Title
The Death of the Rule Against Perpetuities, or the RAP Has No Friends - An Essay

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THE DEATH OF THE RULE AGAINST PERPETUITIES, OR THE RAP HAS NO FRIENDS—AN ESSAY

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Editors' Synopsis: This Article analyzes the Rule Against Perpetuities, which limits "dead hand" control of property to a reasonable period of time and chronicles its decline in recent years as public interest in creating perpetuities has increased. The author details society's prevailing attitudes towards aggregations of wealth in trusts that facilitate the creation of perpetuities and undermine the Rule's legitimacy in modern law.

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The author hopes to further explore some of the themes in this Article in a forthcoming piece on the proposed repeal of the federal transfer taxes to appear in a symposium issue of the *Cleveland State Law Review*.

FOREWORD

This is an essay.[1] It is not an empirical study or a theory. It asks and answers an interesting question.

I. INTRODUCTION

We are in a moment in time where parts of the body politic and various legislatures are willing to allow perpetual trusts to exist unmolested and undenounced.[2] Except for a few law professors,[3] tax bureaucrats, and even fewer reform-minded trusts and estates practitioners,[4] society does not

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[1] As an essay, and a piece of professional literature, many statements in this paper are based on observation, experience, intuition, and situation. The finding of empirical proof, or disproof, must be the task of others.

[2] To simplify, the Rule Against Perpetuities does not exist, to one degree or another, in the following jurisdictions, among others: Alaska, Delaware, Idaho, Illinois, Maryland, Ohio, Rhode Island, South Dakota, and Wisconsin. *See* ALASKA STAT. § 34.27.050 (a) (3) (Michie 2000) (repealed 2000); 25 DEL. CODE ANN. tit. 25, § 503(a) (2000) (amended 2000); IDAHO CODE § 55-111 (Michie 2000); 765 ILL. COMP. STAT. 305/2-6 (1993 & Supp. 2000); MD. CODE ANN. EST. & TRUSTS § 11-102 (e) (Supp. 2000); OHIO REV. CODE ANN. § 2131.09 (Anderson 1998 & Supp. 1999); R.I. GEN. LAWS § 34-11-38 (1956 & Supp. 1999); S.D. CODIFIED LAWS §§ 43-5-1, 43-5-8 (Michie 1997); WIS. STAT. ANN. § 700.16 (West 1981 & Supp. 1999). South Dakota is discussed in Thomas H. Foye, *Using South Dakota Law for Perpetual Trusts*, PROB. & PROP., Jan./Feb. 1998, at 17.

[3] The case for the Rule Against Perpetuities can be found in many places, including JOEL C. DOBRIS & STEWART E. STERK, RITCHIE, ALFORD & EFFLAND'S ESTATES AND TRUSTS 745-48 (9th ed. 1998). *See* Edward C. Halbach, Jr., *Significant Trends in the Trust Law of the United States*, 32 VAND. J. TRANSNAT'L L. 531, 535 (1999); Ira Mark Bloom, *The GST Tail is Killing the Rule Against Perpetuities*, TAX NOTES, Apr. 24, 2000, at 569.

[4] To simplify, the trusts and estates law reform establishment assumes that the movement to abolish the Rule Against Perpetuities is unseemly and should be dismissed. *See* Halbach, *supra* note 3, at 535; Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1180 (1999). (Professor Heller is not yet a member of the Trusts and Estates Establishment.) *But cf*. Susan F. French, *Perpetuities: Three Essays in Honor of My Father*, 65 WASH. L. REV. 323, 348 (1990). (Professor French is currently a member of the Trusts and Estates Establishment.) *See also* T.P. Gallanis, *The Rule Against Perpetuities and the Law Commission's Flawed Philosophy*, 59 CAMBRIDGE L.J. 284 (2000) (suggesting that the experience of Canada and the United States undermines the economic rationale of the Rule Against Perpetuities and that the Law Commission should consider recommending the Rule's abolition); Stewart E. Sterk, *Asset Protection Trusts: Trust Law's Race to the Bottom?* 85 CORNELL L. REV. 1035 (2000) (tracing the rise of the asset protection trust and analyzing the effects of interstate competition on trust laws). Abolition is discussed in G. Graham Waite, *Let's Abolish the Rule Against Perpetuities*, 21 REAL EST. L.J. 93 (1992).

seem to care anymore about perpetuities,[5] dynasties, dynastic property, and "baronies."[6] Why? It is not clear if today's equivalents of the landed gentry of yesteryear are merely meeting less resistance, if the debate (if there even is one) is asymmetrical, or if the number of folks who want perpetuities is larger than before. Or, it actually may be that the Rule Against Perpetuities has outlived its usefulness.

Are economic elites seizing a prosperous moment in time to assure their primacy forever? Rich folks always push for advantage, but at the moment no one is pushing back in the perpetuities arena. Most plain folks see no danger. Why are there so few complaints? That is the point of this essay.

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[5] To simplify, the Rule Against Perpetuities requires that interests vest, or fail to vest, within a period of a life or lives in being, plus 21 years. *See* JOHN CHIPMAN GRAY, THE RULE AGAINST PERPETUITIES (Roland Gray ed., 4th ed. 1942). Historically, the Rule Against Perpetuities represented a compromise between rich folks who wanted to tie up their property, and their heirs, forever, and those heirs (and society) who wanted the property outright, immediately. A compromise was struck. Society, through its courts, determined that one could tie up one's property for a reasonable period of time, but if that reasonable period was exceeded then the arrangement was void from the beginning. "Reasonable" came to be defined as a life or lives in being, plus 21 years. *See* The Duke of Norfolk's Case, 3 Ch. Cas. 1, 22 Eng. Rep. 931 (1682); Mary Louise Fellows, *Testing Perpetuity Reforms: A Study of Perpetuity Cases 1984-89*, 25 REAL PROP. PROB. & TR. J. 597, 602 (1991). Professors Scott, Fratcher, and Ascher deal with the Rule Against Perpetuities in 4A AUSTIN W. SCOTT, THE LAW OF TRUSTS § 348 (William F. Fratcher ed., 4th ed. 1987 & Mark L. Ascher ed., Supp. 1998).

[6] A look at some Van Dyck portraits might change some minds. That Van Dyck specialized in portraying aristocrats is noted by Souren Melikan, *The Patrician Genius of Van Dyck*, INT'L HERALD TRIB., Sept. 11-12, 1999, at 7; ROBIN BLAKE, ANTHONY VAN DYCK, 1599-1641: A LIFE (1999). Better a viscount than a baron. Let me attempt to prove, dear reader, that you do not care. The English Channel Island of Sark, simply put, is governed by feudal law. Major players on Sark are the two Barclay brothers who own, among other things, the Ritz Hotel in London and *The Scotsman* newspaper (Scotland's leading daily). They have a $100 million summer place on Sark that was subject to primogeniture. Primogeniture is bad for the Barclays, who want their daughters to have access to the summer place and who have successfully forced the Seigneur of Sark and its tiny legislature of landowners to abolish primogeniture. Does any of this bother you or inspire a desire for reform? I hazard a guess: "No." *See* Rachel Sylvester, *Sark Forced to Let Daughters Inherit*, THE DAILY TELEGRAPH Nov. 17, 1999, at 1. *See also* Angela M. Vallario, *Death by a Thousand Cuts: The Rule Against Perpetuities*, 25 J. LEGIS. 141 (1999) (critically analyzing the weakening of the common law Rule Against Perpetuities in the United States).

Let us talk about the form not-caring-about-perpetuities is taking.

First and foremost, some U.S. states and foreign jurisdictions, especially some island nations hungry for out-of-jurisdiction trust business, have exhibited willingness to repeal the Rule Against Perpetuities.[7] Who cares if Alaska becomes the home of a number of essentially out-of-state perpetual trusts? Even if there is something inherently wrong with perpetual trusts, not many Alaskans will create them. So, the vast majority of Alaskans are not going to care. Perpetual Alaska trusts are an externality imposed on other states.[8] Inevitably, in an era of low taxes in a federal system, the local bankers and lawyers organize and lobby to gain an advantage, with no opposition from disorganized out-of-state creditors and out-of-state banks that eventually may lose money or business. Their most effective weapon against lost business is enacting similar laws at home.[9]

The sanctioning of perpetual trusts by some states and nations is the most obvious form that not-caring-about-perpetuities is taking.[10] We[11] are

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[7] *See* John K. Eason, *Home From the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations*, 52 FLA. L. REV. 41, 54 (2000). *See also* Randall J. Gingiss, *Putting a Stop to "Asset Protection" Trusts*, 51 BAYLOR L. REV. 987 (1999) (discussing remedies available to set such trusts aside).

