for purposes enforceable applied only to those for the care of a pet.<sup>61</sup> The Commissioners elected to extend those process rules to trusts for general noncharitable purposes under the technical amendments of 1993—but they did so without making any accompanying change in the language of the prior subsection giving effect to purpose trusts as honorary, rather than as full-fledged, trusts. Surely, this must have been an oversight<sup>62</sup> (and, as we shall see, it was not the only one). But the upshot is that, as presently composed, *the optional section has become self-contradictory*.<sup>63</sup>

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60. See *supra* notes 51, 54 and accompanying text.

61. See UNIF. PROBATE CODE § 2-907(b) (9th ed. 1991); see also UNIF. PROBATE CODE, app. X, § 2-907(b) (amended 1993) (technical amendments). This original scheme of distinguishing unenforceable trusts for general noncharitable purposes from enforceable ones for the care of pets was adopted by two non-Uniform Probate Code jurisdictions which nonetheless borrowed for their statutes parts of the language set out in the 1990 version of the optional section. See N.C. GEN. STAT. §§ 36A-145, 36A-147 (1995) (construed in Ronald C. Link & Kimberly A. Licata, *Perpetuities Reform in North Carolina: The Uniform Statutory Rule Against Perpetuities, Nondonative Transfers and Honorary Trusts*, 74 N.C. L. REV. 1783, 1805-07, 1836-37 (1996)); N.Y. EST. POWERS & TRUSTS LAW § 7-6.1 (McKinney 1992 & Supp. 1999) (rendering trusts for pets enforceable without covering bequests for general noncharitable purposes).

62. It is not absolutely clear, however, that the drafters of the technical amendments recognized all of the implications of their revisions. The amended comment accompanying the amended optional section contains not a word about this seemingly significant change. See UNIF. PROBATE CODE § 2-907 cmt. (amended 1993). To the National Conference of Commissioners, all the drafters of the technical amendments reported was this: “Several of the provisions previously applicable only to trusts for pets are equally appropriate for honorary trusts, and the amendments extend those provisions to honorary trusts.” Technical Amendments, *supra* note 50, at 106-07 (“Explanation of Technical Amendments”). Given the import of those “several . . . provisions,” which relate, as we have observed in the text, to enforceability, continuing to speak of them as applying to “honorary trusts” appears at best anachronistic, and at worst a contradiction-in-terms: Once the provisions are extended, the trusts they govern are “honorary” no longer. See also *infra* note 68.

63. Cf. MICH. COMP. LAWS ANN. § 700.2722(1) (West 1995 & Supp. 1999) (effective Apr. 1, 2000) (omitting the label “honorary trust,” but otherwise reproducing the confusing language of the optional section, quoted *supra* in text at notes 51-54). By contrast, the discussion draft of the Uniform Trust Act expressly deems both a trust for a general noncharitable purpose and a trust for the care of a pet as “valid and enforceable and not dependent on the trustee deciding on whether to honor the settlor’s wishes.” UNIF. TRUST ACT §§ 406(a) & cmt., 407(1) & cmt. (Discussion Draft, Feb. 9, 1999). Meanwhile, the tentative draft of the *Restatement (Third) of Trusts* follows the prior *Restatement* in deeming a trust for definite or indefinite noncharitable purposes as subject to a “power but not a duty” to carry out the purpose. RESTATEMENT (THIRD) OF TRUSTS § 47(1), (2) & cmts. a, c, & d (Tentative Draft No. 2, Mar. 10, 1999). Though recognizing the possibility of bestowing “fully enforceable trust status” on these bequests, the Restators prefer “a cautious approach,” leaving “more aggressive development of the law to the enactment of legislation.” *Id.* § 47 reporter’s notes, at 256.

Assuming, at any rate, that the last subsection controls, trusts for noncharitable purposes under the revised Uniform Probate Code have become honorary in name only. In this respect, the Commissioners smuggled a substantive amendment into their technical amendments. Viewed on the merits, this change represents a great leap forward: No substantive justification for rendering noncharitable purpose trusts unenforceable against the trustee, as they are under the *Restatement*, has ever been presented by a court or scholar; nor does one present itself now.<sup>64</sup> On the contrary, allowing the testator to create an enforceable noncharitable purpose trust affirmatively furthers public policy by preventing trustees from colluding with alternative beneficiaries to terminate their trusts in exchange for a portion of the proceeds.<sup>65</sup> But the Commissioners failed to go the distance by scrapping the old label and identifying trusts for noncharitable purpose as garden-variety trusts. That failure has the ill consequence of leaving "honorary trusts" for noncharitable purposes—as they were, and remain, under the *Restatement*—a muddled category, somewhere in between trust and power.<sup>66</sup> Whether the subsidiary principles of trust law or powers doctrine apply had never been clear under the common law<sup>67</sup>—and remains

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64. The *Restatement (Third) of Trusts* offers no express justification for its caution. See RESTATEMENT (THIRD) OF TRUSTS § 47 reporter's notes, at 256-58 (Tentative Draft No. 2, Mar. 10, 1999).

65. For a fuller discussion of the public policy of enforceability of noncharitable purpose trusts, see Hirsch, *supra* note 2, at 94-97. A number of foreign jurisdictions (for example, the Isle of Jersey) now also offer testators the power to create enforceable trusts for noncharitable purposes. See Simon Gould, *Jersey and Non-Charitable Purpose Trusts: The Product of an Evolutionary Process?*, 5 J. INT'L TR. & CORP. PLAN. 87 (1996). This may also be the rule in Kentucky. See KY. REV. STAT. ANN. § 381.260(1) (Michie 1972 & Supp. 1996) (for a case interpreting this statute, see *Willett v. Willett*, 247 S.W. 739 (Ky. 1923)). But several American jurisdictions treating noncharitable purpose trusts by statute, together with Canadian provinces acknowledging their validity, have instead codified the *Restatement* process rule whereby intended trusts for noncharitable purposes become powers, not specifically enforceable. See CAL. PROB. CODE §§ 15204, 15211, 15212 (West 1991 & Supp. 1999); MO. ANN. STAT. § 456.055 (West 1992) (covering trusts for specific noncharitable purposes only); TENN. CODE ANN. § 35-50-118 (1996) (covering trusts for the care of pets only); WIS. STAT. ANN. § 701.11(1) (West 1981 & Supp. 1998) (covering trusts for specific noncharitable purposes only); see also the North Carolina statutes cited *supra* note 61, and the Canadian statutes cited *infra* note 112.

66. According to the *Restatement*, "it is more accurate to state the [honorary] trustee has a power than it is to state that he holds upon trust," but the *Restatement* does not identify an honorary trust as a power per se. RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. c (1959).

67. For a discussion of the extant case law, further arguing as a matter of public policy that the subsidiary rules of trust law should apply to honorary trusts, see Hirsch, *supra* note 2, at 98-101. The tentative draft of the *Restatement (Third) of Trusts* is more strongly suggestive, although not quite definitive. It refers to a noncharitable purpose trust as "a special form of . . . trust," in which "the devisee holds the property in trust, upon terms adapted by operation of law. That adapted trust is for the testator's residuary beneficiaries or heirs but subject to the devisee's power (with no duty) to . . . make distributions for . . . the . . . intended purposes." Hence, the devisee becomes "a trustee-power holder."

unsettled under the Code,<sup>68</sup> although one adopting state has taken the bull by the horns and resolved this ambiguity on its own.<sup>69</sup>

Only in two particulars does the optional section help to resolve this cluster of issues, one serviceably, the other less so. Under the optional section, if a trustee of a purpose trust is not named, or is unwilling or unable initially or subsequently to serve, the court may (barring an expression of testamentary intent to the contrary) appoint one, or one's successor.<sup>70</sup> In this important respect, "honorary

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RESTATEMENT (THIRD) OF TRUSTS § 47 cmts. a, c, & f (Tentative Draft No. 2, Mar. 10, 1999). Either the personal representative or a successor in interest can sue "to prevent or redress a breach of trust." *Id.* cmt. f. The *Restatement (Third) of Trusts* would profit by an express statement that, except as explicitly modified, the subsidiary rules of trust law apply to non-charitable purpose trusts.

68. This is true even of the special category of "trusts for pets," which is not clearly identified as coming under the trust rubric in all respects. Whereas the optional section continues to characterize trusts for general noncharitable purposes as honorary trusts, trusts for pets are referred to in the accompanying comment as "a particular type of honorary trust." UNIF. PROBATE CODE § 2-907 cmt. (amended 1993). Nor do other sections of the Uniform Probate Code and the separate uniform acts dealing with trust law resolve the question at the receiving end: Invariably these other sections and acts refer to trusts alone, never to honorary trusts. See UNIF. TESTAMENTARY ADDITIONS TO TRUSTS ACT (1991), 8B U.L.A. 455 (1993 & Supp. 1997); UNIF. PRINCIPAL AND INCOME ACT (1962), 7B U.L.A. 150 (1985 & Supp. 1997); UNIF. PRUDENT INVESTOR ACT (1994), 7B U.L.A. 18 (Supp. 1997); UNIF. PROBATE CODE § 1-201(53) (amended 1993) (definitional section, failing to clarify whether an honorary trust falls within the definition of a trust under the Code); *id.* § 2-511. The discussion draft of the Uniform Trust Act is clearer, distinguishing "the trusts created by this . . . section" from "unenforceable powers of appointment," although—like the Uniform Probate Code—it continues to identify trusts for noncharitable purposes as "so-called honorary trusts." UNIF. TRUST ACT § 406 cmt. (Discussion Draft, Feb. 9, 1999). Again, an express statement that the subsidiary rules of trust law apply to noncharitable purpose trusts is advisable.

69. Three cheers for Colorado, which adopted the optional section but modified it in language that other enacting states would do well to emulate: "All trusts created under this section shall be registered and all trustees shall be subject to the laws of this state applying to trusts and trustees." COLO. REV. STAT. § 15-11-901(3)(e) (1998).

70. See UNIF. PROBATE CODE § 2-907(c)(7) (amended 1993). Compare the tentative draft of the *Restatement (Third) of Trusts*, which, barring an expression of intent in the will, presumes that the trustee's office is personal to a trustee named in the will where the trust is for indefinite noncharitable purposes, but draws the opposite presumption where the trust is for a definite noncharitable purpose, in which case "if the designated trustee effectively refuses the power or resigns or dies before its expiration, a successor trustee may be appointed by the court." RESTATEMENT (THIRD) OF TRUSTS § 47 cmt. f (Tentative Draft No. 2, Mar. 10, 1999). (Will the as-yet-undrafted sections of the *Restatement (Third)* covering trusts for definite and indefinite *charitable* purposes draw an analogous distinction? The *Restatement (Second)* quite explicitly does not. See RESTATEMENT (SECOND) OF TRUSTS, § 397 & cmts. a & b (1959).) One assumes—although the point needs to be clarified—that under the *Restatement (Third)*, if a court either expressly or by presumption has authority to replace the trustee of a noncharitable purpose trust, it will *not* do so if the trustee's decision to resign stems from her unwillingness to carry out the designated purpose. Otherwise, trusts for noncharitable purposes would be rendered effectively enforceable under the *Restatement (Third)*, a result which it explicitly disavows. See *supra* note 63; cf. 2 SCOTT, *supra* note 20, § 124, at 247 (arguing that courts should have authority to replace an honorary trustee who dies but not one who "refuses to exercise the power," because that would amount to "indirect enforcement of the power, and it can hardly be maintained that if it is unenforceable directly it can be enforced indirectly").

trusts” under the Uniform Probate Code follow the law of trusts rather than powers.<sup>71</sup> But in another important respect the Commissioners saw fit to deviate from trust law: The optional section provides that “no . . . periodic accounting, separate maintenance of funds, . . . or fee is required by reason of the existence of the fiduciary relationship of the trustee.”<sup>72</sup> This provision is significant in that it seems to take for granted—although it fails to aver—“the existence”<sup>73</sup> of fiduciary responsibilities. Thus, the provision could be read to mean that trust fiduciary law *does apply otherwise* to trusts for noncharitable purposes, an outcome that the common law had never clarified.<sup>74</sup> Assuming that is what they meant, one wishes the Commissioners had announced the principle, instead of implying it *en passant*.

That aside, the virtues of the exceptions carved out of trust fiduciary law in this subsection are, to say the least, mysterious. Because, like a standard trust, a trust for a purpose can implicate extended managerial duties, fees would seem in order in the ordinary course.<sup>75</sup> So would the traditional duties to segregate trust assets and periodically to account for them. Whoever has the task of monitoring a purpose trust, assuming such a person is named,<sup>76</sup> needs to determine whether the trustee is fulfilling her responsibilities, no less than the beneficiaries of a trust for persons do. The removal of these fiduciary duties can only heighten information costs and, as a consequence, agency costs.<sup>77</sup>

Yet again, the (disquieting) solution to the mystery emerges from the history. Recall that all of the special process rules relating to purpose trusts under the optional section originally applied—and

71. Compare RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 11.2 cmt. b, 14 introductory note, 14.2 & cmts., 14.5 (1983) (powers doctrine), with RESTATEMENT (SECOND) OF TRUSTS §§ 33 & cmt. a, 101 & cmts., 196 & cmt. a (1959) (trust doctrine).

72. UNIF. PROBATE CODE § 2-907(c)(5) (amended 1993). These presumptions yield to an expression of contrary intent or to an order by the court. See *id.* In Colorado, this subsection was not enacted but was replaced by the language quoted *supra* note 69.

73. UNIF. PROBATE CODE § 2-907(c)(5) (amended 1993).

74. But compare the notes accompanying this same language in the preliminary proposal for a trust-for-pets section, quoted *infra* in text at note 79.

75. By analogy, trustees of trusts for charitable purposes receive fees under ordinary trust law. See RESTATEMENT (SECOND) OF TRUSTS § 390 & cmt. (1959).