[8] *See* Sterk, *supra* note 4.

[9] *See id.*

[10] For a discussion of how to invest and pay out return from a perpetual trust, *see* James P. Garland, *A Market-Yield Spending Rule for Endowments and Trusts*, FIN. ANALYSTS J., July-Aug. 1989, at 50. An update of this article can be found at James P. Garland, *A Market Yield Spending Rule Revisited: An Update Through 1998*, 2 J. PRIVATE PORTFOLIO MGMT. 50 (1999), *available at* http://www.jeffreyco.com/Jim_Pubs.html.

[11] The term "we" is used differently throughout this essay. Sometimes it refers to the joint venture of author and reader. Most of the time the term means that part of society involved with (or choosing not to be involved with) the matter under consideration. "We" in this essay never includes every reader or every member of society. The problem with "we" is that of "essentialism." According to Professor Appiah:

> The genteel cadences of old did not survive the resulting culture wars, for the liberationists aimed to dismantle the ethical consensus that earlier critics had assumed: Trilling's magisterial "we" once meant to conjure a moral community, came to be deplored as blithe "exclusion of difference." "Essentialism" began as a word for criticizing anyone who assumed that all X's shared the same characteristics.

K. Anthony Appiah, *Battle of the Bien-Pensant*, N.Y. REV. BOOKS, Apr. 27, 2000, at 42. This excerpt might well refer to the breakdown of the trust consensus. The pronoun "we" as used in this Article never includes Professor Holly Doremus.

repealing the Rule Against Perpetuities.

Second, we have come to live in a world in which perpetuities[12] are "everywhere." That is, we have grown accustomed to arrangements and entities that, in one way or another, last longer than the period of the Rule Against Perpetuities. For instance, we accept without question the perpetual existence of business corporations. This was not always so. Dramatically oversimplifying, in the 19th century, business corporations were so mistrusted that, at the beginning of the century, many had to be created by special legislation.[13] Some saw investing trust funds in corporate stock as evil speculation.[14] There is not a lot of interest these days in the idea of the demon corporation[15] or share investing as evil

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[12] This Article addresses two kinds of perpetuities, including entities that can last "forever" and trust arrangements that are meant to last longer than the Rule. "Forever" is eternity that can only be described as

> the darkness beyond . . . which went on and on forever. There was no word for it. Even *eternity* was a human idea. Giving it a name gave it a length; admittedly, a very long one. But this darkness was what was left when eternity had given up. It was where Death lived. Alone.
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> TERRY PRATCHETT, SOUL MUSIC 303 (1995).

[13] *See* MARION FREMONT-SMITH, FOUNDATIONS AND GOVERNMENT 40-41 (1965) (General acts for incorporation for charitable purposes in some instances preceded corporations for business purposes. For instance, in New York an act allowing incorporation for religious purposes was passed in 1784; the first act permitting general incorporation for business purposes was not passed until 1811.); Henry N. Butler, *Nineteenth-Century Jurisdictional Competition in the Granting of Corporate Privileges*, 14 J. LEGAL STUD. 129, 138-63 (1985).

[14] *See In re* Mayo, 105 N.W.2d 900 (Minn. 1960). The point is picaresquely made: "[B]ut it would come to nothing he knew. . . . [C]ompanies were an invention of the devil. A few speculators got them up and made money themselves out of land and contracts, while the shareholders they had hoodwinked starved. There's something in that, I conceded to this bigoted old conservative . . . ." ERSKINE CHILDERS, THE RIDDLE OF THE SANDS 223 (1903), *quoted in* Joel C. Dobris, *Why Trustee Investors Often Prefer Dividends to Capital Gain and Debt Investments to Equity—A Daunting Principal and Income Problem*, 32 REAL PROP. PROB. & TR. J. 255, 297 n.169 (1997).

[15] *See* CHILDERS, *supra* note 14; JAMES WILLARD HURST, THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAWS OF THE UNITED STATES 1780-1970 (1970). The religious right's attempts to demonize the Walt Disney Company over Disney corporate policies came to naught. *See* Joan Lowy, *Effectiveness of Continuing Disney Boycott Debated: SBC Ethics Chief Once Worked for Walt Disney, Torn by Conflict*, CHATTANOOGA TIMES, Sept. 26, 1999, at A18. Imagine trying to demonize Disney over its being a perpetuity. Many readers will instantly react with a question. How can corporations be perpetuities when the shares can be sold at any time by the shareholders and the assets sold or merged away by the management, while constantly being subject to Joseph Schumpeter's

speculation.[16]

We coexist happily, at some mythic waterhole, with perpetual nonprofit foundations,[17] charities,[18] college endowments,[19] and pension

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dictum of "creative destruction?" *See* JOSEPH ALOIS SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81-86 (6th ed. 1987). Yes, but corporations have a way of enduring. *See* ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY 43-44 (1968). For a very brief and recent hymn to the modern corporation, *see A Survey of the 20th Century: Freedom's Journey*, THE ECONOMIST, Sept. 11, 1999, at 1 [hereinafter *The 20th Century*]. Many of the author's observations in this Article find support in this *Economist* essay, which was published well after this Article existed in draft form. A simple recap: we do not demonize all corporations, just some of them. Charles Hurwitz and Maxxam Inc.'s attempts to cut down old growth redwoods in California come to mind. *See* Frank Clifford, *Last-Minute Deal Reached on Headwaters*, L.A. TIMES, Mar. 4, 1999, at A3.

[16] Some, however, do appear to be open to the evils of speculation. Speculation is a topic of current interest. *See, e.g.,* EDWARD CHANCELLOR, DEVIL TAKE THE HINDMOST: A HISTORY OF FINANCIAL SPECULATION (1999) (providing a history of speculative manias that informs an analysis of the recent bull-market binge and defining the essence of speculation as "a Utopian yearning for freedom and equality which counterbalances the drab rationalistic materialism of the modern economic system with its inevitable inequalities of wealth").

[17] *See, e.g.*, Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980). *See generally* NONPROFITS AND GOVERNMENT: COLLABORATION AND CONFLICT (Elizabeth T. Boris & C. Eugene Steuerle eds., 1999) (discussing essays on charities), *cited in* Evelyn Brody, *Charities in Tax Reform: Threats to Subsidies Overt and Covert*, 66 TENN. L. REV. 687, 694 n.16 (1999).

[18] *See generally* LEWIS M. SIMES, PUBLIC POLICY AND THE DEAD HAND 110 (1955) (explaining why charitable trusts can exist in perpetuity). Charities have been exempt from the Rule Against Perpetuities for centuries, because of the social good they provide. We have been comfortable with perpetual charitable corporations for centuries. One scholar has noted:

> The word corporation came into use in Saxon times to describe religious institutions and monastic orders as well as religious persons. The parson of a parish or an order of friars was regarded as a corporation by prescription and was therefore a separate legal entity which could exist in perpetuity. Present day corporate concepts have their roots in these early views.

FREMONT-SMITH, *supra* note 13, at 16-17. In the United States, charitable corporations date back to earliest colonial times. In 1756, the Massachusetts General Court granted one of the earliest corporate charters in the United States to the "Feoffees of the Grammar School of the Town of Ipswich to administer a private bequest in the interest of public education there." *Id.* at 40.

[19] College endowments are discussed in Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873 (1997); Joel C. Dobris, *Real Return, Modern Portfolio Theory, and College, University, and Foundation Decisions on Annual*

trusts.[20] Try to imagine complaining successfully that the Red Cross or the Salvation Army is a noxious perpetuity,[21] or that the traditional pension trust is a tool from the devil's workshop.[22]

We accept long-term intellectual property rights; for example, we are prepared to consider giving the Walt Disney Company very long-term rights to exploit Mickey Mouse.[23] As Professor Michael Froomkin likes to

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Spending from Endowments: A Visit to the World of Spending Rules, 28 REAL PROP. PROB. & TR. J. 49 (1993).

[20] *See generally* JOHN H. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW (3d ed. 2000) (discussing pension trusts in the context of benefit denials, fiduciary duties, and pension plans).

[21] The law has recognized charitable perpetuities for centuries, but the idea that "the perpetual charity is my friend" is, the author submits, a 20th century artifact. The growth of this view paralleled the disappearance of mortmain. Oversimplifying, the Rule does not apply to charitable trusts. *See* DOBRIS & STERK, *supra* note 3, at 772-74.

[22] For an eloquent hymn to the pension, *see* ROSS MACDONALD, BLUE CITY 8-10 (Alfred A. Knopf ed., 1947), *quoted in* Joel C. Dobris, *Book Review*, 52 OHIO ST. L.J. 625, 634-35 n.112 (1991) (reviewing J. EEKELAAR & D. PEARL, AN AGING WORLD, DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY (1989)):

> "But after all, life begins at sixty-five." . . . .
> "It's for different reasons entirely that my life began at sixty-five. That was when I qualified."
> "Qualified for what? Voting?"
> "Qualified for the old age pension, son. Ever since then I've been my own boss. No more getting pushed around, no more licking asses, not for me! Nobody can't take that pension away from me."
> "It's a great thing," I said.
> . . . .
> "It's a wonderful thing. It's the most wonderful thing that ever happened to me in my life."
> "Can you imagine what they did to me?" the old man said. "And that was when I couldn't walk yet after my second stroke. They put me out in the county poorhouse, with nobody to look after me except my chums out there. They said all the hospitals were full. I still have some of the bedsores I got then. And then they weren't going to give me my old-age pension, even after I qualified." . . . .
> "Now I got me a little place of my own under the stairs at the warehouse, and nobody can say boo to me."

Id. *See also* LANGBEIN & WOLK, *supra* note 20.

[23] Mickey may not last that long. *See* Marc Gunther, *Eisner's Mousetrap*, FORTUNE, Sept. 6, 1999, at 106. Of course, there is opposition to extending (or even recognizing) intellectual property rights. *See* Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

joke, "Copyright exists for a period of Mickey's life plus five years."[24] No one cares that the Walt Disney Company appears capable of lasting forever or that it wants its intellectual property to last a long time, too.

Lawyers,[25] accountants,[26] and the upper-middle class[27] are bombarded with articles about techniques for keeping pension and IRA benefits "going" for at least a generation.[28] Obviously, the idea is that the longer advantageous arrangements exist, the better.[29] As with so many things, the longer the better.

Californians have lived in a world where Proposition 13 real estate tax preferences were inheritable.[30]

Rent control apartments in New York City are inheritable within families.[31] Again, only a few theorists will carp about this. Most people do not care, or wish they had the advantage of these arrangements for

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[24] Mickey's long life is discussed in Jon M. Garon, *Media & Monopoly in the Information Age: Slowing the Convergence at the Marketplace of Ideas*, 17 CARDOZO ARTS & ENT. L.J. 491, 524 (1999).

[25] For a theoretical discussion of these ideas, *see* Jeffrey N. Gordon, *Employees, Pensions and the New Economic Order*, 97 COLUM. L. REV. 1519 (1997).

[26] *See* Gary R. Stout & Robert L. Barker, *Roth IRA Planning*, 186 J. ACCT. 59 (1998).

[27] Again, a few "spoilsport" law professors do care. *See* Jane C. Ginsburg, *Authors as "Licensors" of "Informational Rights" Under U.C.C. Article 2B*, 13 BERKELEY TECH. L.J. 945, 952 (1998). The "ultimate" perpetuity might be a perpetual trust, holding the shares of a perpetual corporation that exploits intellectual property perpetuities. One is reminded of Professor Meir Dan-Cohen's personless corporation. *See* MEIR DAN-COHEN, RIGHTS, PERSONS AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 46-51 (1986). The author thanks Professor Thomas W. Joo for pointing out this resource.

[28] *See* Shelly K. Schwartz, *Leaving an IRA to Your Heirs*, *at* http://cnnfn.com/1999/10/18/life/q_stretch/ (last visited Oct. 28, 2000). Professor Bruce A. Wolk has prepared an illustration showing how $1 million before taxes, put in an IRA at age 70, can grow to $11 million after taxes, under specific circumstances. *See* LANGBEIN & WOLK, *supra* note 20, at 430.

[29] *See* Brian Layman, *Perpetual Dynasty Trusts: One of the Most Powerful Tools in the Estate Planner's Arsenal*, 32 AKRON L. REV. 747 (1999). For a discussion of top-hat pension planning in a different context, *see* Bruce Wolk, *Discrimination Rules for Qualified Retirement Plans: Good Intentions Confront Economic Reality*, 70 VA. L. REV. 419 (1984).

[30] *See* CAL. CONST. art. XIIIA, § 2g (amended and approved as "Proposition 13," 1978).

[31] *See* Joel C. Dobris, *Foreword, The Modern Family Fragmented*, 22 U.C. DAVIS L. REV. 691 (1989).

themselves. The economic arguments against rent control[32] are not heard by most people. Thus, this modest distant cousin to the fee tail survives into the third millennium.

We accept political family "perpetuities" without blinking. We embrace term limits to cut off political careers, but we embrace political family dynasties.[33] Nevertheless, dynasties appear hard to preserve.[34]

We have come to accept big pools of capital existing for indefinite periods of time as benign, at worst, and beneficent, at best.[35] We have a tolerance for large aggregations of wealth and long-lived preferences that both do, and do not, technically offend the Rule Against Perpetuities.

We are sanctioning perpetuities right and left.

Let us consider why this change in attitude, both legal and cultural, is underway. For simplicity's sake, let us assume there are several explanations for the change. The categories set out are somewhat artificial, but they are reasonable and convenient. As Oscar Wilde wrote: "The first duty in life is to be as artificial as possible. What the second duty is no one

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[32] *See* Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517 (1984).

[33] The Bush, Kennedy, Cuomo, Gore, and even Taft families come to mind. *See* STEPHEN HESS, AMERICA'S POLITICAL DYNASTIES (1997); BILL MINUTAGLIO, FIRST SON: GEORGE W. BUSH AND THE BUSH FAMILY DYNASTY (1999); Lars-Erik Nelson, *Legacy*, N.Y. REV. BOOKS, Feb. 24, 2000, at 4; David Plotz, *George Bush Lite*, THE PALM BEACH POST, July 18, 1999, at 1E; Froma Harrop, *U.S. Politics as House of Lords*, PROVIDENCE J-BULL., Mar. 12, 1999, at 7B; Howard Fineman, *The Family Business*, NEWSWEEK, June 23, 1997, at 38.

[34] It is a bromide that most family businesses disappear, too. *See* Deborah Stead, *Lessons About Money in Family Inc.*, N.Y. TIMES, Oct. 1, 1995, at 10F. For a discussion of family businesses that do not seem about to fail, *see* SUSAN F. TIFFT & ALEX S. JONES, THE TRUST: THE PRIVATE AND POWERFUL FAMILY BEHIND *THE NEW YORK TIMES* (1999); NIALL FERGUSON, THE HOUSE OF ROTHSCHILD: MONEY'S PROPHETS, 1798-1848 (1998); David Barboza, *At Johnson Wax, A Family Hands Down Its Heirloom; Father Divides a Business to Keep the Children United,* N.Y. TIMES, Aug. 22, 1999, § 3, at 1.

[35] In response to the reader who would argue that some of these arrangements have nothing to do with the Rule Against Perpetuities, I submit that they are close enough to traditional perpetuities to influence social understandings of the beast. At least one commentator thinks that love of the big is coming to an end. *See* Gerard Baker, *Boos and Hisses for America's Corporate Titans*, FIN. TIMES, Nov. 9, 1999, pt. 1, at 27.

has as yet discovered."[36]

Our categories are as follows:

1. The harms inflicted by perpetuities are, or seem to be, diminished.

2. The need for the positives gained from perpetuities, real or imagined, is perceived as so strong that we must allow perpetuities to exist.

3. Society's guardians in these matters—its lawyers, legislators, judges, and law professors—are asleep in the gatehouse. Only one head of Cerebus[37] is awake. Argos[38] is sleeping.