76. See *supra* note 59 and accompanying text.

77. Once again, by analogy, the *Restatement* mandates that trustees of trusts for charitable purposes bear the standard litany of fiduciary duties, including segregation of assets and periodic accounting. See RESTATEMENT (SECOND) OF TRUSTS § 379 & cmt. a (1959); see also *id.* §§ 172, 179 (mandating these duties with respect to trusts for persons). Historically, however, many states required no periodic reports from charitable trustees to the attorney general. But the Commissioners themselves have recognized that such accounting is “vitaly needed,” and they produced a uniform act achieving this result. See UNIF. SUPERVISION OF TRUSTEES FOR CHARITABLE PURPOSES ACT, 7B U.L.A. 727 & prefatory note (1954).

were crafted to apply—only to trusts for the care of pets.<sup>78</sup> In that limited context, an exception from the strict rules of trust fiduciary law might appear to make sense. The preliminary proposal for the trust-for-pets section, suggesting language virtually identical to that which came to appear in the optional section concerning fiduciary law, reasoned:

It is important that all the results be accomplished in as low-key and unobtrusive a way as possible. Hence [this] subsection . . . excuses the trappings and expenses of trustee relationships. The entire draft statute goes out of its way to avoid the language involved in the creation of formal trusts and does not invoke the application of the whole body of trust law and fiduciary obligations.<sup>79</sup>

That is all well enough, perhaps, in respect of small sums allocated for sustaining cats and dogs—but it is plainly inappropriate for more substantial endowments set aside for other noncharitable causes. The rationale for the subsection collapses under the weight of its expanded coverage, accomplished via the technical amendments.<sup>80</sup> Troublingly, it appears that the Commissioners promulgated those amendments not only without regard to the inconsistencies of language they created,<sup>81</sup> but also heedless to the suitability of the old process rules to handle trusts for purposes which, however similar

78. See *supra* note 61 and accompanying text.

79. Rees Proposal, *supra* note 13.

80. See *supra* notes 61-62 and accompanying text. Another subsection that collapses along with it is the one permitting a court to appoint an enforcer for a noncharitable purpose trust if the testator neglects to name one, but only “upon application to it by an individual.” See UNIF. PROBATE CODE § 2-907(c)(4) (amended 1993); see also *supra* note 59. The language of this subsection derives from the preliminary proposal for a trusts-for-pets section. See Rees Proposal, *supra* note 13. The notes accompanying that proposal state:

The intended result of [this] subsection . . . is exactly analogous to that of the guardian ad litem for a minor or a disabled beneficiary. I believe that in most jurisdictions no guardian has to be appointed . . . but any person may apply to be appointed if there appears to be a problem. Similarly, under the draft statute, if one thinks the animal is not getting the benefit of the gift, he may apply or persuade another to apply. . . . But no person is required to be appointed, either initially or upon application.

*Id.* Once again, it is manifest that the proposal contemplated bequests of small sums for the care of pets whose condition might be observed by sympathetic others. And, once again, this subsection originally applied only to such bequests, but was expanded by the technical amendments to cover bequests for all noncharitable purposes, including large gifts for abstract social causes, whose diffuse and indirect “beneficiaries”—the only persons with any reason to petition a court for appointment of an enforcer—may have heavily diluted mercenary incentives and huge information costs. For a related discussion, see Hirsch, *supra* note 2, at 105-06 (addressing whether indirect beneficiaries should have personal standing to enforce purpose trusts). In such cases, if not in all cases, the language of the section should direct the court to appoint an enforcer *sua sponte* if the testator neglects to do so.

81. See *supra* notes 61-63 and accompanying text.

structurally, could differ dramatically in their financial order of magnitude.<sup>82</sup>

#### IV. DURATION OF TRUSTS

Finally, we come to the matter of the permissible longevity of trusts for purposes: For how long can a testator dictate that such a trust will persist? The rules which we must here unpack appear within two separate uniform acts: the Uniform Statutory Rule Against Perpetuities, now grafted onto the revised Uniform Probate Code<sup>83</sup> but adopted widely on its own,<sup>84</sup> and the optional section of the Code devoted exclusively to purpose trusts, which has gained adoption (thus far) only in a handful of states.<sup>85</sup>

In the absence of these acts, the principles of law that govern are moderately clear, though by no means wholly resolved. John Chipman Gray once crowed that perpetuities doctrine was "concatenated with almost mathematical precision,"<sup>86</sup> but around even this field one can discern a penumbra; and the life of perpetuities law appears least logical when we come to explore purpose trusts.

Contributing to the confusion is the fact that, strictly speaking, the Rule Against Perpetuities seems to have no bearing on trusts for definite purposes at all. What the Rule requires is that an interest become *vested*—a manner of speaking, by which we mean *not subject to a condition precedent*—within the allotted period of some life in being plus twenty-one years.<sup>87</sup> Bequests that might vest remotely, possibly remaining saddled with contingencies after the period has elapsed, are void *ab initio*. But so long as a testator attaches no contingency to a trust for a definite purpose, it "is as vested as anything

82. But compare the assertion of the drafters of the technical amendments, quoted *supra* note 62.

83. See UNIF. PROBATE CODE §§ 2-901 to -906 (amended 1993).

84. The Uniform Statutory Rule Against Perpetuities (promulgated in 1986 and amended in 1990) is today in force in twenty-five states. See UNIF. STATUTORY RULE AGAINST PERPETUITIES, 8B U.L.A. 44 (Supp. 1998); UTAH CODE ANN. § 75-2-1201 (Supp. 1998). It has been adopted without the optional section of the Uniform Probate Code in fifteen states, although one of these (New Jersey) may be about to repeal the Uniform Statutory Rule, see *infra* note 134, and two other of these (California and Tennessee) regulate the duration of trusts for noncharitable purposes by other statutes (in the case of Tennessee, only trusts for pets are otherwise regulated), see *infra* notes 126, 128. In a sixteenth state (Michigan), the Uniform Statutory Rule will prevail on its own until April 1, 2000, when the optional section becomes effective. See *supra* note 13.

85. See *supra* note 13.

86. JOHN C. GRAY, THE RULE AGAINST PERPETUITIES § 869, at 757 (Roland Gray ed., 4th ed. 1942) (1886).

87. See J.H.C. MORRIS & W. BARTON LEACH, THE RULE AGAINST PERPETUITIES 1-2 (2d ed. 1962). Hence, the Rule Against Perpetuities "is *not* a rule invalidating interests which last too long." *Id.* at 2.

can be."<sup>88</sup> For this reason, a testator can direct that a trust for a definite charitable purpose will continue forever—such a direction is perfectly valid under the Rule.<sup>89</sup> But, in fact, she can provide that a trust for indefinite charitable purposes will also continue forever: Though the beneficial interest is now contingent upon the trustee's choice of which charity to subsidize at any one time, so long as the occurrence of a condition merely shifts the interest from one charity to another, the trust remains valid irrespective of when the contingency is due to be resolved—this, under a special exception to the Rule Against Perpetuities.<sup>90</sup>

By the same token, logic suggests, perpetual trusts for definite noncharitable purposes should be valid *per se*, as creating vested interests. Yet, the case law is quite clear that they are not. Courts unanimously require trusts for definite noncharitable purposes to *terminate* (rather than vest) within some life in being and twenty-one years.<sup>91</sup> From this, Professors Leach, Simes, Gulliver, Fratcher

88. Charles Sweet, *Restraints on Alienation* (pt.2), 33 L.Q. REV. 342, 361-62 (1917); see also WILLIAM M. MCGOVERN, JR. ET AL., WILLS, TRUSTS, AND ESTATES § 13.7, at 548-49 (1988); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1.6 cmt. a, § 2.1 cmt. f (1983); George L. Clark, *Unenforcible [sic] Trusts and the Rule Against Perpetuities*, 10 MICH. L. REV. 31, 35 (1911); Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648, 1704 (1985); *In re Estate of McNeill*, 41 Cal. Rptr. 139, 141 (Ct. App. 1964); *Snouffer v. Peoples Trust and Sav. Co.*, 212 N.E.2d 165, 171 (Ind. Ct. App. 1965); *In re Estate of Woods*, 311 P.2d 359, 369 (Kan. 1957); *Devereux's Estate*, 48 Pa. D. & C. 491, 504 (Orphans' Ct. 1943), *appeal quashed*, 46 A.2d 168 (Pa. 1946); *In re Cain*, 1950 V.L.R. 382, 391 (Vict.). *But see* *Barton v. Parrott*, 495 N.E.2d 973, 976 (Ohio Prob. Ct. 1984) (asserting without analysis that though the interest in a charitable trust is vested, the interest in a noncharitable purpose trust is not).

89. See MORRIS & LEACH, *supra* note 87, at 185-86; RESTATEMENT OF PROPERTY § 398 (1944); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 2.1 & cmt. f (1983); *supra* note 3. The historical origins of the *perpetual* charitable trust have not been explored by legal historians. Professor Keeton asserted that its legal authorization traced to the English ecclesiastical courts sometime during the medieval period, and that surmise is almost certainly correct. See GEORGE W. KEETON, *THE MODERN LAW OF CHARITIES* 1 (1962); see generally A.J. McClean, *Charitable Trusts, the Rule Against Perpetuities, Accumulation and Cy-Près*, 1 U.B.C. L. REV. 729 (1963). Scholars heretofore have identified only nineteenth-century precedents, although one involved a 1585 trust that "has been used now for nearly three centuries for charitable purposes." *Attorney General v. Webster*, 20 Eq. 483, 489-90 (1875) (M.R.). I have discovered a far earlier case (involving, however, a later trust) in which a court held a perpetual charitable trust valid without analysis. See *In re Stoddard* (App. 1622), *reprinted in* GEORGE DUKE, *THE LAW OF CHARITABLE USES* 81 (London 1676); see also *id.* 105-12. Probably the longest lasting charitable trust in the United States was the one endowed by the estate of Benjamin Franklin. It terminated in 1990, after a term of two hundred years, as Franklin's will provided. See Fox Butterfield, *From Ben Franklin, A Gift That's Worth Two Fights*, N.Y. TIMES, Apr. 21, 1990, at A1. According to Professor Holdsworth, some charitable trusts founded in England in the sixteenth century have endured into the twentieth. See 7 WILLIAM HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 371 (2d ed. 1937).

90. See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1.6 & cmt. d (1983).

91. There is an Everest of such cases. See, e.g., *Foshee v. Republic Nat'l Bank*, 617 S.W.2d 675, 677 (Tex. 1981). For a tabulation of many of them, see LEWIS M. SIMES & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* § 1394 n.24 (2d ed. 1956 & Supp. 1998).

and Kales all deduced that noncharitable purpose trusts are subject to a second, (unnamed)<sup>92</sup> rule, shadowing the Rule Against Perpetuities, though not identical to it.<sup>93</sup> The Restators pay implicit homage to this view. Carefully, they refer to noncharitable purpose trusts as constrained by the “period” of the Rule Against Perpetuities, rather than by the Rule itself.<sup>94</sup>

92. On the naming controversy, see MORRIS & LEACH, *supra* note 87, at 325-27; J.H.C. Morris & H.W.R. Wade, *Perpetuities Reform at Last*, 80 L.Q. REV. 486, 531 (1964). Though Shakespeare's Juliet thought otherwise, names do matter: In this instance, the want of a name has sowed much confusion. See *infra* note 95.

93. See WILLIAM F. FRATCHER, PERPETUITIES AND OTHER RESTRAINTS 421-22, 424 (1954); ASHBEL G. GULLIVER, CASES AND MATERIALS ON THE LAW OF FUTURE INTERESTS 81-82 (1959) (analogizing an honorary trust to a fee simple determinable, which the author points out is not subject to the Rule Against Perpetuities); ALBERT M. KALES, ESTATES, FUTURE INTERESTS AND ILLEGAL CONDITIONS AND RESTRAINTS IN ILLINOIS § 660 (1920); MORRIS & LEACH, *supra* note 87, at 324-27; SIMES & SMITH, *supra* note 91, § 1394, at 249-52; see also J.B. CLARK & J.G. ROSS MARTYN, THEOBALD ON WILLS 630-31 (15th ed. 1993); JILL E. MARTIN, HANBURY & MARTIN: MODERN EQUITY 359-60 (14th ed. 1993); RONALD H. MAUDSLEY, THE MODERN LAW OF PERPETUITIES 167 (1967); ROBERT MEGARRY & H.W.R. WADE, THE LAW OF REAL PROPERTY 296 (5th ed. 1984); Philip Jamieson, *Trusts for the Maintenance of Particular Animals*, 14 U. QUEENSLAND L.J. 175, 181 (1987); William O. Hart, *Some Reflections on the Case of Re Chardon*, 53 L.Q. REV. 24, 28 & *passim* (1937) (“a bastard offshoot of the confused union of the two senses in which Gray speaks of the word ‘perpetuity’”); O.R. Marshall, *The Failure of the Astor Trust*, 6 CURRENT LEGAL PROBS. 151, 174-75 (1953); Joseph Warren, *The Progress of the Law, 1919-1920: Estates and Future Interests* (pt. 2), 34 HARV. L. REV. 639, 647-48 (1921). For an early recognition of this duality, see Clark, *supra* note 88, at 33-35. John Chipman Gray agreed that the Rule Against Perpetuities “has nothing to do with” a trust for a noncharitable purpose. Nonetheless, he failed to posit a parallel rule because he took the position that a trust for a noncharitable purpose was void *per se* for want of a beneficiary. See GRAY, *supra* note 86, §§ 898, 906. Professor Sweet, already quoted on this subject, see *supra* note 88 and accompanying text, endorsed this view but subsequently altered it, arguing that alternative beneficiaries in the event of nonperformance of an honorary trust hold contingent interests, hence subject to the Rule Against Perpetuities. See 2 THOMAS JARMAN, A TREATISE ON WILLS 899 n.r. (Raymond Jennings ed., 8th ed. 1951) (1st ed. 1841-43) (note by Sweet). This argument neglects the fact that, as takers by right of reversion, the alternative beneficiaries' interests are vested by definition and therefore not subject to the common law Rule Against Perpetuities! See Briant Smith, *Honorary Trusts and the Rule Against Perpetuities*, 30 COLUM. L. REV. 60, 66-68 (1930). It has also been argued that because honorary trusts may be treated as akin to powers, limitations on powers found within the main branch of the Rule Against Perpetuities are applicable. See A.K.R. Kiralfy, “Purpose Trusts,” *Powers and Conditions*, 14 CONV. & PROP. LAW. (n.s.) 374, 375 (1950); Smith, *supra*, at 60; Briant Smith, *Honorary Trusts and Restraints on Alienation*, 16 TEX. L. REV. 149 (1938). Simes criticized this position on the ground that the analogy is imprecise; Leach simply pointed out that the argument is nowhere acknowledged in the case law. See MORRIS & LEACH, *supra* note 87, at 324-25; SIMES & SMITH, *supra* note 91, § 1394, at 251-52; see also 2 SCOTT, *supra* note 20, § 124.1, at 248-49 (simply noting the conflicting theories).

94. See RESTATEMENT OF TRUSTS §§ 124 cmt. f, 418(2) (1935); RESTATEMENT (SECOND) OF TRUSTS §§ 124 & cmts. b & f, 418(b) & cmt. b (1959); RESTATEMENT OF PROPERTY § 379 & cmt. a (1944). (Oddly, the matter is not treated in the *Restatement (Second) of Property*, updating the Rule Against Perpetuities. See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 2.1 (1983).) Indeed, the Restators were *too* careful, adopting the same phraseology in the case of a trust for indefinite noncharitable purposes, to be selected by the trustee. See RESTATEMENT (SECOND) OF TRUSTS §§ 123 & cmt. f, 417(b) & cmt. a (1959). Here, however, the interest is *not* vested; that is, it is contingent upon the trustee's selection, and so the Rule Against Perpetuities itself applies! Cf. *supra* note 90 and accom-

Though few courts have taken pains to illuminate this distinction,<sup>95</sup> its significance may be more than semantic. The application of corollary doctrines within the Rule Against Perpetuities to the parallel rule governing noncharitable purpose trusts remains unclear. Consider the case—quite common in fact—where a testator enjoins performance of a purpose but fails to specify when the purpose shall be carried out. According to the arcana of the Rule Against Perpetuities, executors are assumed to be slothful—they are always a day late, if not a dollar short. Hence, a bequest made contingent upon circumstances existing “when my estate is probated” is void, on the assumption that the executor might take forever to do so.<sup>96</sup> Ordinarily, the prospect of a slothful executor is of no consequence under the Rule, for delays are not typically tied to contingencies—it makes no difference under the Rule whether a bequest becomes possessory now or in fifty years time, so long as we have already resolved who the beneficiary is. But under the parallel rule requiring that trusts for noncharitable purposes *terminate* within the perpetuities period, the speed at which purposes are accomplished makes all the difference. Suppose, for example, a testator bequeaths a sum for the construction of a monument but neglects to indicate precisely when it must be built. Do we then assume, as we would under the Rule Against Perpetuities, that the executor (or trustee) might not get round to it until the perpetuities period had passed, thereby rendering the bequest void *ab initio*?

Most courts have held *no*, on the (usually implicit, although unthematic!) assumption that purposes that can be performed immediately are intended to be performed immediately and are analyzed

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panying text (on charitable trusts). For indefinite noncharitable purpose trust cases, see *In re Sutro's Estate*, 102 P. 920, 920-22 (Cal. 1909) (no terminal date specified); *In re Estate of Jones*, 318 So. 2d 231, 232-34 (Fla. 2d DCA 1975) (distribution to be made over twenty-five years); *Chamberlain v. Stearns*, 111 Mass. 267, 267-69 (1873) (distribution to be made “from time to time,” without specific limitation); *Smith v. Pond*, 107 A. 800, 801 (N.J. Ch. 1919) (perpetual income endowment); *Goetz v. Old Nat'l Bank*, 84 S.E.2d 759, 773 (W.V. 1954) (no terminal date specified).

95. For four exceptions, see *Lyon Estate*, 67 Pa. D. & C.2d 474, 479 (Orphans' Ct. 1974); *Bliven v. Borden*, 185 A. 239, 244-45 (R.I. 1936); *In re Cain*, 1950 V.L.R. 382, 391 (Vict.); *In re Oldfield*, [1949] 2 D.L.R. 175, 184-87 (Can.); and see also *Devereux's Estate*, 48 Pa. D. & C. 491, 504 (Orphans' Ct. 1943), *appeal quashed*, 46 A.2d 168 (Pa. 1946). But many other courts refer to prolonged trusts for noncharitable purposes as violating “the Rule Against Perpetuities” without elaboration or explanation, see, e.g., *Foshee v. Republic Nat'l Bank*, 617 S.W.2d 675, 677-78 (Tex. 1981); *McCartney v. Jacobs*, 123 N.E. 557, 558-59 (Ill. 1919); *Meehan v. Hurley*, 150 A. 819, 820 (R.I. 1930); *Morristown Trust Co. v. Mayor and Bd. of Aldermen*, 91 A. 736, 737 (N.J. Ch. 1913); *Perry v. Twentieth Street Bank*, 206 S.E.2d 421, 423 (W.V. 1974), while still other courts hold such trusts void without reference to any rule at all, see, e.g., *Travis v. Randolph*, 112 S.W.2d 835, 835 (Tenn. 1938).

96. See JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 844-46 (5th ed. 1995) (noting a few contrary precedents); W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 645 (1938) (examples 15 & 16) (deeming this to be the rule).

under the parallel rule as if they *will* be performed immediately.<sup>97</sup> On the other hand, if a testator calls for performance of a purpose over a space of time—say, maintenance of a grave site—then most courts have assumed, absent an explicit temporal limitation, that the

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97. See RESTATEMENT (SECOND) OF TRUSTS § 418 cmt. b (1959) (asserting in connection with perpetuities limitations, but without elaboration or analysis, that “if property is . . . bequeathed to a person to be applied by him to the erection of a monument . . . or . . . a tomb . . . no resulting trust arises;” that is, perpetuities principles are satisfied); see also *id.* § 124 cmt. b (indicating that if an honorary trustee fails to carry out an honorary trust within a “reasonable time,” the court can declare the trustee’s power to carry out the purpose unexercised and terminate the interest; by analogy, a minority of courts have reasoned in connection with interests in persons contingent on when an executor probates an estate that the legal obligation to do so expeditiously ensures that the common law Rule Against Perpetuities is satisfied, see *Belfield v. Booth*, 27 A. 585, 587 (Conn. 1893), and *supra* note 96). In one early case, where life (for once) imitated logic and an executor “long delay[ed]” performing a bequest to say masses, the bequest was held valid notwithstanding that fact. See *Wilmes v. Tiernay*, 174 N.W. 271, 273 (Iowa 1919). For additional cases, see *Sherman v. Baker*, 40 A. 11, 12 (R.I. 1898) (where a bequest funded masses, it is “not in perpetuity” because it “takes effect at once”); *In re Lennon’s Estate*, 92 P. 870, 872 (Cal. 1907) (same); *Holland v. Smyth*, 47 N.Y. Sup. Ct. 372, 373 (1886) (same); *Leonard v. Haworth*, 51 N.E. 7, 8 (Mass. 1898) (bequest to fund widow’s funeral expenses is valid, “as it would be completely performed upon the decease of the testator’s wife”); *Cochran v. McLaughlin*, 24 A.2d 836, 838 (Conn. 1942) (indefinite purposes) (“These payments were to be made within such time as might properly be taken to settle [the estate]”); *In re Baeuchle’s Will*, 82 N.Y.S.2d 371, 375 (Sur. Ct. 1948), *aff’d*, 94 N.Y.S.2d 582 (1950), *aff’d mem.*, 93 N.E.2d 491 (1950) (bequest of residuary to build a mausoleum held valid since “the trustees are empowered to expend the residue at once”); *Waller v. Sproles*, 22 S.W.2d 4, 5 (Tenn. 1929) (distinguishing bequests for the perpetual care of monuments, “of course . . . void under the rule against perpetuities,” from bequests for the erection of monuments, which “cannot be said to violate the rule against perpetuities”); *Ford v. Ford’s Ex’r*, 16 S.W. 451, 452 (Ky. 1891) (making the same distinction); see also, e.g., *Moran v. Moran*, 73 N.W. 617, 621-22 (Iowa 1897) (bequest for masses held valid without perpetuities analysis); *In re Backes’s Will*, 30 N.Y.S. 394, 395-96 (Sur. Ct. 1894) (same); *In re Gorey’s Will*, 170 N.Y.S. 635, 635-36 (Sur. Ct. 1918) (same); *In re Shanahan’s Estate*, 112 N.E.2d 665, 667 (Ohio 1953) (same); *In re Koppikus’ Estate*, 81 P. 732, 733 (Cal. Ct. App. 1905) (bequest to build a monument held valid without perpetuities analysis); *Detwiller v. Hartman*, 37 N.J. Eq. 347, 349-52 (1883) (same); *In re Young’s Estate*, 157 N.Y.S. 494, 494-95 (Sur. Ct. 1915) (same); *Bainbridge’s Appeal*, 97 Pa. 482, 485-86 (1881) (same); *In re Stoffel’s Estate*, 145 A. 70, 70-71 (Pa. 1929) (same); *McIlvain v. Hockaday*, 81 S.W. 54, 55 (Tex. Ct. App. 1904) (same); *Callin Estate*, 25 Pa. D. & C. 376, 380-81 (Orphans’ Ct. 1961) (same, dicta); *Williams v. Herrick*, 32 A. 913, 913 (R.I. 1895) (dicta that bequests to build a monument are valid because “[t]hey relate to something to be done immediately, and ended”); *Trimmer v. Danby*, 25 L.J. Ch. (n.s.) 424, 426-27 (V.C. 1856) (bequest to build a monument held valid without perpetuities analysis); *Masters v. Masters*, 24 Eng. Rep. 454, 454-56 (M.R. 1717) (validity conceded without perpetuities analysis); *Adnam v. Cole*, 49 Eng. Rep. 862, 864 (M.R. 1843) (same); *In re Dulles’ Estate*, 67 A. 49, 49-51 (Pa. 1907) (indefinite purposes) (no perpetuities analysis); *In re Endacott*, 3 All E.R. 562, 569 (Ch. App. 1959) (dicta); *Mason v. Bloomington Library Ass’n*, 86 N.E. 1044, 1045-47 (Ill. 1908) (bequest for perpetual care of monument is void, but bequest for purchase of monument is valid without analysis). *But see* *Morristown Trust Co. v. Mayor and Bd. of Aldermen*, 91 A. 736, 737 (N.J. Ch. 1913) (bequest to build a flagstaff within a park upon consent of the municipal authorities held void because “violative of the rule against perpetuities”); *Wilson v. Flowers*, 277 A.2d 199, 201 (N.J. 1971) (indefinite purposes) (immediate bequest “void . . . for a violation of the rule against perpetuities”) (dicta); *Goetz v. Old Nat’l Bank*, 84 S.E.2d 759, 773 (W.V. 1954) (indefinite purposes) (“no time is fixed in the will for [the trustees] to finally dispose of the property”).

testator meant to carry it out forever, in violation of the parallel rule.<sup>98</sup>

Likewise, courts have usually held invalid trusts to provide support for the lives of pet animals because they *might* continue too long, unless expressly limited to some human life or lives and/or twenty-one years.<sup>99</sup> Yet, strikingly, there are some contrary precedents. In one case, where a testator sought to create a trust for the care of an animal for the rest of its life, the court, “[b]y simple mathematical computation,” reasoned that the fund would be exhausted within three years, and so contained an implicit “time limit . . . much less than the maximum period allowed under the rule against perpetuities.”<sup>100</sup> This approach is wrong, at least by analogy to the classical Rule Against Perpetuities. For purposes of determining whether a future interest satisfies the Rule, one ignores actual or anticipated depletions of the fund that provides it.<sup>101</sup> Do this and other “What-Might-Happen” doctrines not apply to the parallel rule? If that is so, the court in the instant case failed to make the principle explicit, and neither the Restators nor the treatise writers have addressed the issue. To this day it remains unresolved.<sup>102</sup>

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98. For cases in which trusts lacking express provisions for duration were assumed to be intended as perpetual, see, for example, *Alexander v. House*, 54 A.2d 510, 511-12 (Conn. 1947); *Rhode Island Hosp. Trust Co. v. Proprietors of Swan Point Cemetery*, 3 A.2d 236, 238 (R.I. 1938), *aff'd*, 7 A.2d 205 (R.I. 1939). *But see In re Budge*, 1942 N.Z.L.R. 350, 352-53 (adopting the construction principle that where a testator fails to specify how long a purpose trust will endure, she is presumed to intend that it terminate within a space of time allowed by law). In a very few cases, courts have given effect to perpetual trusts for the care of graves without discussion of the perpetuities issue. See *Hammond v. Stringer*, 258 S.W.2d 46, 47-48 (Ark. 1953); *Trustees of Methodist Episcopal Church v. Williams*, 96 A.795, 796 (Del. 1914); *Delaware Trust Co. v. Delaware Trust Co.*, 95 A.2d 569, 575-76 (Del. 1953) (recognizing that *Williams* was wrongly decided under perpetuities doctrine, but declining to overrule it, given widespread reliance on the decision); *Security Trust Co. v. Willett*, 97 A.2d 112, 113 (Del. Ch. 1953) (same); see also *infra* note 134 (noting special statutory rules concerning trusts for the care of graves).

99. See RESTATEMENT OF PROPERTY § 374 cmt. h (1944); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1.3 cmt. i (1983); RESTATEMENT (SECOND) OF TRUSTS §§ 124 cmt. f, 418 cmt. b (1959); *In re Howells' Estate*, 260 N.Y.S. 598 (Sur. Ct. 1932), *modified*, 261 N.Y.S. 859 (Sur. Ct. 1933); *In re Mills' Estate*, 111 N.Y.S.2d 622 (Sur. Ct. 1952); *In re 1932 Kelly*, I.R. 255 (court not indicated).

100. *In re Searight's Estate*, 95 N.E.2d 779, 783 (Ohio Ct. App. 1950).

101. Professor Leach dubbed this the “Magic Gravel Pit” doctrine. See MORRIS & LEACH, *supra* note 87, at 73-74. Oddly, however, Professor Leach raised no question about the court’s analysis in *Searight*. See *id.* at 324.

102. For a case rejecting the analysis found in *Searight*, see *Meehan v. Hurley*, 150 A.819, 820 (R.I. 1930) (holding void a bequest to care for a grave till the fund was exhausted, despite calculations that it would run out within seven years). Cf. *Leonard v. Haworth*, 51 N.E. 7, 8-9 (Mass. 1898) (where the court’s analysis of the validity of a noncharitable purpose trust may have neglected, by analogy, the “Unborn Widow” doctrine). In several other American cases, however, courts have given effect to trusts for the care of animals for the rest of their lives, without regard to the application of durational rules, apparently because the issue was not raised by contestants. See *In re Rogers*, 412 P.2d 710, 711-12 (Ariz. 1966); *Willett v. Willett*, 247 S.W. 739, 740-41 (Ky. 1923); *Wrenshall's Estate*, 72 Pa. Super. Ct. 258, 259-62 (1919). In Great Britain, several courts have also upheld trusts for the lifetime

Also unresolved is whether a trust that violates the parallel rule can be reformed.<sup>103</sup> In the absence of statutory authority, a court could conceivably sever a void purpose trust into annual installments and thereby give effect to it for the first twenty-one years. The Restators raise this possibility, but do not pass judgment on it.<sup>104</sup> Statutes in a number of states have authorized courts to modify void future interests, deleting remote contingencies in order to render the interests valid with as small violence as possible to the testator's intent.<sup>105</sup> Whether this statutory authority extends to violations of the parallel rule, so that a court could re-write a trust for a noncharitable purpose to expire within the perpetuities period instead of failing altogether, is in most jurisdictions unspecified and has never come before a court for construction.<sup>106</sup> Certainly, one would presume that the public policy of effectuating intent so nearly as the law al-

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care of animals, in one early instance apparently by allowing the animal to be used as a measuring life, and in another by taking judicial notice of the animal's life-expectancy. Commentators consider neither analysis sound. See MORRIS & LEACH, *supra* note 87, at 322-23; 7 RICHARD R. POWELL, THE LAW OF REAL PROPERTY ¶ 588, at 46-7 (Don R. Castleman rev., rev. ed. 1998); J.G. RIDDALL, THE LAW OF TRUSTS 178 & n.14 (4th ed. 1992); L.A. Sheridan, *Trusts for Non-Charitable Purposes*, 17 CONV. & PROP. LAW. (n.s.) 51-53, 59-61 (1953).