Before we go any further let us set out some simple definitions.

The Rule Against Perpetuities ("RAP," "Rule") in its basic form requires that every interest must vest or fail to vest within a period of a life or lives in being, plus 21 years.[39] The point of the Rule is to limit certain indirect restraints on alienation and duration, to limit dead hand[40]

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[36] Oscar Wilde, *Phrases and Philosophies for the Use of the Young*, *reprinted in* THE OXFORD AUTHORS, OSCAR WILDE 572 (Isabel Murray ed., 1989). In a work of science fiction, Death speaks of duty: "Without duty, what am I?" PRATCHETT, *supra* note 12.

[37] Cerebus is the mythological multi-headed dog that guards the gate to Hades. *See Microsoft, Deadly Embrace*, THE ECONOMIST, Apr. 1, 2000, at 58.

[38] Argos, or Argus, is the mythological guardian with many eyes. *See* ENCYCLOPEDIA BRITANNICA, *available at* http://www.britannica.com/bcom/eb/article/5/0,5716,9505+1+9394,00.html?query=argus (last visited Oct. 28, 2000). Argos was also Odysseus' faithful dog who watched for his return. *See* HOMER, THE STORY OF ODYSSEUS 209-10 (W.H.D. Rouse trans., 1937); Elizabeth L. Mathieu, *How to Choose and Evaluate a Corporate Trustee for Long-Term Trusts*, 27 EST. PL. 80 (2000).

[39] *See* GRAY, *supra* note 5. Many modernizing reforms have been proposed and enacted.

[40] Professor Simes was the 20th century's leading "dead hand" scholar. *See* SIMES, *supra* note 18; Lewis M. Simes, *The Policy Against Perpetuities*, 103 U. PA. L. REV. 707 (1955) [hereinafter Simes, *The Policy*]. The dead hand is also discussed in Gareth H. Jones, *The Dead Hand and the Law of Trusts*, *in* DEATH, TAXES AND FAMILY PROPERTY 119 (Edward C. Halbach, Jr. ed., 1977). For many lawyers, the ultimate perpetuities piece is W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938). The 19th century's leader was Hobhouse. *See* ARTHUR HOBHOUSE, THE DEAD HAND (London, Chatto & Windus 1880).

control—control of property and donees' lives—to a reasonable period of time.[41] The modern expression of the Rule first began in *The Duke of Norfolk's Case*.[42] The case allowed the arrangements to stand, with the court retaining the right to call things perpetuities when it made sense to do so.[43] From the 17th to the 19th century, the Rule became encrusted, or simplified, rather like the prudent man rule of trust investing,[44] and finally became the rule against remoteness in vesting.[45]

In today's world, the typical perpetuity—a trust that purposely is designed to last longer than the period the Rule allows—is a trust managed by a trustee with modern investment powers who can sell the trust property at any time. However, the beneficial, or equitable interests, are tied up beyond the period of the Rule.[46]

Recently, the perpetuities debate has bubbled over.[47] For hundreds of years there was a social agreement that despite the desires of rich settlors, property should, at least periodically, be owned outright by its beneficial owners. Under a unique statute, Delaware has allowed perpetual trusts for decades through the use of special powers of appointment.[48] However, this opportunity never caused much of a perpetuities creation

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[41] Wealthy settlors often seek to control their objects of bounty and resent state attempts to control them. The second point is Bella Wong's, University of California, Davis, Class of 1987. *See* RONALD CHESTER, INHERITANCE, WEALTH AND SOCIETY 125-29 (1982).

[42] 3 Ch. Cas. 1, 22 Eng. Rep. 931 (Ch. 1682).

[43] *See id.*

[44] Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52 (1987).

[45] *See* Fellows, *supra* note 5, at 597.

[46] There are a variety of distinctions that could be made among rules forbidding excess accumulations and similar rules that are outside the scope of this Article. The simple point is that for an extended period we have had an agreement that from time to time property should be owned outright as to both legal and equitable interests. *See* Simes, *The Policy*, *supra* note 40, at 707.

[47] Public interest in abolishing the Rule manifested itself with the interest in the dynasty trust. It is convenient to say that interest in the dynasty trust came into focus with the publication of Professor Dukeminier's article. *See* Jesse Dukeminier, *Dynasty Trusts: Sheltering Descendants From Transfer Taxes*, 23 EST. PL. 417 (1996).

[48] Delaware's section 501, which allowed special powers of appointment to be exercised in perpetuity, led to the enactment of section 2041(a)(3) of the Internal Revenue Code. *See* DEL. CODE ANN. tit. 25, § 501 (2000); I.R.C. § 2041(a)(3). For a full discussion, *see* DOBRIS & STERK, *supra* note 3, at 794-95.

boom. Some midwestern states repealed either the Rule or the Rule as it applied to trusts without causing a rush to set up perpetual trusts.[49] Suddenly things seem different.[50] Why now? Interest in creating perpetuities seems to be intense these days and the change appears best understood as a matter of culture and society, not law.[51] Why have we lost interest in preventing dead hand control of the equitable interests in property created by trusts?

II. PERPETUITIES' PERCEIVED HARM IS FADING

Let us turn to the idea that the harms, either real or imagined, that perpetuities inflict are lesser harms today than existed when we first embraced the Rule. The analysis breaks down into two categories: (1) Why do we think the harms caused by perpetuities are lessened, if we think about such things at all? (2) Can we say that the spillovers, harms, negative externalities, and other inefficiencies of perpetuities, or more specifically perpetual trusts, are less threatening than we once thought? As Professor Schoenblum puts it, "[T]he preoccupation with perpetuities has dissipated."[52]

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[49] *See* Fellows, *supra* note 5, at 597; Sterk, *supra* note 4, at 1037.

[50] This bit of history is discussed succinctly in JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 316 (4th ed. 1998). Professor Dukeminier's explanation is that the change is "pushed along by lawyers for the rich seeking tax advantages and trust companies seeking fees for managing perpetual trusts . . . ." *Id*. Another possible explanation is that the breakdown in barriers to communication means that ideas are taken up more quickly than in the past. A third explanation is that aggressive trusts and estates lawyers need something "hot" to sell. *See* Joel C. Dobris, *Changes in the Role and the Form of the Trust at the New Millennium, or, We Don't Have to Think of England Any More*, 62 ALB. L. REV. 543 (1998).

[51] It is strange that we currently have this intense interest in perpetual trusts when there seems to be some general agreement that most donors do not see past their own grandchildren. *See* DOBRIS & STERK, *supra* note 3, at 747-48. Perhaps the notion of "forever" is too abstract. Might not a rule that no trust could last longer than 250 years effectively fight off the move to repeal the RAP? The population of people who want trusts to last longer than that is very small, and their defenders would be few and far between.

Perhaps the best explanation for the sea change in the use of perpetuities trusts is that "this decade is different from the rest of the 20th century." *The 20th Century*, *supra* note 15, at 1.

[52] Jeffrey A. Schoenblum, *The Role of Legal Doctrine in the Decline of the Islamic Waqf: A Comparison With the Trust*, 32 VAND. J. TRANSNAT'L L. 1191, 1211-12 (1999).

The standard list of charges against the perpetuity, the arrangement that lasts longer than the reasonable period allowed by the Rule, includes the following: perpetuities tie up the management of property and prevent property from reaching its highest and best use; perpetual trusts concentrate wealth to the detriment of society; all trusts unwholesomely interfere with the character, laboring, and investment productivity of the beneficiaries; and perpetuities lead to intergenerational inequities.[53] Society views this list less seriously than it once did, as does the majority of the legal community. Let us explore the reasons why.

A. We Do Not Mind Rich People These Days

To the extent that perpetual trusts buttress the rich, and to the extent the RAP is an attack on, or a restraint upon, rich folks, it seems that we do not care about the Rule because we like rich folks these days.[54] Socialism is out of fashion.[55] We identify with the rich. We revere the capitalist and the entrepreneur.[56] We do not automatically associate decadence with wealth. And we are feeling good.

We dislike only rich showoffs who do not charm us, people who put on airs, a few arrogant bosses,[57] and a few individuals whom the press or

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[53] *See* DOBRIS & STERK, *supra* note 3, at 744-48.