103. Of course, like a future interest in persons, a trust for a noncharitable purpose can always be self-reforming by inclusion of a saving clause. See *In re Hooper*, 1931 All E.R. 129, 130 (Ch.); *Pirbright v. Salwey*, W.N., Aug. 8, 1896, at 86, 86 (court not indicated).

104. See RESTATEMENT (SECOND) OF TRUSTS § 124 cmt. f (1959), which asserts that the issue "is not within the scope of the Restatement of this Subject," though neither is it treated by the *Restatement* of the subject within whose scope it is: namely, the *Restatement of Property*. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS pt. 1 (1983) (addressing the Rule Against Perpetuities). Have Alphonse and Gaston taken the field here? The notion of severing future interests into annual segments was first promoted by Professor Gray in connection with discretionary trusts, but Gray's dictum has found little support in the published cases. See DUKEMINIER & JOHANSON, *supra* note 96, at 865-66. As yet, only one American court has ever taken this approach in connection with a noncharitable purpose trust. See *Lyon Estate*, 67 Pa. D. & C.2d 474, 479, 483 (Orphans' Ct. 1974). Two foreign courts have also followed this course. See *In re Kelly*, 1932 I.R. 255, 261-64 (court not indicated); *In re Budge*, 1942 N.Z.L.R. 350, 351-53. *But cf. In re Producers' Defence Fund*, 1954 V.L.R. 246, 255-56 (Vict.) (rejecting severance theory).

105. In a very few jurisdictions, courts have presumed to modify future interests without statutory authorization. See, e.g., *In re Estate of Anderson*, 541 So. 2d 423, 430 & n.13 (Miss. 1989).

106. One treatise assumes this breadth application, though without analysis of the relevant perpetuities statutes. See 2 SCOTT, *supra* note 20, § 124.1, at 250-51. In fact, only one state statute asserting a general power to reform void future interests has been drafted so as explicitly to apply both to the principal and to the parallel rule, referring to judicial modification of an interest that "violates the rule against perpetuities or a rule or policy corollary thereto." MO. ANN. STAT. § 442.555 (West 1986) (emphasis added). Other state statutes refer to modifications of interests that violate (simply) the Rule Against Perpetuities. See, e.g., KY. REV. STAT. ANN. § 381.216 (Michie 1972); OHIO REV. CODE ANN. § 2131.08(c) (Anderson 1994); OKLA. STAT. ANN. tit. 60, § 75 (West 1994); VT. STAT. ANN. tit. 27, § 501 (1998); *cf. TEX. PROP. CODE* § 5.043(d) (West 1984 & Supp. 1999) (allowing modification of "noncharitable gifts and trusts" that violate "the rule against perpetuities," but without express reference to trusts for purposes).

lows applies with equal force to both branches of perpetuities doctrine, but this issue too remains unsettled.

And lastly, there is the doubtful relevance of “wait-and-see” rules, allowing a court in some jurisdictions to delay finding an interest void under the Rule Against Perpetuities until time reveals whether the interest actually does vest remotely or not. Does this principle also apply to durational uncertainties under the parallel rule? If so, trusts for the care of specified animals until their deaths could run for twenty-one years, in order to determine whether the interests terminated within that period, as the parallel rule requires.

In adopting the wait-and-see approach, the Restators speak of waiting to see whether the interest “does not vest” within the parameters of the Rule—language that is not strictly applicable to trusts for definite purposes, which lack contingencies but nonetheless have to satisfy durational limits.<sup>107</sup> State statutes adopting wait-and-see often use the same inapt terminology.<sup>108</sup> Yet, a number of scholars (albeit without analysis) have read wait-and-see doctrine to encompass cases governed by the parallel rule.<sup>109</sup> Some have even suggested that wait-and-see doctrine could apply to a trust for a non-charitable purpose set to continue indefinitely or until a date-certain beyond the perpetuities period, in order to give it effect for twenty-one years.<sup>110</sup> This suggestion appears erroneous. If a court can determine initially that an interest will *surely* vest remotely (by analogy), then there is nothing more to “see” by waiting, and the doctrine is inapplicable. On this point (if not others), the *Restatement* is crystal clear.<sup>111</sup>

In light of all this substantive underdevelopment and slender authority, the Commissioners’ decision in the 1980s to draft a uniform act covering perpetuities law presented a unique opportunity to resolve the problems of the parallel rule. Unfortunately, as promulgated in 1986, the Uniform Statutory Rule failed explicitly to treat noncharitable purpose trusts at all. Whereas the perpetuities statutes of Great Britain and several other Commonwealth countries—all predating the uniform act and familiar to the Commissioners—

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107. RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1.4 (1983).

108. See, e.g., VA. CODE ANN. § 55-13.3(c) (Michie 1995). *But cf.*, e.g., KY. REV. STAT. ANN. § 381.216 (Michie 1972) (under which courts wait to see “whether an interest would violate the rule against perpetuities,” without reference to vesting, but without explicit extension to the parallel rule); OHIO REV. CODE ANN. § 2131.08(c) (Anderson 1994) (same).

109. See 2 SCOTT, *supra* note 20, § 124.2, at 251; *infra* note 110.

110. See DUKEMINIER & JOHANSON, *supra* note 96, at 672-73; SIMES & SMITH, *supra* note 91, § 1394, at 129 (Supp.) (“probably”); Dukeminier, *supra* note 88, at 1702-04.

111. See RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS § 1.4 cmt. e (1983); see also *id.* § 1.4, reporter’s note 5. Professor Leach’s original proposal for wait-and-see likewise called for waiting until we have ascertained “those facts” with which “we shall be able to decide the issue.” W. Barton Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 HARV. L. REV. 721, 728-30 (1952).

I predated the uniform act and familiar to the Commissioners—had not neglected this aspect of perpetuities law,<sup>112</sup> the Uniform Statutory Rule does so. Indeed, in respect of purpose trusts, the Uniform Statutory Rule must actually be accounted worse than useless: For, as we shall see, its legal relevance is unclear and so, instead of stripping away the uncertainties of preexisting doctrine, it perversely adds a second layer of ambiguity.

By its plain language, the Uniform Statutory Rule applies only to a “nonvested property interest,” giving it effect either if it satisfies the common law rule or if, when we wait-and-see, it happens to vest *vel non* within ninety years.<sup>113</sup> As we have observed, a trust for a definite purpose, not subject to a condition precedent, is vested.<sup>114</sup> Hence, trusts for charitable purposes can continue in perpetuity, both under the common law and under the Uniform Statutory Rule.<sup>115</sup> As far as trusts for definite noncharitable purposes are concerned, the Uniform Statutory Rule is silent: Nowhere does it limit

112. The perpetuities act of Great Britain applies the traditional perpetuities period to trusts for noncharitable purposes, even as it has modified the Rule Against Perpetuities applicable to ordinary trusts for persons to a set term of eighty years. See *Perpetuities and Accumulations Act, 1964*, ch. 55, §§ 1, 15(4) (Eng.). The same is true in New Zealand and the Australian state of Victoria, except that these acts allow the trust to “be applied for the purposes . . . during the perpetuities period, but not thereafter;” that is, the trust is not void *per se* if it violates the parallel rule. An Act to Effect Reforms in the Rule of Law Commonly Known as the Rule Against Perpetuities, 1964, no. 47, § 20 (N.Z.); VICT. STAT. no. 7750, § 18 (1968). In New South Wales, the period applicable to trusts for noncharitable purposes and ordinary trusts for persons is a symmetrical eighty years. See N.S.W. PUB. ACTS no. 43, §§ 7(1), 16(2) (1984). In four Canadian provinces, perpetuities legislation gives effect to trusts for definite noncharitable purposes for up to twenty-one years; but trusts intended to endure in perpetuity may be held void *ab initio* if the court finds that this would more closely approximate the testator’s intent than a modified twenty-one-year term. See R.S.A. ch. P-4, § 20 (1980); R.S.B.C. ch. 321, § 21 (1979); R.S.O. ch. 113, § 16 (1966); S.Y.T. ch. 129, § 20 (1986); see also *infra* note 134 (trust havens). For commentary interpreting the British perpetuities act as it pertains to noncharitable purpose trusts, which is not perfectly clear, see John A. Andrews, *Gifts to Purposes and Institutions*, 29 CONV. & PROP. LAW. (n.s.) 165, 169-70 (1965); J.F. Garner, *The Perpetuities and Accumulations Act, 1964*, 28 CONV. & PROP. LAW. (n.s.) 333, 340 (1964); Morris & Wade, *supra* note 92, at 530-31; cf. MAUDSLEY, *supra* note 93, at 177-78. For a comparison between other aspects of the British act and the Uniform Statutory Rule (but ignoring this one) by the Commissioner who served as Reporter for the Uniform Statutory Rule, see Lawrence W. Waggoner, *Wait-and-See: The New American Uniform Act on Perpetuities*, 46 CAMBRIDGE L.J. 234 (1987).

113. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a) & cmt. B (amended 1990), 8B U.L.A. 333, 336-43 (1993 & Supp. 1998); UNIF. PROBATE CODE § 2-901(a) (amended 1993). The Commissioners used the term “nonvested” as a synonym for the conventional concept of “contingent.” See Lawrence W. Waggoner, *The Uniform Statutory Rule Against Perpetuities*, 21 REAL PROP. PROB. & TR. J. 569, 570 n.2 (1986).

114. See *supra* note 88 and accompanying text. On the other hand, a trust for indefinite noncharitable purposes remains contingent until the purposes are selected and so is limited by the Uniform Statutory Rule to ninety years. See *supra* note 94.

115. Following the common law, the Uniform Statutory Rule permits in perpetuity “a nonvested . . . interest held by a charity, . . . if the nonvested . . . interest is preceded by an interest held by another charity.” UNIF. STATUTORY RULE AGAINST PERPETUITIES § 4(5) (amended 1990), 8B U.L.A. 370 (1993 & Supp. 1998); UNIF. PROBATE CODE § 2-904(5) (amended 1993). Thus, though not vested, a trust in perpetuity for indefinite charitable

the *duration* of interests.<sup>116</sup> Construed strictly, then, and barring additional legislative intervention in jurisdictions that have passed the Uniform Statutory Rule, the common law continues to prevail with respect to noncharitable purpose trusts, and the prior legal parallelism between the Rule Against Perpetuities and its unnamed counterpart exists no longer.<sup>117</sup>

This would seem, in fact, the logical conclusion to draw—were the doctrinal waters not muddied by a further reference to the Uniform Statutory Rule tucked away in the Uniform Probate Code. As already remarked, the revised Code adopts the Uniform Statutory Rule, but also includes an optional section specifically devoted to the validity—and temporal boundaries—of noncharitable purpose trusts. We shall return to the optional section in just a moment. But for now, notice that the accompanying comment informs us that “if this optional provision is enacted, a new subsection . . . should be added,” earlier on, to the Code’s list of exceptions from the purview of the Uniform Statutory Rule, in order “to avoid an overlap or conflict” between that Rule and the optional section, and thus “mak[ing] it clear that [the optional section] is the exclusive provision applicable to property interests” of this sort.<sup>118</sup> And so, it seems the Commissioners do contemplate that the Uniform Statutory Rule, when standing

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purposes remains valid under the Uniform Statutory Rule, and we can also conclude by negative inference that a trust for a definite charitable purpose that is not subject to a condition precedent is deemed vested by the Uniform Statutory Rule and hence can also continue in perpetuity. See also *supra* notes 89-90 and accompanying text.

116. Actually, the Uniform Statutory Rule requires that a nonvested property interest “vest or terminate” within ninety years, and the latter verb in one of its senses does refer to duration. But that is not the sense in which the Commissioners use the verb: By “terminate,” they mean “is lost;” that is, the relevant contingency is resolved against the holder of the contingent interest. At any rate, this provision applies only to a nonvested interest. See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a) & cmt. B (amended 1990), 8B U.L.A. 333, 336-43 (1993 & Supp. 1998); UNIF. PROBATE CODE § 2-901(a) (amended 1993).

117. The Uniform Statutory Rule “supersedes the rule of the common law known as the rule against perpetuities,” without reference to any kindred or parallel rules; furthermore, the Uniform Statutory Rule expressly “does not apply to . . . a property interest . . . or arrangement that was not subject to the common-law rule against perpetuities.” UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 4(7), 9 (amended 1990), 8B U.L.A. 370, 381 (1993 & Supp. 1998); UNIF. PROBATE CODE §§ 2-904(7), 2-906 (amended 1993). This interpretation is also thematic with the Uniform Statutory Rule’s approach to gap-filling: “[A] subsidiary doctrine [of the common law Rule Against Perpetuities] is superseded by this Act only to the extent the provisions of the Act conflict with it.” UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1 cmt. & cmt. H (amended 1990), 8B U.L.A. 334-35, 352-56 (1993 & Supp. 1998). This same legal uncoupling occurred by express provision under the British act and several of its Commonwealth counterparts. See *supra* note 112.

118. UNIF. PROBATE CODE pt. 9, sub-pt. 2, general cmt. (amended 1993). The list of exceptions that otherwise accompanies the Uniform Statutory Rule makes no reference to trusts for noncharitable purposes. See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 4 (amended 1990), 8B U.L.A. 370 (1993 & Supp. 1998); UNIF. PROBATE CODE § 2-904 (amended 1993).

alone, speaks to noncharitable purpose trusts after all.<sup>119</sup> But how does it do so? The Commissioners' comment, offering instructions to "make [the Code] clear," simultaneously renders the Uniform Statutory Rule anything but.

The only conceivable answer is that the Commissioners have implicitly adopted the view of a small minority of scholars that honorary trusts for definite noncharitable purposes should be treated, at least with respect to perpetuities analysis, as special powers of appointment, which then fall under the main branch of the Rule Against Perpetuities, rather than a parallel rule.<sup>120</sup> In that case, trusts for noncharitable purposes under the Uniform Statutory Rule could persist for ninety years.<sup>121</sup> But does this interpretation not press the limits of conceivability? Is it truly possible, as a matter of hermeneutics, that the Commissioners have insinuated into the Uniform Statutory Rule an unorthodox theory of honorary trusts, *one that has never found expression in a single common law case*,<sup>122</sup> without any explicit statement of statutory intent?<sup>123</sup> Alas, silence in the law rarely speaks its proverbial volumes, and the Commissioners' uncommunicativeness on the matter of purpose trusts leaves

119. Several scholars have assumed that the Uniform Statutory Rule applies to trusts for definite noncharitable purposes, though without statutory analysis. See DUKEMINIER & JOHANSON, *supra* note 96, at 673, 888; LAWRENCE W. WAGGONER ET AL., FAMILY PROPERTY LAW 845 (2d ed. 1997) (this reference is a significant *ipse dixit*, since one of the co-authors, Lawrence Waggoner, was himself Reporter for the Uniform Statutory Rule, though the assertion is again made without any statutory analysis); James S. Chase, *Perpetuities Reform: How Much Do We Need?*, 11 PROB. L.J. 1, 19-20 (1992); Jesse Dukeminier, *The Uniform Statutory Rule Against Perpetuities: Ninety Years in Limbo*, 34 UCLA L. REV. 1023, 1042-43 (1987).

120. See *supra* note 93. An alternative hypothesis might be that the Commissioners' comment in the Uniform Probate Code referred only to trusts for indefinite noncharitable purposes, which—as nonvested interests—do come under the main branch of the Rule Against Perpetuities and, as such, are covered by the Uniform Statutory Rule and limited to ninety years, see *supra* notes 94, 113 and accompanying text, a limit now revised by the optional section, see *infra* note 125 and accompanying text. But this cannot be, for the Commissioners' comment had also appeared in the unamended, 1990 version of the Code, whose optional section had not covered trusts for indefinite noncharitable purposes! See UNIF. PROBATE CODE pt. 9, sub-pt. 2, general cmt. (9th ed. 1991); *supra* notes 148-50 and accompanying text.

121. Under the Uniform Statutory Rule, a special power is permitted to last for ninety years, and it can also be reformed to terminate within that span. See UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 1(c)(2), 3(1) (amended 1990), 8B U.L.A. 333-34, 364-65 (1993 & Supp. 1998); UNIF. PROBATE CODE §§ 2-901(c)(2), 2-903(1) (amended 1993).

122. See MORRIS & LEACH, *supra* note 87, at 324-25; cf. Barton v. Parrott, 495 N.E.2d 973, 976 (Ohio Prob. Ct. 1984) (asserting that a trust for a definite noncharitable purpose was unvested, without explanation or analysis).

123. In point of fact, it seems most unlikely that the Commissioners contemplated whether, or how, the Uniform Statutory Rule applied to trusts for noncharitable purposes when it was initially promulgated in 1986. None of the voluminous comments accompanying the Uniform Statutory Rule are addressed to the issue; nor was the issue addressed in the Commissioners' scholarly exposés. See Waggoner, *supra* note 113. The subsequent reference to the issue in the revised Uniform Probate Code of 1990 was, under the circumstances, almost certainly an afterthought.

their treatment to an estate planner's imagination.<sup>124</sup> This constitutes a tangible, if tangential, slip in the Uniform Statutory Rule's draftsmanship, and state lawmakers who enact it without revision do so at their peril.

By comparison, the optional section directly following the Uniform Statutory Rule within the Code—though thinly adopted, as of yet—is a model of clarity. Under the optional section, trusts for definite or indefinite noncharitable purposes “may be performed for [21] years but no longer, whether or not the terms of the trust contemplate a longer duration.”<sup>125</sup> Trusts that might, or certainly would, continue beyond that point are reformed to last for up to twenty-one years. Hence, under the optional section testators can no longer mandate that noncharitable purpose trusts run for specified measuring lives plus twenty-one years, as they could under the common law;<sup>126</sup> extraneous measuring lives have been spliced out of the timeline. On the other hand, under the optional section a trust “for the care of a designated domestic or pet animal” is valid for the entire life of the animal.<sup>127</sup> Thus, trusts for the care of long-lived animals

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124. The issue has not been raised as of yet in a published case.

125. UNIF. PROBATE CODE § 2-907(a) (amended 1993). The Commissioners bracketed the twenty-one-year time limit “to indicate that an enacting state may select a different figure.” *Id.* § 2-907 cmt. To date, none has done so.

126. See, e.g., *Angus v. Noble*, 46 A. 278, 279-82 (Conn. 1900) (trust for upkeep of graves to continue for named lives in being); *Leonard v. Haworth*, 51 N.E. 7, 8 (Mass. 1898). The optional section's durational rule, giving effect to noncharitable purpose trusts for up to twenty-one years and reforming them if necessary to last no longer, also appears in several non-Uniform Probate Code jurisdictions. See CAL. PROB. CODE § 15211 (West 1991 & Supp. 1999); MO. ANN. STAT. § 456.055 (West 1992) (slightly ambiguous, in that it could be read to permit validity for the full perpetuities period and allow reformation to twenty-one years only if it might violate the perpetuities rule); N.C. GEN. STAT. § 36A-145 (1995). *Cf.* WIS. STAT. ANN. § 701.11(1) (West 1981 & Supp. 1998) (giving effect to honorary trusts without establishing a durational rule, hence leaving the common law in place, but compare *infra* note 134).

127. UNIF. PROBATE CODE § 2-907(b) (amended 1993). Though not defined in the Code, the term “a designated domesticated or pet animal,” *id.* § 2-907(b), presumably includes a stabled horse, caged bird, or tank fish, but does not include plant life. Nor, by virtue of the designation requirement and the legislative history noted below, does it include the unborn offspring of a living animal. Hence, a trust for the care of a tree, or for the care of offspring of a pet animal, can only continue for twenty-one years. See *id.* § 2-907(a). Nor, on strict reading, does the terminology “a designated . . . animal” cover consolidated trusts for *all the pet animals that I own at my death*, which then could persist for only twenty-one years. See *id.* § 2-907 (a) & (b). During the plenary reading of the optional section prior to its enactment in 1990, a Commissioner had objected to the absence of a definition of the term “animal,” but his criticism was ignored. As a consequence, litigation could ensue over the issue. See Plenary Reading, *supra* note 55, at 134. The allowance of life-long bequests for the care of pets first appeared under the technical amendments of 1993. As originally promulgated in 1990, the revised Uniform Probate Code terminated trusts for the care of pets after twenty-one years. See UNIF. PROBATE CODE § 2-907(b)(2) (9th ed. 1991); see also UNIF. PROBATE CODE app. X, § 2-907(b)(2) (amended 1993) (technical amendments). Whereas the original section validating trusts for the care of pets also applied to trusts for the care of their offspring, offspring were excluded from the analogous section under the technical amendments. Compare UNIF. PROBATE CODE § 2-907(b) & cmt. (9th ed. 1991), with UNIF.

are effective, despite the common law convention that measuring lives must be human lives.<sup>128</sup>

As a matter of public policy, these provisions invite criticism at several levels. One is the limited scope of the reformation doctrine applied by them. Under the Uniform Statutory Rule, a void bequest can be reformed "in a manner that most closely approximates the transferor's manifested plan of distribution."<sup>129</sup> If (as is unclear) the Uniform Statutory Rule covers noncharitable purpose trusts, a court faced with, say, a perpetual trust for care of a grave would have room to reform the interest substantively, perhaps by changing the purpose after ninety years to embellishment of the cemetery as a whole. The trust could then persist in perpetuity, given that it would thereafter serve a charitable purpose. Under the optional section, however, this room is closed off; a court can only reform a noncharitable purpose trust temporally, by cutting it short to twenty-one years, though a revision of substantive purpose might more nearly approach the testator's intent. The same is true of trusts for indefinite

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PROBATE CODE § 2-907(b) (amended 1993); see also *id.* app. X, § 2-907(b) (technical amendments); Technical Amendments, *supra* note 50, at 106-07 ("Explanation of Technical Amendments"). When the optional section was first debated at its plenary reading, two Commissioners had called attention to the problem of long-lived animals, but their concerns were not addressed until passage of the technical amendments, save for a reference in the original comment accompanying the optional section, raising the possibility of this reform. See Plenary Reading, *supra* note 55, at 133-34, 137-38; UNIF. PROBATE CODE § 2-907 cmt. (9th ed. 1991); see also UNIF. PROBATE CODE app. X, § 2-907 cmt. (amended 1993) (technical amendments); Technical Amendments, *supra* note 50, at 106-07 ("Explanation of Technical Amendments").

128. Two non-Uniform Probate Code states have also adopted this rule. See CAL. PROB. CODE § 15212 (West 1991 & Supp. 1999); N.C. GEN. STAT. § 36A-147 (1995); cf. N.Y. EST. POWERS & TRUSTS LAW § 7-6.1 (McKinney 1992 & Supp. 1999) (giving effect to trusts for the care of pets for up to twenty-one years); TENN. CODE ANN. § 35-50-118 (1996) (same). Durational rules equivalent to those found in the optional section appear in the discussion draft of the Uniform Trust Act. See UNIF. TRUST ACT §§ 406(a), 407(1) (Discussion Draft, Feb. 9, 1999). Compare the tentative draft of the *Restatement (Third) of Trusts*, establishing a vaguer but more flexible reasonability standard: A trust for a noncharitable purpose is permitted to endure "for a reasonable period of time, normally not to exceed 21 years." RESTATEMENT (THIRD) OF TRUSTS § 47(2) (Tentative Draft No. 2., Mar. 10, 1999). In the case of trusts for the care of a pet, the court could set that limit at the life of the pet; in the case of trusts for the care of a grave, the limit could be the lives of the testator's surviving spouse and children; in the case of trusts for indefinite noncharitable purposes, the limit could be twenty-one years. See *id.* § 47 cmts. b, c, & d. This approach harks back to the early history of the Rule Against Perpetuities, when courts also judged the validity of ordinary future interests in persons according to a looser, equitable standard of decision; only gradually did the Rule harden into a rule of law. In light of qualitative variations in the application of dead hand control to bequests for persons, a collaborator and I have elsewhere raised the possibility of restoring flexibility to the main branch of the Rule Against Perpetuities. But the cost of doing so, even in the presence of articulated standards and helpful illustrations, as in the tentative draft of the *Restatement (Third)*, is a marginal increase in uncertainty and litigation. See Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 55 n.223 & *passim* (1992).

129. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 3 (amended 1990), 8B U.L.A. 364-65 (1993 & Supp. 1998); UNIF. PROBATE CODE § 2-903 (amended 1993).

noncharitable purposes (treated identically by the optional section):<sup>130</sup> Circumstances could well indicate that a testator would prefer that her gift in perpetuity for "benevolent purposes" be reformed by restricting it to perpetual *charitable* purposes, rather than to a broader range of purposes for only twenty-one years.<sup>131</sup>

The core issue, however, is whether noncharitable purpose trusts should be subject to a time limit so restrictive as this. If passed on its own, the Uniform Statutory Rule does not alter fundamentally pre-existing perpetuities policy, because its ninety-year limit for the resolution of contingencies serves as a rough-and-ready surrogate for the common law limit of lives in being plus twenty-one years. Though it radically simplifies the structure of perpetuities doctrine, the Uniform Statutory Rule does so without radically adjusting the traditional scope of testamentary freedom.<sup>132</sup> Accordingly, whether or not the ninety-year limit created by the Uniform Statutory Rule is construed to cover trusts for definite noncharitable purposes, the durational restraints that apply to them will remain more-or-less constant and, as under the common law, substantively (though possibly not structurally) equivalent to the restraints that apply to contingent future interests. The optional section is another story. Under the Code, trusts containing contingent interests in persons can persist for ninety years, whereas trusts for definite and even indefinite noncharitable purposes (other than provisions for pet animals) must end after twenty-one.<sup>133</sup> The optional section thus curtails testamentary freedom as compared to the common law and does so asymmetrically, only with respect to purpose trusts.<sup>134</sup>

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130. See *supra* note 125 and accompanying text.

131. Often, courts read such broad phrases as synonymous with "charitable" initially, but the question of what the testator intends by her phrasing is, in any case, an issue of construction. See RESTATEMENT (SECOND) OF TRUSTS § 398 cmt. b (1959). Perpetual trusts for indefinite charitable purposes are valid. See *supra* note 90 and accompanying text.

132. See UNIF. STATUTORY RULE AGAINST PERPETUITIES prefatory note (amended 1990), 8B U.L.A. 325-29 (1993 & Supp. 1998) (justifying the ninety-year period on this basis). Professor Dukeminier has counterargued, however, that the ninety-year rule renders the exercise of extended dead hand control a simpler matter and so will tend functionally to extend the duration of trusts. See Dukeminier, *supra* note 119, at 1028-43; see also Hirsch & Wang, *supra* note 128, at 2 n.4 (noting further references on this debate).

133. See UNIF. PROBATE CODE §§ 2-901(a), 2-907(a) (amended 1993).

134. A majority of American jurisdictions has moved in the opposite direction as concerns one sort of noncharitable purpose trust, the trust for care of a cemetery lot, allowing this type of trust to persist in perpetuity. For fairly up-to-date statutory compilations, see 4A SCOTT, *supra* note 20, § 374.9, at 236 n.13; RESTATEMENT (SECOND) OF PROPERTY § 1.6, statutory note 3 (1983); see also *supra* notes 29, 55. Several American jurisdictions have also abolished the Rule Against Perpetuities in its entirety, although whether these statutes are intended also to abolish the parallel common law rule restricting the duration of trusts for noncharitable purposes is unclear from the language used. See DEL. CODE ANN. tit. 25, § 503(a) (1989 & Supp. 1998); IDAHO CODE § 55-111 (1994); 765 ILL. COMP. STAT. ANN. §§ 305/3(a-5), 305/4(a)(8) (West 1993 & Supp. 1999); S.D. CODIFIED LAWS § 43-5-8 (Michie 1997); WIS. STAT. ANN. § 700.16(5) (West 1981 & Supp. 1998); see also ALASKA STAT. §

Is this rollback justified? The comment accompanying the optional section offers no rationale, persuasive or otherwise.<sup>135</sup> I have elsewhere addressed the public policy of temporal restraints on purpose trusts at some length.<sup>136</sup> Put briefly: Though a noncharitable purpose trust contributes little or nothing (by definition) to the public welfare, it nonetheless produces private benefits—either for that segment of society which relishes the purpose,<sup>137</sup> or for the testator herself<sup>138</sup>—no less substantial than those generated by garden-variety trusts for family members. Consequently, like trusts for persons, trusts for noncharitable purposes should be allowed to allocate property so long as the allocations they make remain premised on a testator's knowledgeable judgments. Divisions of property among a testator's family members are bound to become arbitrary after precisely one generation has passed, because the relative needs of individual members of the generation following are unknown to her; whence, the common law's restriction of future interests to *lives in being* (plus the custodial period of their children). But the same cannot be said of trusts for purposes. Here, it is the testator's *social* knowledge that renders a trust thoughtful, and hence durably beneficial, yet the extent to which that knowledge will remain current over time is uncertain: Social change, rendering a trust for a purpose arbitrary, occurs at a clip that is as unpredictable as it is variable, depending upon the aspect of society to which the trust purpose pertains. The ideal rule, then, appears the same flexible standard that has always applied to charitable trusts—allowing them to endure so

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34.27.050(a)(3) (Michie 1998) (discussed in David G. Shaftel, *Newest Developments in Alaska Law Encourage Use of Alaska Trusts*, 26 EST. PLAN. 51, 52 (1999)); A. 2804 §§ 13-16, 208th Leg., 2d Sess. (N.J. 1999) (bill to abolish the Rule Against Perpetuities, passed by both houses but awaiting gubernatorial disposition). In recent years a number of foreign jurisdictions specializing in trust services have offered testators the opportunity to establish noncharitable purpose trusts for extended periods; on the Isle of Jersey, the applicable period is 100 years. See Gould, *supra* note 65, at 90. On Guernsey the period is 100 years, and in Belize it is 120 years. See MARTIN, *supra* note 93, at 374 n.41.