[54] *See* Lester C. Thurow, *Building Wealth*, THE ATLANTIC MONTHLY, June 1999, at 57; Maureen Dowd, *Living la Vida Trumpa*, *at* www.nytimes.com/library/opinion/dowd/111799dowd.html (last visited Oct. 28, 2000); Maureen Dowd, *$$$$$?????!!!!!*, *at* http://www.nytimes.com/library/opinion/dowd/011200dowd.html (last visited Oct. 28, 2000).

[55] "Socialism" as used here is, in part, what Professor Simon Schama calls, "the ancient stuff about class conflict." Simon Schama, *Clio and the Zip Drive* (BBC Radio Three broadcast, Nov. 13, 1999) (a lecture in the BBC series "Sounding the Century"). "Socialism" as used here also refers to command economies.

[56] If we have a problem with these individuals, it is with consumption by their offspring. *See* David Brooks & Michael Elliot, *Is Washington Washed Up?*, *at* http://politics.slate.msn.com/dialogues/00-02-21/dialogues.asp (last visited Oct. 28, 2000).

[57] For example, the pre-modern public picture of Gary Wendt cost him an opportunity to be president of General Electric. *See* Diane Brady, *A Capital Exercise*, BUSINESS WEEK, Aug. 9, 1999, at 44.

prosecutors choose to villainize. We are not levelers these days.[58] We see harm most easily in grotesque extravagance, such as extravagant aggregations of land or extravagant conduct. We do not seem to care about big spending that is quiet or does not involve 29,000 acres, private islands, or gold plumbing fixtures.

An additional complicating factor is that we have come to enjoy tales of spending excess. We love lifestyles of the rich and famous. We identify with the gentry, the quasi-gentry, and the pseudo-gentry, and we usually have no problem with the self-made man or woman. That is, we are in an era when we tend to value rich winners.[59] About the only financial villains left, fit for some modern version of a Thomas Nast cartoon,[60] are foolish and pompous high-corporate executives who get absurd salaries for bossing us around.

The prevalence of lotteries enhances these effects. The hopeful think: "I may be very rich on Saturday night, and then I will be glad that taxes are low and I am free to set up gimmicky trusts."[61] Using perpetual trusts is a rich person's advantage and we all imagine being rich someday.[62]

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[58] *See* Russell Baker, *Only in America*, N.Y. REV. BOOKS, Oct. 7, 1999, at 4 (reviewing MARGUERITE YOUNG, HARP SONG FOR A RADICAL: THE LIFE AND TIMES OF EUGENE VICTOR DEBS (1999) (noting how out-of-fashion Young's book is in its populism and hostility to wealth and power).

[59] Professor Thurow tells us they compete for our attention as "economic winners." *See* Lester C. Thurow, *supra* note 54, at 58. Maureen Dowd also addresses the question: "Our politics is warped by money, celebrity, polling and crass behavior, and our culture is defined by stock-market high rolling, boomer narcissism, niche marketing mania, rankings, and a quiz show called 'Who Wants to Be a Millionaire?'" Dowd, *Living*, *supra* note 54, at A25. Intriguingly, "Who Wants to Be a Millionaire" is a Disney production. Some of these attitudes can be found by watching the CNBC financial program "Squawk Box." Ms. Dowd has written again on the millionaire in popular culture. *See* Dowd, *$$$$$?????!!!!!*, *supra* note 54, at A23. We live in a moment of millionaires and markets. *See* Michael Prowse, *In the Market for a Winning Set of Clothes*, FT WEEKEND, Feb. 26-27, 2000, at xxiv.

[60] Thomas Nast was a famous 19th century cartoonist who lampooned the rich and powerful. *See* DAVID SHIRLEY, THOMAS NAST: CARTOONIST AND ILLUSTRATOR (1998).

[61] Studies suggest that over 70% of college students assume they will be millionaires. *See They Will Be Millionaires*, USA TODAY, Jan. 24, 2000, at 1B. That is why we have lotteries.

[62] We even feel sorry for rich folks. *See* Monica Langley, *Trust Me Baby*, WALL ST. J., Nov. 17, 1999, at A1; Gary Silverman, *Affluenza Hits Nouveau Rich Kids*, FIN. TIMES, Jan. 10, 2000, at 1.

And we all want access to rich folk's advantages. If the perpetual trust is one of their advantages, then we want it, too.[63]

Just as we are positive about rich people, we also are positive about aristocrats. Regardless of their status, we surely do not fear them. If they are rich, as well as aristocratic, all the better. We need look no further than Princess Diana as proof of this trend. She came from one of the oldest noble families in England.[64] Few Americans had any problem with her money, her aristocratic background, or her dynastic connections, and most were curious about her way of life. Most Americans are not even bothered by the English royal family or the dynastic families of American politics.[65] The idea that "if the Queen only knew me, I am sure she would like me" essentially sums up the prevailing mood.[66] Often we are exposed to the unattractive side of riches and dynasty because the rich have fallen from grace, and then we take pleasure in the sorrows of others and feel confirmed in our "decisions" not to be rich.[67] We are not concerned about the creation, or the sustaining, of an aristocracy via perpetual trusts. Even though family fortunes will not go from dirt to dirt in three generations if

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[63] One is reminded of the woman at the table next to Meg Ryan's in the famous scene in *When Harry Met Sally:* "I'll have what she's having." WHEN HARRY MET SALLY (Castle Rock Entertainment 1989).

[64] *See* CHARLES SPENCER, THE SPENCER FAMILY (1999); Charles Spencer, *Diary*, THE SPECTATOR, Nov. 6, 1999, at 9. Spencer House, a splendid 18th century townhouse, once belonged to the Spencer family, but is now owned by a Rothschild. *See* www.spencerhouse.co.uk (last visited Oct. 4, 2000). The Spencers have been around a long time. *See* AMANDA FOREMAN, GEORGIANA, DUCHESS OF DEVONSHIRE (1998).

[65] In 1999, in the United States, Prince Edward (the Duke of Wessex, Edward Windsor) was seen as a charming young Brit who Hollywood was dying to meet. In England, he was a foolish aristocrat who had trouble making a living and who endangered the position of the Lords and the Crown with his negative view of the British press. *See* Mark Reynolds, *Storm at Edward's Attack on Britain*, EVENING STANDARD, Sept. 2, 1999, at 1. *See generally* Richard Conniff, *Class Dismissed*, THE SMITHSONIAN, Dec. 1999, at 98 (discussing the highs and lows of life in the British aristocracy).

[66] If the Queen likes me, either I am an aristocrat (natural or born) whom the stork put down the wrong chimney or the Queen is a really great gal. Either way, I win. It is another lottery ticket.

[67] The author's subjective view is that the lawyers who know the rich best are their trusts and estates lawyers and that most trusts and estates lawyers like their clients. To find fancy lawyers who dislike rich people, one must find litigators who have been involved in the fights of the rich. They will talk of grotesque personalities and stale perpetuity dreams.

the "founder" can establish perpetual trusts, no one seems to care.[68]

One reason we like rich people is they have good public relations. It is important to remember that we live in an age of public relations.[69] Images of wealth often are presented in an appealing light and PR often is used to keep unattractive stories out of the news.[70] We attack the working rich[71] only when they do not attend to their public images[72] and come to the attention of an inquisitorial prosecutor like Rudolph Giuliani[73] or Joel Klein.[74] We slowly are allowing Michael Milken to rehabilitate himself

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[68] The main jobs of trusts are as follows: caring for the young and the infirm; providing for successive ownership; avoiding government impositions like taxes and probate; and holding together dynastic aggregations of wealth. If transfer taxation is dropped, a primary job of trusts will be gone. The current interest in the dynastic function arises at the perfect time for trust professionals, a time when the possibility exists that transfer taxation may be abandoned. However, if we dropped transfer taxes there would be considerably less interest in trust creation and many fewer trusts, including perpetual trusts, created. There seem to be too many trusts in existence. One way to reduce the number of trusts is to allow the credit shelter of the first spouse to die to carry over to the estate of the surviving spouse. This would reduce the creation of so-called credit shelter trusts. The author thanks David Schaengold, CPA of New York City, for this thought.