135. See UNIF. PROBATE CODE § 2-907 cmt. (amended 1993). Professor Lawrence Waggoner, the Reporter for both the Uniform Statutory Rule and the revised Article II of the Uniform Probate Code, observes vaguely: "Some commentators have worried about the duration of . . . [honorary] trusts . . . [for] 90 years. The Uniform Probate Code avoids the problem, however, by providing . . . that the duration of honorary trust[s] is limited to 21 years." WAGGONER ET AL., *supra* note 119, at 845. During the plenary reading of the section, Waggoner stated without elaboration that "[y]ou've got to have some cutoff," but had no assertive view on what the time limit should be. See Plenary Reading, *supra* note 55, at 133-34; see also *infra* note 157.

136. The remainder of this paragraph summarizes my analysis in Hirsch, *supra* note 2, at 84-91.

137. A trust for the noncharitable "social" purpose of yacht-racing, for example, benefits that group of individuals who take pleasure in the sport. See *In re Nottage*, [1895] 2 Ch. 649 (App.).

138. Noncharitable trusts for "personal" purposes, such as care of a grave, give anticipatory satisfaction to the testator while she remains alive.

long as they continue to deliver benefits efficiently, and then updating them, via *cy pres*, whenever (and if ever) they decay into obsolescence.

The Commissioners' preference for an inflexible limit can be questioned on this basis, but their adoption of an *abbreviated* limit is particularly dubious, creating senseless inconsistencies by comparison with other limits that obtain under the Code. Consider, by way of contrast, a trust restricted to some use (yacht-racing expenses, let us say) by the members of a class. Under the Code's Uniform Statutory Rule, a restriction as to use applied to defined class members can continue for ninety years;<sup>139</sup> such a trust may or may not appeal to these persons, depending on their taste in sports. But when a use restriction takes the form of a trust for a noncharitable purpose (here, to promote yacht-racing), its duration is tightened under the Code's optional section to twenty-one years. Yet, not being limited to defined persons, such a trust can in fact do more good, because now the "class" of eligible beneficiaries is infinite and hence more likely to include persons who will appreciate the bequest.

Notice, incidentally, that this same truncated span applies under the optional section even when the testator *doesn't* restrict the use of a trust for purposes and hence avoids all risk of obsolescence. A trust for any "benevolent" purposes selected by the living hand of the trustee still must terminate after twenty-one years.<sup>140</sup> Such a trust, I submit, could continue for ninety years—or, for that matter, indefinitely—without violating any public policy associated with the Rule Against Perpetuities.

What is more, testators operating under the Code can evade the twenty-one-year restriction by placing comparable provisions in other legal packages. Instead of settling an enforceable trust to support yacht-racing, the testator could create a *special power of appointment* for the support of yacht-racing. Though authority is confined to unconsummated dicta, special powers for noncharitable purposes do appear to be valid under the common law.<sup>141</sup> These are *not* covered by the optional section<sup>142</sup> but fall rather under the Uniform Statutory Rule, limiting the exercise of a special power to ninety (not

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139. No special limitation pertains to trusts for persons or classes containing use restrictions. See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1(a)(2) & cmt. H (amended 1990), 8B U.L.A. 333, 354 (1993 & Supp. 1998); UNIF. PROBATE CODE § 2-901(a)(2) (amended 1993).

140. UNIF. PROBATE CODE § 2-907(a) (amended 1993).

141. See MORRIS & LEACH, *supra* note 87, at 320-21; Hirsch, *supra* note 2, at 40 n.25, 43 n.38, 92 n.216.

142. The optional section only pertains to trusts. See UNIF. PROBATE CODE § 2-907 (a), (b) (amended 1993).

twenty-one) years.<sup>143</sup> And there are even more durable alternatives at a testator's disposal: She could *contract* with a corporate entity to perform a purpose after her death. Once again, the optional section fails to apply.<sup>144</sup> Interests created by contract are exempt from temporal limits under the common law,<sup>145</sup> and the Commissioners have carried this exemption forward into the Uniform Statutory Rule.<sup>146</sup> Hence, under the Code—as under the common law—a testator can contract for performance of a noncharitable purpose in perpetuity.<sup>147</sup> Similarly, a testator can make a bequest to a corporate entity *subject to a condition subsequent* that the corpus reverts to the testator's estate upon the entity's failure to continue performing a noncharitable purpose. By longstanding precedent, conditions subsequent followed by possibilities of reverter are valid in perpetuity under the common law,<sup>148</sup> and the Commissioners have done nothing to change it.<sup>149</sup> If

143. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1 (c) (amended 1990), 8B U.L.A. 333-34 (1993 & Supp. 1998); UNIF. PROBATE CODE § 2-901 (c) (amended 1993).

144. See *supra* note 142.

145. See SIMES & SMITH, *supra* note 91, § 1246; cf. *Coulter & Smith, Ltd. v. Russell*, 966 P.2d 852, 856-59 (Utah 1998). The testator could execute the contract *inter vivos* and either pay the contract price to the corporate entity immediately or agree to pay the sum to the corporate entity by will, upon her death. See *Gilman v. McArdle*, 2 N.E. 464, 467-69 (N.Y. 1885). The interest thereby created in the corporate entity is then vested, in any event.

146. See UNIF. STATUTORY RULE AGAINST PERPETUITIES § 4(1) (amended 1990), 8B U.L.A. 381 (1993 & Supp. 1998) (excluding from its purview nonvested interests created by contracts other than nonvested interests created by contracts to make wills); UNIF. PROBATE CODE § 2-904(1) (amended 1993).

147. For common law cases reaching this result, see *Union Trust Co. v. Rossi*, 22 S.W.2d 370, 372 (Ark. 1929) (contract for perpetual grave care, dicta); *French v. Kensico Cemetery*, 30 N.Y.S.2d 737, 737-38 (Sup. Ct. 1941) (contract for perpetual grave care); *Kahlmeyer v. Green-Wood Cemetery*, 23 N.Y.S.2d 17, 20 (Sup. Ct. 1940) (same). Nonetheless, the successor(s) in interest to the promisee's rights could reach an accord with the promisor to terminate the contract. See RESTATEMENT (SECOND) OF CONTRACTS § 281 (1981). Bilateral monopoly problems and social norms may operate to deter such an accord, however.

148. See SIMES & SMITH, *supra* note 91, § 1239. Very similarly, under the common law a testator can validly bequeath a corpus to one charity subject to a perpetual condition subsequent—here, that the charity perform some noncharitable purpose—with a gift over to another charity if and when the first charity ever fails to perform the condition. See *id.* § 1280; *supra* note 90 and accompanying text. For common law cases giving effect in perpetuity to both of these constructs where they were used to effectuate noncharitable purposes, see *In re Murray's Estate*, 99 N.Y.S.2d 32, 33 (Sur. Ct. 1948) (bequest subject to a condition that beneficiary provide care for a pet animal for the duration of its life); *In re Andrews' Estate*, 228 N.Y.S.2d 591, 594 (Sur. Ct. 1962) (same, dicta); *Betts v. Snyder*, 19 A.2d 82, 84 (Pa. 1941) (same, dicta); *In re Chardon*, 1928 Ch. 464, 467-70 (bequest to a corporation conditioned on continuing to provide grave care in perpetuity); *In re Chambers' Will Trusts*, 1950 Ch. 267, 267-68 (same); *Estate of Campbell*, 20 Cal. App. 3d 474, 478-80 (1971) (same); *Dunne v. Minsor*, 143 N.E. 842, 842-45 (Ill. 1924) (same); *Giblin v. Giblin*, 182 N.W. 357, 359 (Wis. 1921) (same); *In re Tyler*, [1891] 3 Ch. 252, 254-60 (App.) (bequest to a charity in perpetuity with a gift over to another charity on failure to provide grave care); *In re Lopes*, [1931] 2 Ch. 130, 137 (same); *In re Martin*, 1952 W.N. 339, 340 (Ch.) (same); see also *In re Johnston's Will*, 99 N.Y.S.2d 219, 221-26 (App. Div. 1950), *aff'd*, 98 N.E.2d 895 (1951) (holding a bequest to remain in effect without the condition of care for animals, when the condition failed because conservators sold the animals prior to the testator's death); *In re Andrews' Estate*, 228 N.Y.S.2d 591, 594 (Sur. Ct. 1962) (same result on similar facts). *But see*

testators can see to the protracted or even perpetual performance of noncharitable purposes under the Code by recourse to legal gimmicks such as these, then why not permit them to achieve a similar result directly?<sup>150</sup>

Even considered in isolation, the twenty-one-year limit chosen by the Commissioners has no policy significance. As has often been the case in our law, its appearance in the Code reflects history—or, more precisely in this instance, historical glare. Plainly, the Commissioners have borrowed the number from the twenty-one-year period-in-gross incorporated into the common law Rule Against Perpetuities.<sup>151</sup>

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*In re Filkins' Will*, 120 N.Y.S.2d 124, 125-26 (Sur. Ct. 1952) (holding void a bequest subject to a condition subsequent that the beneficiary care for pet animals); *cf. In re Davies*, [1915] 1 Ch. 543, 548-49 (holding void a bequest because incorrectly framed as a gift over from a charity to a noncharity); *Lloyd v. Lloyd*, 21 L.J. Ch. (n.s.) 596, 599-600 (1851) (holding void a bequest because incorrectly framed as a gift over to a charity impressed with the same obligation); *In re Dalziel*, 1943 Ch. 277, 279-85 (holding void a bequest because incorrectly framed as a bequest of funds to be used in part for the performance of a noncharitable purpose, instead of a bequest of funds subject to a separate condition that the purpose is carried out); *In re Gassoit*, 70 L.J. Ch. (n.s.) 242, 242-43 (1901) (same); *Kostarides v. Cent. Trust Co.*, 122 N.W.2d 729, 734 (Mich. 1963) (similar facts); *Giles v. Boston Fatherless & Widows' Soc'y*, 92 Mass. 355, 357 (1865) (dicta questioning the validity of a perpetual condition). Again, however, the difficulty here from the testator's perspective is that the holders of the fee simple determinable and the possibility of reverter or executory interest could bargain to consolidate their interests and thereby extinguish the contingency. Still, bilateral monopoly problems and social norms may again serve to deter such action. *Cf. supra* note 147.

149. UNIF. STATUTORY RULE AGAINST PERPETUITIES §§ 4(5), 4(7) & cmt. B (amended 1990), 8B U.L.A. 370, 373-74 (1993 & Supp. 1998); UNIF. PROBATE CODE §§ 2-904(5), (7) (amended 1993). The final draft of the revised Uniform Probate Code had included an optional section setting a (bracketed) thirty-year limit on conditions subsequent, but the section was dropped at the eleventh hour out of concern that it trenched on legal territory claimed by the drafters of the Uniform Marketable Title Act, then in progress. See UNIF. PROBATE CODE § 2-910 (Draft for Approval, July 13-20, 1990); Plenary Reading, *supra* note 55, at 118-27. But, as finally promulgated, this second Act failed to address the subject of forfeiture conditions. See UNIF. MARKETABLE TITLE ACT (1990), 13 U.L.A. 138 (Supp. 1997). Alphonse and Gaston again? See *supra* note 104. Nevertheless, modern statutes in a number of jurisdictions do invalidate conditions subsequent after a fixed number of years, most commonly thirty. For a tally, see SIMES & SMITH, *supra* note 91, § 1994 & nn.44-50 (as updated by the supplement), and see also UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 3-409 (1975), 14 U.L.A. 301 (1990 & Supp. 1997).

150. Estate planners are perfectly aware of these gimmicks. See Fratcher, *supra* note 1, at 786-90. For an early recognition, see Note, *Private Trusts for Indefinite Beneficiaries*, 45 YALE L.J. 1515, 1515-16 (1936). Professors Scott and Leach had objected to the anomalous validity of gifts over from one charity to another, conditioned on the provision of perpetual noncharitable services. The Commissioners, however, appear oblivious to the whole issue. See MORRIS & LEACH, *supra* note 87, at 193-94; 2 SCOTT, *supra* note 20, § 124.2, at 259-61; 4A *id.*, § 401.5, at 590-91; Scott, *supra* note 43, at 641-42; see also John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 650 n.133 (1995) (opining more generally that the Rule Against Perpetuities ought to apply to dead hand control irrespective of whether it is exercised by creating property interests or by way of contract).

151. A number of commentators had also proposed this time limit, though without analysis. See MAUDSLEY, *supra* note 93, at 178; Dukeminier, *supra* note 88, at 1702, 1704; Dukeminier, *supra* note 119, at 1043; William F. Fratcher, *The Missouri Perpetuities Act*, 45 MO. L. REV. 240, 251-52 (1980). Certainly, the Commissioners were right to eliminate the

In that context, the time limit chosen made sense: It is the period of a child's minority, following lives in being. An age contingency of twenty-one years in an unborn person has the reasonable aim of ensuring that she is old enough to handle money wisely when she would otherwise become entitled to receive it.<sup>152</sup> But age contingencies do not bear on trusts for purposes, so the period of twenty-one years—however conspicuous and distracting, given its historical usage—loses all trace of relevance. Here, we face the entirely different question of deciding how much time will elapse before a purpose trust becomes socially anachronistic or inefficient.

And the answer, of course, is that we cannot say: Obsolescence in a shadowy future is unpredictable. That is why the cy pres doctrine is ideally responsive, giving courts leeway to deal with the problem as the need arises.<sup>153</sup> But even assuming cy pres reform was not to be,<sup>154</sup> hence leaving in place the threat of obsolescence at least with respect to trusts for definite noncharitable purposes, the Commissioners ought to have pondered their limit with this precise concern in mind.<sup>155</sup> And that they failed to do:<sup>156</sup> In statements recorded in

concept of measuring lives from their limit, since life spans only have relevance in connection with future interests in persons. See Hirsch, *supra* note 2, at 86.