[69] *See* ROLAND MARCHAND, CREATING THE CORPORATE SOUL (1998). *See generally* William S. Blatt, *Minority Discounts, Fair Market Value, and The Culture of Estate Taxation*, 52 TAX L. REV. 225 (1997) (discussing cultural constructs in the estate taxation of the rich).

[70] Professor Holly Doremus has suggested to the author that we do not hate rich people because we do not know they are there. She also questions whether our nonrecognition of the rich explains why we also do not care if they turn their offspring through eternity into lazy "good-for-nothings." No one knows what goes on behind closed doors.

[71] If you inherit your money, and let Bessemer Trust manage it, next year's Rudolph Giuliani or Joel Klein will not prosecute you.

[72] The attempts by Charles Hurwitz and Maxxam Inc. to cut down old-growth redwoods in California come to mind. *See* Frank Clifford, *Last-Minute Deal Reached on Headwaters*, L.A. TIMES, Mar. 4, 1999, at A1.

[73] Rudolph Giuliani, a New York politician, gained fame for prosecuting Wall Street operatives. *See generally* Tim O'Brien, *Go Directly to Jail, but Which One?* THE AMERICAN LAWYER, July/Aug. 1989, at 126, 128 (discussing Giuliani's effort to keep white collar criminals out of federal low-level security prisons).

[74] In April 2000, Joel I. Klein was the assistant attorney general in charge of the Justice Department's antitrust division and the person responsible for pursuing the government's antitrust case against Microsoft. *See* Marc Lacey & Eric Schmitt, *Gates Keeps Washington Dates*, N.Y. TIMES, Apr. 6, 2000, at C1.

and often we appear ready to forgive Bill Gates.[75] The unattractive rich who groom their images or who stay out of public view are safe.[76]

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[75] In September 1999, Bill Gates announced he was giving one billion dollars, through his private foundation and established social service charities, to fund scholarships for minority students interested in studying engineering, science and math. *See* Sam Howe Verhover, *Gates Pledges $1 Billion Gift for Students,* N.Y. TIMES, Sept. 6, 1999, at A1. Whether Gates is winning or losing the PR battle is undecided. For a positive portrayal of Gates, *see* STAN LIEBOWITZ, WINNERS, LOSERS AND MICROSOFT (1999). For interesting insights on Liebowitz's book, *see Lock and Key*, THE ECONOMIST, Sept. 18, 1999, at 124. The problem is that the Liewbowitz book was published by the Independent Institute, which was exposed on the same day to be taking hitherto secret contributions from Microsoft to put pro-Microsoft advertisements in national newspapers. *See id.* Books about Gates and his business strategy abound. *See, e.g.*, GARY RIVLIN, THE PLOT TO GET BILL GATES: AN IRREVERENT INVESTIGATION OF THE WORLD'S RICHEST MAN AND THE PEOPLE WHO HATE HIM (1999) (telling the story of how Silicon Valley businessmen plotted to undermine Gates). Experts have predicted that Bill Gates could die with a trillion-dollar estate. *See* THE ESTATE ANALYST, *A Bank of the West Newsletter*, n.3 (1999) (copy on file with author). In the year 2000, the value of Gates' estate is not a fact of general interest. However, if he were to die, pay his estate taxes, and devise the remainder of a trillion dollars in a private perpetual trust, then repercussions from these events could place the RAP on the political agenda. In 1999, he seemed to give away enough money to give some PR substance to his promise to leave "all his money" to charity. *See* Thomas J. Billitteri, *Who Gave the Most: Carnegie, Rockefeller, or Gates?*, CHRON. PHILANTHROPY, Jan. 13, 2000, at 32. Gates and the trillion-dollar estate are topics that fascinate some writers. *See The Foresight Saga*, THE ECONOMIST, Dec. 18, 1999, at 59.

[76] *See* Robert G. Kaiser & Ira Chinoy, *The Right's Funding Father: Fighting a War of Ideas*, WASHINGTON POST, May 2, 1999, at A1. This article details the story of a billionaire scion of a wealthy American "aristocratic" family (the Mellons) who has had a disproportionate and major effect on American politics in the 1990s by virtue of targeted political spending from the massive amount of inherited money at his disposal. Depending on one's politics he is perceived as a hero or a villain and a poster child either for aggregations of wealth or for breaking them up. Yet, this story does not resonate with the public. People do not care. It does not resonate, in part, because the populism of the Depression and the generation of Roosevelt Democrats is almost gone from the scene; because we refuse to admit we have an aristocracy; and because the subject of the story has been adept at staying out of the news until recently. Simply put, in an era when capitalism is triumphant, it is not surprising that there is little concern about aggregations of wealth and the growth of a pseudo- or quasi-American aristocracy.

Historically, our leaders who have been concerned about abuses of power by American aristocrats are often upper-class Americans who have been snubbed by their "betters." We are told that Franklin Delano Roosevelt was concerned for the plain folk because he was denied access to Porcellian, the Harvard senior society of his choice. *See* Felipe Fernandex-Armesto, *But Where, Exactly, Are They Leading Us?*, LITERARY REVIEW, July 1999, at 17 (reviewing DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945 (1999)). "Capitalists—said Franklin D Roosevelt, who never forgave snooty undergraduate clubmen for blackballing him at Harvard—wanted

To the extent we have a social concern relevant to the discussion in this subsection, we are concerned with abuses of power. We no longer automatically associate abuses of power with wealth.[77] Our default is no longer that rich people (a) have power that (b) they will abuse. Most rich people actually appear to have little power to concern us. We see neither "villainous industrial despotism"[78] nor

> aggressive men, akin in spirit to military captains of the past, working their way up from the ranks, exploiting natural resources without restraint, waging economic war on one another, entering into combinations, making immense fortunes, and then, like successful feudal chieftains or medieval merchants, branching out as patrons of learning, divinity and charity.[79]

The evil abuses of power, to the extent we see them and are bothered by them, we attribute to corporations, some of their high executives, and a tiny population of self-made individuals whom we erratically demonize.[80] All

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'power for themselves, slavery for the republic'." *Id.* The Roosevelt story is confirmed at the Harvard web site, *at* http://www.harvard-magazine.com/issues/nd96/frank2.html (last visited Oct. 28, 2000). *See* Jack van Doren, *Is Jurisprudence Politics by Other Means? The Case of Learned Hand*, 33 NEW ENG. L. REV. 1, 24 (1998). *See generally* GERALD GUNTHER, LEARNED HAND, THE MAN AND THE JUDGE 27 (1994) (discussing the Porcellian incident Hand experienced). As the reader may have noticed, we do not care much about snooty clubmen these days.

[77] "So the rich today have far less direct command over people—fewer servants, fewer exclusive services—even though they have far more command over things." *The 20th Century*, *supra* note 15, at 10. As Professor Skidelsky states: "Unaccountable power always breeds resentment, especially when it is money power. The Rothschilds were demonized in Europe in much the same way as J.P. Morgan was in the United States—only more so, because they were Jewish." Robert Skidelsky, *Family Values*, N.Y. REV. BOOKS, Dec. 16, 1999, at 24 (reviewing Niall Ferguson's books, THE HOUSE OF ROTHSCHILD: MONEY'S PROPHETS, 1798-1848 (1998) and THE HOUSE OF ROTHSCHILD: THE WORLD BANKER, 1849-1999 (1999)). Today's rich lack power. We seem to be aiming our finite firepower for fighting abuses of power at politicians. If we are concerned about undue concentrations of money, we are being quiet about it these days.

[78] Baker, *supra* note 58, at 6.

[79] *Id.* (quoting CHARLES BEARD & MARY BEARD, THE RISE OF AMERICAN CIVILIZATION (1927)). We are more concerned with the abuse of power relevant to gene patents. *See* Paul Jacobs & Peter G. Gosselin, *Firm Stands Fast on Retaining Genetic Data*, L.A. TIMES, Mar. 8, 2000, at C3.