152. See MORRIS & LEACH, *supra* note 87, at 68-69; LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 68-70 (1955).

153. The notion of expanding cy pres to noncharitable purpose trusts is hardly a radical one. Various commentators have long advocated that cy pres apply to private trusts in general, and modern statutes in a number of American jurisdictions grant courts discretion to remove use restrictions from trusts for persons or to terminate use-restricted trusts at any time when the restrictions become burdensome to private beneficiaries. See Paul G. Haskell, *Justifying the Principle of Distributive Deviation in the Law of Trusts*, 18 HAST. L.J. 267 (1967); Hirsch & Wang, *supra* note 128, at 51 n.205 (citing additional references). For statutes, see CAL. PROB. CODE § 15409 (West 1991 & Supp. 1997); MO. ANN. STAT. § 456.590.2 (West 1992 & Supp. 1998); N.Y. EST. POWERS & TRUSTS § 7-1.6 (McKinney 1992 & Supp. 1997); OHIO REV. CODE ANN. § 1339.66 (Anderson 1993 & Supp. 1996); PA. CONS. STAT. § 6102 (West 1975 & Supp. 1997); WIS. STAT. ANN. § 701.13 (West 1981 & Supp. 1997). Several of these statutes might be construed to apply to noncharitable purpose trusts as they stand. On the Isle of Jersey, the cy pres doctrine applies to noncharitable purpose trusts. See Gould, *supra* note 65, at 91.

154. The discussion draft of the Uniform Trust Act fails to expand the substantive scope of the cy pres doctrine *per se*, but it does include a general provision allowing modification of a trust in light of unanticipated circumstances that could apply to noncharitable purpose trusts. See UNIF. TRUST ACT §§ 408(b), 411 (Discussion Draft, Feb. 9, 1999). Compare the tentative draft of the *Restatement (Third) of Trusts*, which is flexible on the front end, allowing courts to limit trusts for noncharitable purposes to a period deemed reasonable in light of the purpose. See *supra* note 128.

155. Another relevant concern, to be sure, is taxation of purpose trusts. This concern has been raised in connection with ninety-year trusts for persons allowed under the Uniform Statutory Rule. See Jesse Dukeminier, *Dynasty Trusts: Sheltering Descendants from Transfer Taxes*, 23 EST. PLAN. 417 (1996). But it is a question quite distinct from the substantive matter of trust duration, because lawmakers can provide for the periodic taxation of any trust. See Hirsch, *supra* note 2, at 91 n.210, 103 n.266.

156. Nor is there evidence in the legislative history that any consideration was ever given to applying cy pres to noncharitable purpose trusts or to relaxing the usual time restrictions on trusts for indefinite noncharitable purposes (brought within the scope of the

the legislative history, a lead drafter owned that the limit established in the optional section was arrived at arbitrarily.<sup>157</sup>

By contrast to their casual disposal of this issue, the Commissioners' decision to allow trusts for the care of an animal to last for the life of the animal was a thoughtful and laudable innovation.<sup>158</sup> Early commentators had rejected this idea out of fear that testators would exploit it to undermine the Rule Against Perpetuities, designating longevous creatures as extraneous measuring lives for contingent interests in persons, and thereby prolonging contingencies beyond human lives in being.<sup>159</sup> By confining the measuring lives in question to *animals* (not redwood trees, and so on) and by authorizing the use of an animal measuring life only when it validates a trust to support that same animal, the Commissioners have taken care to prevent a testator from arrogating their nonhuman-measuring-lives doctrine to undesirable ends.

Once a noncharitable purpose trust terminates, either according to the terms of the will or upon reformation, who receives the corpus? Following traditional principles, the optional section allows the testator to designate a remainderman; absent express designation, the corpus flows to the residuary legatees or heirs.<sup>160</sup> But the Commissioners have decorated these normal guidelines with artlessly

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section by the technical amendments of 1993, see *supra* notes 49-50, 140 and accompanying text).

157. When questioned about its provenance, the Reporter for the revised Article II confessed that "[w]e used 21 years for no particular reason, frankly." Plenary Reading, *supra* note 55, at 133-34. Apparently in reaction to the question raised in plenary debate, the Commissioners bracketed their time limit in the optional section, indicating that enacting states were free to select a different time limit. Compare UNIF. PROBATE CODE § 2-911 & cmt. (Draft for Approval, July 13-20, 1990) (compulsory time limit), with UNIF. PROBATE CODE § 2-907 & cmt. (amended 1993) (bracketed time limit). So, instead of devoting further thought to an issue to which they had previously devoted no thought, the Commissioners simply punted the question back to the states.

158. See *supra* notes 127-28 and accompanying text. For prior commentary urging that trusts for the care of living animals be valid for their lives, see James T. Brennan, *Bequests for the Care of Specific Animals*, 6 DUQ. L. REV. 15, 21-23, 40 (1967-1968). In recent years it has become fashionable in the United States to own exotic pets, some of which (tortoises and parrots, for example) are quite longevous. See Jim Bodor, *Pet Owners Take Fancy for Exotic*, TELEGRAM & GAZETTE (Worcester, Mass.), Aug. 4, 1996, at A1. Hence, the social need for legislation of this sort has increased. For earlier cases validating lifetime trusts for animals, apparently by misapplying the common law rule, see *supra* notes 100-02 and accompanying text.

159. See GRAY, *supra* note 86, § 906; John C. Gray, *Gifts for a Non-Charitable Purpose*, 15 HARV. L. REV. 509, 530 (1902); Charles Sweet, *The Monstrous Regiment of the Rule Against Perpetuities*, 18 JURID. REV. 132, 136-37 (1906-07) (also noting the potential difficulty of identifying the measuring life); *In re Kelly*, 1932 I.R. 255, 260-61 (court not indicated); see also Note, *Validity of Trusts in Favor of Animals*, 42 YALE L.J. 1290, 1291-92 (1933) (observing that a distinction could be drawn between normal, short-lived pets and other animals, but defending the traditional rule as furthering simplicity). The old argument is endorsed by at least one modern treatise. See DAVID B. PARKER & ANTHONY R. MELLOWS, *THE MODERN LAW OF TRUSTS* 165 (1975).

160. See UNIF. PROBATE CODE § 2-907(c)(2) (amended 1993).

drafted refinements whose precise meanings are in several respects unclear. Under the revised Uniform Probate Code, when a future interest is held by heirs, they are determined at the time when the interest becomes possessory, not at the testator's death.<sup>161</sup> This provision expressly applies to an interest held by heirs following a trust for a noncharitable purpose.<sup>162</sup> Similarly, under the revised Code, a future interest in a named person is rebuttably construed to be contingent on her survival to the time when it becomes possessory.<sup>163</sup> This provision also expressly applies to the interest following a trust for a noncharitable purpose when that interest is created by a residuary clause; it does *not* expressly apply, however, when the testator designates a remainderman.<sup>164</sup> By negative inference, then, we would conclude that a residuary legatee or heir must survive to the time when the remainder of a noncharitable purpose trust becomes possessory, but a designated remainderman need not. This is at best an ambiguity and at worst a pointless inconsistency created by imperfect drafting.<sup>165</sup>

Furthermore, according to the language of the optional section, a residuary legatee takes the remainder following a noncharitable purpose trust (only) if the trust "was created in a nonresiduary clause."<sup>166</sup> On strict reading, then, if a testator were to divide the residue itself—or her entire estate—between a noncharitable purpose and a named person, the remainder would flow *not* to the named residuary legatee, but to the heirs. This result contradicts the modern rule, adopted elsewhere by the Code,<sup>167</sup> treating divided residuary bequests, and divided bequests of an entire estate, as equivalent to class gifts. Here, careless drafting has saddled the optional section with still another ambiguity and potential inconsistency.

## V. CONCLUSION

Doubtless, I am a fastidious critic. And, criticism aside, I do not want to ring down the curtain without rehearsing several of the uniform laws' signal accomplishments. In particular, the opportunity they create to execute enforceable trusts for noncharitable purposes,

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161. See *id.* § 2-711.

162. See *id.* § 2-907(c)(2)(iii).

163. See *id.* § 2-707.

164. See *id.* § 2-907(c)(3).

165. Cf. COLO. REV. STAT. ANN. § 15-11-901(3)(b)(III) & (c) (1998) (establishing remaindermen at the testator's death); N.Y. EST. POWERS & TRUSTS LAW § 7-6.1(c) (McKinney 1992 & Supp. 1999) (same under a non-Uniform Probate Code statute); N.C. GEN. STAT. § 36A-147(c)(3) (1995) (same).

166. UNIF. PROBATE CODE § 2-907(c)(2)(ii) (amended 1993).

167. See *id.* § 2-604(b) & cmt.

slaying at long last the sacred cow of the beneficiary principle, merits critical praise. So does the opportunity to maintain a trust for the care of a pet animal for the remainder of that animal's life. On balance, however, there is no getting around the judgment that, particularly regarding their nuts-and-bolts, the uniform laws relating to trusts for purposes leave much to be desired. The applicable sections are strewn with technical glitches and saturated with so much ambiguity that, without further revision, they present an unappealing model. The Commissioners engaged in the current round of trust law-modelling would be well advised to eschew their predecessors' prototype.<sup>168</sup>

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Were the culmination of this Article suggestions for the correction of a few obscure provisions of the Uniform Probate Code, I would long since have given it over as not worth the effort. But there are some larger, more important morals to take home from this critique—morals related, curiously enough, to the very obscurity of the task at hand.

One clear revelation is the inherent fallibility of the code-drafting exercise. Its chief architects would have us believe that the revised Uniform Probate Code was fashioned according to the standards of a methodical, iterative protocol:

Uniform acts . . . are the result of a deliberative process that is measured and lengthy. As proposed legislation goes through the cycle of drafting and redrafting, many hands leave their imprint . . . [and] a vast number of alternatives are considered and revised or rejected en route to the final product.<sup>169</sup>

Alas, one detects a hint of mythology here. Truth be known, codes are drafted by mortal folk, beset by all of the failings associated with our condition. Though the history of the Uniform Probate Code has yet to be written, a recent scholar looking into the drafting of the Uniform Commercial Code found, by comparison, a collection of unusually fine minds grappling with all-too-usual sorts of deadline

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168. Several previous discussion drafts of the Uniform Trust Act offered a carbon copy of the optional section as an alternative to its freshly designed section. The current discussion draft omits the carbon-copy, and so its authors appear to have dodged a bullet. *Compare, e.g.*, UNIF. TRUST ACT §§ 2-105, [2-105] & cmt. (Discussion Draft, Oct. 13, 1997), with UNIF. TRUST ACT §§ 406-07 (Discussion Draft, Feb. 9, 1999). Nonetheless, as it stands, the Uniform Trust Act parrots the durational rules contained in the optional section. *See supra* note 128.

169. John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 877-78 (1992).

pressures and funding pinches. The consequence was eleventh-hour amendments and omissions even from that masterwork.<sup>170</sup>

In reality, not every section of a uniform code—or any code, for that matter—is lavished with intensive care. The optional section we have dissected in the last many pages is a case in point. It made its debut only in the second of the three discussion drafts of the 1990 Code and underwent only one significant revision (more properly, elaboration) prior to its promulgation,<sup>171</sup> which itself borrowed—amazingly, if not amusingly—in significant respects from language proposed to the Commissioners, unsolicited, by a lay person.<sup>172</sup> The National Conference's plenary debate on the optional section lasted five minutes or so,<sup>173</sup> and the 1993 revisions, causing difficulties of construction and added process concerns, were presented as a technical amendment and hence received the imprimatur of the National Conference with no debate at all.<sup>174</sup>

And all of this is perfectly understandable! The problems addressed in this Article never stood at the forefront of the Commissioners' agenda. The bulk of their creative energies were spent on reworking the Code in light of the perceived need to reduce legal formalism, to provide for the rising frequency of probate-avoidance, and to take account of the advent of multiple-marriage in America.<sup>175</sup> Over salient matters such as the elective share and the dispensing power, the Commissioners labored long and hard.<sup>176</sup> But trusts for purposes lay far removed from these "grand themes"<sup>177</sup>—and when they came to draft the optional section the Commissioners sank to the occasion, devoting to it "rather routine attention," as one partici-

170. See Allen R. Kamp, *Uptown Act: A History of the Uniform Commercial Code, 1940-49*, 51 SMU L. REV. 275, 314-15, 338-40, 346-48 (1998).

171. Cf. UNIF. PROBATE CODE (Discussion Draft, July 29-Aug. 5, 1988) (not including a section on purpose trusts); UNIF. PROBATE CODE § 2-904(f) (Discussion Draft, Dec. 1-3, 1989) (including the first, skeletal version); UNIF. PROBATE CODE §§ 2-911 [optional provision] & 2-911 [working version] (Discussion Draft, Feb. 2-4, 1990) (including a version virtually identical to the final published version, except for minor differences in phraseology); UNIF. PROBATE CODE § 2-911 (Draft for Approval, July 13-20, 1990); UNIF. PROBATE CODE § 2-907 (9th ed. 1991).

172. See *supra* note 13. The advocate who influenced the language of the optional section, David Rees, "was a non-attorney from Houston, Texas. After he sent us this material, we never heard from him again." Letter from Katie Robinson, National Conference of Commissioners on Uniform State Laws, to the author (April 4, 1996) (on file with author).

173. See Plenary Reading, *supra* note 55, at 132.

174. See Richard V. Wellman, Annual Report for 1992-93 of Joint Editorial Board for the Uniform Probate Code 2 (n.d.) (unpublished document, on file with author); Minutes of the Executive Committee [of the National Conference of Commissioners on Uniform State Laws], Midyear Meeting 2 (Feb. 6, 1993) (unpublished document, on file with author).

175. See UNIF. PROBATE CODE art. II, prefatory note (amended 1993); Langbein & Waggoner, *supra* note 169, at 873-75.

176. See UNIF. PROBATE CODE §§ 2-201 to -214, 2-503 (amended 1993).

177. Langbein & Waggoner, *supra* note 169, at 873.

pant recalls.<sup>178</sup> Certainly, the attention it received in plenary debate can best be described as lighthearted. The clipped discussion was interrupted twelve times by laughter, and the Commissioner charged with reading the section to the assembly became so giddy that he had to retire from the podium.<sup>179</sup> Of course, there is nothing the matter with good fun, so long as it accompanies good thinking. But in this instance, the Commissioners' deliberations betrayed an air of dismissiveness—born, one can only surmise, out of a sense of the relative paucity of the section's significance.<sup>180</sup>

And that, surely, is the gist of the tale: Given the demands on drafters' time and powers of concentration, the warp-and-woof of a code—any code—is prone to fray at its edges.<sup>181</sup> In some instances, imbalances of effort are manifest and quite dramatic. Compare, if you will, the ninety-year limit found in the major provision the Uniform Statutory Rule with the twenty-one-year limit found in the minor optional section: The first limit, the Commissioners justified at length, emphasizing that ninety years “is *not* an arbitrarily selected period of time. On the contrary.”<sup>182</sup> But as for the second, “We used

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178. Interview with Professor Eugene Scoles, a Commissioner sitting on the Joint Editorial Board for the Uniform Probate Code (July 1996).