[80] *See The 20th Century*, *supra* note 15, at 39-40.

we see when we look at rich people is the patronage—the art museums, if you will.[81]

Similarly, we are not afraid of large aggregations of wealth these days because rich people often do not control any specific assets we care about. We used to care about land,[82] but today we care about assets on paper. No one cares what Michael Jordan does with his money. No one cares if a great deal of wealth is concentrated in his hands. The undue concentration of money is not a social concern for most people today. If he owns any unique assets, other than his own human capital, no one has told us about them. No one cares if the choses in action that he owns, the blips on computer screens and the paper behind them, are tied up for more than a life or lives in being, plus 21 years.[83] Indeed, most people likely trust him to use his money wisely. Forgetting Michael Jordan, which admittedly is hard to do,[84] no one cares if the senior securities representing a forty-seven percent interest in the future cash flow of a sub-franchisee of a reorganized roast beef sandwich empire that has 112 rural retail outlets in the southeast of America is owned by a trust that may last for 150 years. We all know that "power tends to corrupt, and absolute power corrupts absolutely,"[85] but the settlors of the trusts in question are basically people without power, as far as we know.

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[81] BEARD & BEARD, *supra* note 79, *quoted in* Baker, *supra* note 58, at 4.

[82] In 1799, six of the ten richest people in England, including all of the top five, were "landowners." In 1999, only one was—the Duke of Westminster. *See* Andy Beckett, *Who Wants to be a Millionaire?* THE GUARDIAN, Sept. 29, 1999, at G2. Several of the cases cited in this Article involve dukes. We used to care about land when land and power were intertwined and people were legally or practically tied to the land. *See* PROPERTY AND POWER IN THE EARLY MIDDLE AGES (Wendy Davis & Paul Fouracre eds., 1995). Now we care about things like the control of the human genome because it is a resource of interest to us, not because of the money involved. *See* Jacobs & Gosselin, *supra* note 79, at C3 (detailing how Celera Genomics denies rumor that they were demanding exclusive commercial rights for distribution of genetic research data gathered with the help of the Human Genome Project).

[83] An opposite of blips is the category of precious goods discussed by Bruce Chatwin: "Ever since the priest bureaucracies of Ancient Egypt . . . the upper classes have put precious objects into depositaries. The extent of the treasure proves symbolically the power of the . . . State." BRUCE CHATWIN, ANATOMY OF RESTLESSNESS 173 (1996).

[84] If the topic is Michael Jordan, *see* DAVID HALBERSTAM, PLAYING FOR KEEPS: MICHAEL JORDAN AND THE WORLD HE MADE (1999); MICHAEL JORDAN, FOR THE LOVE OF THE GAME: MY STORY (Mark Vancil ed., 1999).

[85] Lord Acton, *quoted in The 20th Century*, *supra* note 15, at 44.

Furthermore, because the market changes vastly for stocks and commercial real estate—the typical assets that are held in trust—the public hardly worries about dead hand control of the assets, compared with the value and the equitable interests created by the trust. Companies, favorite brands, and even industries can disappear overnight in the creative destruction of capitalism.[86] It is beginning to appear as if our economy can thrive without regard to who owns the assets as long as the asset owners leave the managers alone. There is an argument that, in *fin de millennium* America, who owns society's assets is irrelevant assuming those assets are put to work. Indeed, maybe we benefit most if passive trustees, often pension trustees, hold society's assets.[87]

We live in a libertarian age.[88] We are in the business of revering the property owner. The property owner knows best. We are back to believing that property owners should have a full bundle of rights.[89] Strangely, we are delighted with centralization of capital but determined to see decentralization of government. Are these trends related? It is chiastic. Today

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[86] *See* JOSEPH A. SCHUMPTER, CAPITALISM, SOCIALISM AND DEMOCRACY, 81-86 (6th ed. 1987). For example, the English press is full of stories about the troubles of Marks & Spencer. *See Face Value: Try, Try Again*, THE ECONOMIST, Apr. 8, 2000, at 13. Yet another example in early 2000 is the entire car rental industry's pricing scheme being under attack by an upstart company. *See* Tim Burt, *Easy to Provide Mercedes in Rental Venture*, Mar. 1, 2000, at 13.

[87] *See* Gregory S. Alexander, *Pensions and Passivity*, 56 LAW AND CONTEMP. PROBS. 111 (1993); Bruce A. Wolk, *Comment: Pensions and Passivity*, 56 LAW AND CONTEMP. PROBS. 111, 141 (1993).

[88] According to Professor Gans, the Rule has been criticized on libertarian grounds. *See* Mitchell M. Gans, *Federal Transfer Taxation and the Role of State Law: Does the Marital Deduction Strike the Proper Balance?* 48 EMORY L. J. 871, 878 n. 30 (1999) (citing RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY, AND THE POWER OF EMINENT DOMAIN (1985)); Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 704-05, 710-13 (1986)).

[89] *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994). The movement to allow "self-spendthrifting" of assets in trusts is second cousin to the movement to repeal the Rule Against Perpetuities, in that both glorify property owners' rights and question perceived public policies against such self-centered arrangements. *See* John E. Sullivan, III, *Gutting the Rule Against Self-Settled Trusts: How the New Delaware Trust Law Competes with Offshore Trusts*, 23 DEL. J. CORP. LAW 423 (1998). We live in a self-centered time. *See* Andrew J. Cherlin, *I'm O.K., You're Selfish*, N.Y. TIMES, Oct. 17, 1999, at 45. Professor Cherlin refers to a time of "[u]tilitarian individualism . . . [of] going West . . . to find your fortune." *Id.*

socialism in all its forms is very much out-of-fashion and capitalism rules.[90] In an era when everyone flies the capitalist flag, being free to do whatever you want with your money[91] comes up trumps. We love our entrepreneurs and are inclined to give them whatever they want, especially when all they are asking for is perpetuities that we do not fear giving them anyway. This all may be cyclical, and the cycles surely are related to the economy. Good times mean we do not care. Bad times mean we bust up those aggregations.

Thus, Professor Francis Fukuyama posits that one of the important ideas of the last forty years is that the political right "did not want communities putting constraints on what people could do with their property . . . ."[92] Doing what you want with your property is, of course, one of the key explanations and justifications for perpetuities.[93] Fukuyama also tells us that the left has no interest in opposing the right on this front. All the left wants, he tells us, is lifestyle freedom.[94] No counterforce

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[90] *See* DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS: THE BATTLE BETWEEN GOVERNMENT AND THE MARKETPLACE THAT IS REMAKING THE MODERN WORLD (1998).

[91] As Russell Baker puts it, "Nowadays, . . . political discourse is limited to exalting material excess and the acquisitive instinct . . . ." Baker, *supra* note 58, at 6. *See also* GEORGE BAKER & GEORGE SMITH, THE NEW FINANCIAL CAPITALISTS (1998). Of course, the statements in the text are exaggerations for emphasis.

[92] Francis Fukuyama, *The Great Disruption, Human Nature and the Reconstitution of Social Order*, THE ATLANTIC MONTHLY, May 1999, at 59. Not all readers of Professor Fukuyama are fans. *See The 20th Century*, *supra* note 15, at 17. In another writing, another Anon is quite specific:

> Like all bourgeois philosophers, the current triumphalist philosopher of capitalism is an Hegelian. In his book, *The End of History and the Last Man* (1992) Fukuyama offers afresh the ruling class's recurrent theory of history as the globalization of capitalism, arguing that with the collapse of the Soviet Bloc the liberal democratic market economy has become the last remaining universal ideology and therefore not an ideology at all but the end of history itself.

TWO HUNDRED PHARAOHS, FIVE BILLION SLAVES.... MANIFESTO 31 (1999). As the anonymous quote indicates, Professor Fukuyama previously wrote of the end of history. *See* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992). As noted, it seems fair to say Professor Fukuyama is a student of global capitalism. This Article is about the end of the Rule. We all must write about the end or the death of something. *See* ARTHUR C. DANTO, AFTER THE END OF ART (1997); Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1996).

[93] *See* Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

[94] *See* Fukuyama, *The Great Disruption*, *supra* note 92, at 59.

opposes property freedoms.

In summary, we are not out to get the rich. We are not particularly worried that they will abuse the power of their money[95] and act irresponsibly. We are not concerned that unearned wealth or wealth in excess of earning is dangerous to society. To the extent that the Rule Against Perpetuities is designed to keep wealth in check[96] or to aid in wealth's fragmentation,[97] it is not seen as serving a central social purpose at this time.