179. See Plenary Reading, *supra* note 55, at 128-38. The Commissioners are not the only responsible body to have found humor in trusts for noncharitable purposes. Some judges have also had difficulty maintaining their solemnity when presented with these cases. See, e.g., *In re Hill's Will*, 255 N.Y.S.2d 898, 899 (Sur. Ct. 1965) (“Even an animal hater probably would not complain if the bequest to benefit a dog was, figuratively, only a bone. But when the bequest is substantial and, figuratively, a whole quarter of beef . . .”); *McCaig v. University of Glasgow*, 1907 Sess. Cas. 231, 243 (Scot.) (“and treating the matter as far as possible seriously . . .”).

180. Professor John Langbein, the brilliant and usually serious-minded Commissioner responsible for leading the discussion of the optional section set the tone when he began: “I hadn't realized until just now why it was that [Commissioner Richard] Wellman wanted me to be in charge of reading this thing. I have now discovered that he has left me with the cats and dogs.” As Langbein struggled to maintain a straight face, the Reporter for the revised Article II, Lawrence Waggoner, piped up: “Can we get somebody sober up there?” Finally, Langbein gave up (“I can't read this!”) and Wellman took over for him. Plenary Reading, *supra* note 55, at 128-29. After that, Commissioners wishing to raise questions had to protest that they were being serious, see *id.* at 133, and one interesting matter raised by a Commissioner—namely, how the optional section should be read *in pari materia* with the slayer statute, suggesting the larger issue of how to deal with any effort by a residuary legatee to accelerate the remainder following a noncharitable purpose trust—was drowned out in hoots of laughter, see *id.* at 134; see also *Phillips v. Estate of Holzmann*, No. 98-765, 1998 WL 889239 (Fla. 3d DCA Nov. 25, 1998) (where the court ordered termination of an honorary trust and distribution to residuary legatees after the pets provided for by the honorary trust “were put to sleep for health reasons”).

181. For another apparent example of this phenomenon manifested within the Uniform Probate Code, see Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291, 1292-93 & *passim* (1992).

182. UNIF. STATUTORY RULE AGAINST PERPETUITIES § 1 cmt. C(1) (amended 1990), 8B U.L.A. 342 (1993 & Supp. 1998); accord *supra* note 132 and accompanying text (discussing the theoretical justification for the ninety-year limit).

21 years for no particular reason, frankly.”<sup>183</sup> Shot through with anomalies and ambiguities, the optional section serves ultimately as a warning of the diminishing dependability of code-making bodies, as they press toward the fringe.

And so, it follows that we must regard our codes of law with a suspicious—and not a jealous—eye. That includes model codes. Rightly charmed by their work-product, the architects of the revised Uniform Probate Code would prefer that it gain enactment verbatim. “Perhaps the most disheartening part of the uniform law process,” they complain,

is the travail of enacting these orphaned products when they are made available to the states. . . . [C]ommittees of the state legislature . . . [have] a disposition to tinker in ways that are ill considered. . . . Our experience is that most variations that are introduced into uniform laws at the local level are proposals that were considered and rejected for good cause in the uniform law drafting process.<sup>184</sup>

That is possibly so when we inspect the central provisions of a uniform code.<sup>185</sup> It is less likely to be so when we explore its outer reaches, where provisions may well have received more cursory attention. To foreclose local tinkering (quite apart from issues of sensitivity to regional needs and traditions)<sup>186</sup> would be to break a circuit that on past occasions has provided Commissioners with valuable feedback concerning the merits and flaws that legislative committees

183. Plenary Reading, *supra* note 55, at 133-34 (statement by Reporter Lawrence Waggoner); see also *supra* note 157.

184. Langbein & Waggoner, *supra* note 169, at 878. “The simple truth is that the state enacting process seldom achieves the depth of review that characterizes the uniform law drafting process.” *Id.* at 879.

185. Still, even central provisions of a uniform code may be weakened by information bottlenecks. The National Conference of Commissioners provides no funding for empirical research, which can be the key to identifying efficient default rules. The Uniform Probate Code is largely composed of default rules, and its drafters seized on those scattered bits of empirical evidence that could be found within the scholarly literature. See UNIF. PROBATE CODE §§ 2-102 cmt., 2-106 cmt., 2-302 cmt. (amended 1993). But where none was extant, the drafters were reduced to intelligent guessing, and their guesses in some instances have been questionable. See Hirsch, *supra* note 17, at 1096-97. Noting the Commissioners’ lack of funding for empirical studies, see Waggoner, *Poorly Drafted Trusts*, *supra* note 9, at 2337-38. For suggestions that uniform laws are also vulnerable to infection by interest group politics, see, for example, Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Law Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83 (1993); Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. LEGAL STUD. 131, 142-48 (1996); Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislation*, 143 U. PA. L. REV. 595 (1995). For several proposals for the improvement of the uniform lawmaking process, see Larry T. Garvin, *The Changed (and Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 351-57 (1999).

186. On specific points, some state assemblies may simply have fundamental policy disagreements with the Commissioners. See, e.g., Mary F. Radford & F. Skip Sugarman, *Georgia’s New Probate Code*, 13 GA. ST. U. L. REV. 605, 652-69 (1997); Richard V. Wellman, *Georgia Lawyers Revise Their Probate Code*, 13 GA. ST. U. L. REV. 783, 806 (1997).

detect in the many facets of their models. Such feedback enabled the drafters of the original Uniform Probate Code to improve it in due course.<sup>187</sup> And those original drafters, incidentally, had welcomed all those local efforts.<sup>188</sup>

Nor is conformity for conformity's sake an overriding interest in this area of the law. Once again, the architects of the revised Uniform Probate Code beg to differ: "Local variations cause the uniform laws to lose the uniformity that is a great part of their value," we are told:

It is sometimes thought witty to contrast the field of probate [with commercial law], on the ground that a decedent can only die in one place. But that decedent can own property in many jurisdictions, and because it is ever more common for people to change domicile later in life, an estate plan that is crafted in one state may come into effect in another.<sup>189</sup>

All true, to be sure—but of limited consequence. Estate planners are hardly blind to this danger, and they can easily protect against the unintended application of out-of-state default rules to their wills by recourse to governing-law clauses.<sup>190</sup> Even variations in the prin-

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187. "Since the Fall of 1971, the Board has monitored the legal literature concerning the Code, searched reports about the Code by various bar and legislative study committees and examined the eleven enactments to date of the Code, for ways of strengthening and improving the Code." This effort led to the technical amendments of 1975 "which show that considerable thought and effort already have been expended in national attempts to improve the Code," and which in turn "should serve to reduce the tendency of local draftsmen to make purely technical language and style changes." UNIF. PROBATE CODE, at ix (amended 1993) (1975 Technical Amendments); see also Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 898 (1992). The drafters of the revised Uniform Probate Code fully understand the need for feedback, and they are not so foolish as to believe that "proposed uniform laws are always perfect." But they would prefer that such feedback be funnelled to them through the continuing Uniform Law Commission revision process. "In asking that local variations be resisted, we are speaking to a process value." Langbein & Waggoner, *supra* note 169, at 879. Yet, the Commissioners' revision process takes time, and meanwhile the defective template of a uniform provision may further replicate itself among the states. Are these drafters truly disappointed that the legislators of Colorado have taken it upon themselves to correct flaws in the optional section? See *supra* notes 59, 69, 165.

188. See Richard V. Wellman, *A Reaction to the Chicago Commentary*, 1970 U. ILL. L. F. 536, 536, 542. Along with improvement-spotting, there is also the value of local experimentation to consider. See Kenneth L. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433, 482 (1960) (urging in connection with charitable trust regulation that "[t]he concept of the states as laboratories for experimentation in social control is particularly relevant in this field"); see also *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1931) (Brandeis, J., dissenting).

189. Langbein & Waggoner, *supra* note 169, at 878; see also Ribstein & Kobayashi, *supra* note 185, at 150.

190. See 1 JEFFREY A. SCHOENBLUM, MULTISTATE AND MULTINATIONAL ESTATE PLANNING § 14.08.4 (1982); Nancy G. Henderson, *Drafting Dispositive Provisions in Wills*, (pt. 1), 43 PRAC. LAW., June 1997, at 33, 34-35. The Uniform Probate Code explicitly validates governing-law clauses, hence (ironically) helping to diminish the need for uniformity. See UNIF. PROBATE CODE § 2-703 (amended 1993).

cial mandatory rule of probate law—the statute of wills, setting will-execution formalities—have already been neutralized by widespread passage of liberal conflict-of-law statutes.<sup>191</sup> It is instructive to recall that pressure for conformity did not drive the development of the Uniform Probate Code—it arose out of a perceived need to simplify cumbersome rules and procedures and thereby to salvage the reputation of the probate system, which had fallen into low estate.<sup>192</sup> Local assemblies were not afraid to tinker with the Code then,<sup>193</sup> and they are doing so now: Already, in every jurisdiction where it has been enacted, the revised Uniform Probate Code's elective share provisions have undergone legislative modification—and the sky has not fallen.<sup>194</sup> Indeed, it may not be going too far to suggest that the greatest accomplishment of both editions of the Uniform Probate Code has been to *stir things up*: galvanizing legislators to blow the dust off their statute books and to contemplate anew aspects of local inheritance law that have become pointlessly wrinkled or timeworn.

This is not to say that unifying the inheritance laws of our fifty states would pay no dividends at all. In the trust field, especially, competition for business has prompted a number of state legislatures to embark on a dangerous “race to the bottom” in their recent enactments.<sup>195</sup> A truly uniform law of trusts would facilitate a collective-

191. Again ironically, one such appears in the Uniform Probate Code. See UNIF. PROBATE CODE § 2-506 (amended 1993). In addition, estate planners can easily meet the formal requirements of all fifty states by following well-publicized procedures that comply universally with local requirements. See DUKEMINIER & JOHANSON, *supra* note 96, at 224-28. In similar fashion, estate planners routinely protect against violation of another mandatory rule of inheritance law, the Rule Against Perpetuities (which, in the wake of modern statutory glosses, also varies from state to state) by adding to their wills perpetuities saving clauses. See *id.* at 874-75.

192. See Hirsch, *supra* note 17, at 1068 n.36.

193. In fact, this is something of an understatement: In many jurisdictions, the original Uniform Probate Code was chopped into bits and adopted piecemeal. See UNIF. PROBATE CODE (1969), 8 U.L.A. 1, 1-8 (1998).

194. See Susan N. Gary, *Share and Share Alike? The UPC's Elective Share*, 12 PROB. & PROP., Mar.-Apr. 1998, at 19.

195. Legislatures in several states have repealed the Rule Against Perpetuities, attracting trust business by offering settlors the opportunity to continue their trusts indefinitely. See *supra* note 134. And in another development, 1997 saw two states enact legislation allowing settlors to self-settle spendthrift trusts within their borders, thereby offering settlors a way to protect themselves from creditors' claims. At the forefront of both of these innovations was none other than Delaware—a state whose legislature already knew a thing or two about downhill racing. In both instances, the Delawareans frankly admitted in the legislative history that their motive in enacting these bills was “to maintain Delaware's role as the most favored domestic jurisdiction for the establishment of trusts,” and noting that the bill is “similar to legislation recently enacted in Alaska.” H.R. 356, 139th Leg., 1st Sess. (Del. 1997) (synopsis) (trust statute); accord H.R. 245, 138th Leg., 1st Sess. (Del. 1995) (synopsis) (perpetuities statute); see also Douglas J. Blattmachr & Richard W. Hompesch II, *Alaska vs. Delaware: Heavyweight Competition in New Trust Laws*, 12 PROB. & PROP., Jan.-Feb. 1998, at 32; Joel C. Dobris, *Changes in the Role and Form of the Trust at the New Mil-*

action response to this problem.<sup>196</sup> But given (in both senses of the word) the exhaustive quality of the code-modelling enterprise, even tried hands will falter now and again. Ultimately, I am convinced, we have more to gain by proceeding with disparate caution than in lockstep.

And no more so than in dim corners like the one explored in this Article. For just as the devil is in the details, so does he also prowl the periphery. Without pervasive vigilance and thorough skepticism, we shall never succeed in banishing him from our cathedral.

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*lennium, or, We Don't Have to Think of England Anymore*, 62 ALB. L. REV. 543, 571-75 (1998) (predicting that the "money center jurisdictions" will match these legislative innovations); Hirsch & Wang, *supra* note 128, at 52 n.210 (criticizing statutes repealing the Rule Against Perpetuities as it applies to trusts for persons); Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 83-92 (1995) (advocating the validity of self-settled spendthrift trusts under some conditions, hence suggesting that the legislative moves in this direction thus far down the spiral do not amount to bad policy, despite their dangerous motivations); John E. Sullivan, *Cutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts*, 23 DEL. J. CORP. L. 423 (1998).

196. The "race to the bottom" is nothing other than a political variant of the well-known common pool problem, whereby individuals have an incentive inefficiently to overconsume common goods. For an economic discussion, see Garrett J. Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968). In the instant case, the common good in question is the national supply of trust business. And just as collective action is the ideal solution to the common pool problem, so will it end the political race to the bottom. Commentators concerned with the race to the bottom in corporate law have thus pressed the need for federalization. For the classic discussion (which has spawned much further debate), see William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974). But a uniform law can also provide at least a framework for mutual cooperation among states, and voluntary cooperation is another route to the salvation of collective action. See generally ROBERT M. AXELROD, *THE EVOLUTION OF COOPERATION* (1984). But cf. Edward J. Janger, *Predicting When the Uniform Law Process Will Fail: Article 9, Capture, and the Race to the Bottom*, 83 IOWA L. REV. 569, 579-80, 588-93 (1998) (suggesting that Commissioners themselves might race to the bottom in the hope of gaining more widespread adoption of their acts). For a suggestion that states can arrive at legal uniformity when it is in their collective interest to do so, even without the assistance of a uniform lawmaking body, see Bruce H. Kobayashi & Larry E. Ribstein, *Evolution and Spontaneous Uniformity: Evidence from the Evolution of the Limited Liability Company*, 34 ECON. INQUIRY 464 (1996). For a suggestion that there exist, in any event, strong centripetal tendencies in American law stemming from a variety of institutional factors, see Melvin A. Eisenberg, *Achieving Uniformity in the Law*, FLA. ST. U. L. REV. (forthcoming) (on file with author).