B. We Like Big Capital Pools and Do Not Wish to Break Them Up

We see good in big pools of capital, not harm.[98] We are not concerned about the disappearance of assets into giant pools. We see the economies of scale, and we see the budgets sufficient to bring us new technologies, to help us enter and thrive in the global economy, and to give us national prosperity.[99] More money is better. We recognize, value,[100] and transfer interests in these perpetual commercial pools all the time. These are good friends.

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[95] We once were concerned that the rich would abuse their power. *See* Baker, *supra* note 58, at 6. Baker noted that "[b]ig money's arrogance was eloquently expressed in Henry C. Frick's comment after the bloody crushing of the Homestead steel strike in 1892: 'We had to teach our employees a lesson and we taught them one they will never forget.'" *Id*.

[96] We are concerned, erratically, about excessive executive compensation and the growing gap between the rich and the not rich in our society, but no one seems to be making any Rule Against Perpetuities connections. As to the gap, *see* EDWARD LUTTWAK, TURBO-CAPITALISM: WINNERS AND LOSERS IN THE GLOBAL ECONOMY (1999). The global economy is also considered in John Micklethwait & Adrian Wooldridge, *A Future Perfect: The Challenge and Hidden Promise of Globalisation* (2000).

[97] *See* Heller, *supra* note 4, at 1180.

[98] We are in a time of giant aggregations of capital. *See* Steven Lipin, *Trend Shows No Company is Immune to a Takeover*, WALL ST. J. (Euro. ed.), Nov. 22, 1999, at 7; Steven Syre & Charles Steen, *Tenacious Redstone Savors Biggest Deal*, BOSTON GLOBE, Sept. 8, 1999, at D1 (discussing the announcement on September 7, 1999 of the huge Viacom/CBS merger as reported on September 8, 1999).

[99] *See General Electric, The House that Jack Built*, THE ECONOMIST, Sept. 18, 1999, at 23.

[100] C/R=PV is the equation for the present value of a future income stream, where C=cash to be received, R=rate of return, and PV=present value.

We look at big charities, foundations, pension trusts, and for-profit corporations without concern. They are familiar and make it hard for us to get excited about "bad" perpetuities. We have lost some faith in the idea that these giant charities and corporations can solve all problems or are the be-all-and-the-end-all, but we basically are quite accepting of them, provided there is freedom and room for smaller entities. To the extent they succeed on our behalf, they please us. To the extent they do not, we tend to see them as sad old dinosaurs, headed for some corporations natural history museum, about to be replaced by a successful, inevitably small, start-up corporation.[101] We seem to have no problems with pension funds. Everybody wants a pension.

This good we see in capital pools, in other contexts, colors our ideas about money held in trust.[102] Fractionalizing trust principal at the end of the RAP period does not seem like a particularly good idea to us. Trusts, including perpetual trusts, shelter under this pool umbrella. Paradoxically, we pity those who are attached to large entities, as we dream of our own

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[101] While we are fans of small companies, charities, and magazines, we also remain fans of the idea that fractionalization of capital is bad. *See, e.g.*, Hodel v. Irving, 481 U.S. 704 (1987); Schoenblum, *supra* note 52, at 1191. Perhaps an explanation is that the small company that is focused on a single idea is not fractionalized at all. It is just small for the moment. To be pro-RAP is to be pro-fractionalization. This is so because the RAP forces property out into freehold ownership once every 90 or 100 years, and usually into the hands of a relatively large number of owners. At that point the assets are reduced below the "critical mass" of the trust. There is a bit of primogeniture and feudalism in our rejection of fractionalization. It is submitted that rich people have more children than people of more ordinary means. If this is correct, then the fractionalization problem is exacerbated, although the fractions are pieces of big pies. At least one commentator would have it that we are ill-disposed towards corporations. *See The 20th Century*, *supra* note 15.

A close reading of this Article may reveal sets of parallel views attributed to laypeople: (1) big pools of money are good; big pools of money are bad and (2) we never have been richer; this money could disappear overnight. One is drawn to mental health images by way of explanation. One is that it is schizophrenic. The other is that it is "paranoid optimism," a term used to harmonize observations offered in *The 20th Century*. *Id.* at 2. The author, unnamed in the piece but known to be Bill Emmott, defines paranoid optimism as "the hope that this year's wine will be better than ever, mixed with the fear that it might be ruined by too much sun." *Id.*

[102] It took some remarkable misconduct for the citizens of Hawaii to turn on the Bishop Trust, and even then, the complaint seemed to be with the trustees, not the trust. *See* Bruce D. Collins, *At the Non-Profit Bar*, CORP. LEGAL TIMES, Jan. 6, 1999, at 7.

Internet companies.[103]

At best, we seem to associate big pools of family wealth with charity and benign expenditures. At worst, we do not care. There are always a few exceptions, of course.

C. We See Virtue in Perpetual Existence

Just as we see good in giant capital pools, we see good in perpetuities other than those established for private trust purposes.[104] Like big charities and foundations, big pension trusts and giant for-profit corporations are giant pools that also have perpetual existence. Again, we associate worth with perpetual existence. We seemingly embrace syllogisms of this sort: "The pension trust is my friend. Pension trusts are perpetuities. Ergo, perpetuities are my friend." The huge aggregations of capital in these perpetuities have not interfered with the functioning of our market economy. More specifically, the huge aggregations of capital in essentially perpetual pension trusts have not interfered with the functioning of our market economy.[105] Indeed, one's pension is often one's major financial asset. Therefore, it seems fair to say we live in a world where perpetual (pension) trusts are mighty nice things.

We have grown so accustomed to perpetuities that we do not distinguish between allowing them to exist, in whatever form, and allowing them, or the income streams they produce, to be subjected to dead hand control.

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[103] In the winter of 2000, graduates of Harvard Business School who go to work for large corporations are called "dropouts." The preceding sentence is based on hearsay. The fight for business school graduates is discussed in *America's Talent Battle*, THE ECONOMIST, Mar. 25, 2000, at 75. Things have changed.

[104] The point is made by many commentators, including: ZYGMUNT BAUMAN, INTIMATIONS OF POSTMODERNITY (1991); HARRY C. BOYTE, COMMONWEALTH (1989); JOHN DEWEY, THE PUBLIC AND ITS PROBLEMS (1954); JURGEN HABERMAS, BETWEEN FACTS AND NORMS (William Rehg trans., 1996); HERBERT MARCUSE, ONE-DIMENSIONAL MAN (1991).

[105] If trusts do not interfere with the functioning of the market economy, then we have lost a key argument for controlling them and thus interfering with the settlor's wishes. *See* Alexander, *supra* note 93, at 1189.

We face several issues: (1) Should entities be allowed to exist in perpetuity? (2) Should deceased owners of property, whether they are grantors of legal interests or settlors of trust interests, be allowed to determine how property is managed as investments in perpetuity? (3) Should deceased owners be allowed to determine who gets the income or the use of property in perpetuity?

We have answers that are formed and answers that are inchoate. Those answers are: (1) A variety of entities may exist in perpetuity. (2) Deceased owners may not determine how property is managed in perpetuity except to the extent they can manipulate the rules of charitable trusts and corporations.[106] (3) Now we are wrestling with the third question—can private trusts exist that control the emoluments that flow from investments in perpetuity?

A partial explanation of the current perpetuities-friendly environment is a failure to discriminate among these perpetuity questions. This failure to discriminate may exist because it is only since the 19th century that there has been a meaningful disconnecting of these three issues: (1) allowing an entity to exist in perpetuity outside of the charitable context,[107] (2) allowing dead hand control of property management, and (3) allowing dead hand control of property's perpetual income streams.[108] We understand that many wise investments are made by, and in, entities with perpetual existence and that much that is good comes from the commercial and eleemosynary perpetuities. This Article submits, among other things, that this warm bath of good feelings has sloshed over onto personal trusts, usually trusts for families.

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[106] The truth is that we now understand that dead hand control of management is about the dumbest thing in the world. That means that very few lawyers are drafting such trusts these days. *See In re* Pulitzer's Estate, 249 N.Y.S. 87 (Sur. Ct. 1931), *aff'd mem*., 260 N.Y.S. 975 (1932); Stanton v. Wells Fargo Bank & Union Trust Co., 310 P. 2d 1010 (Cal. Dist. Ct. App. 1957); Matter of Pope, Bowen and Citibank, N.A. N.Y.L.J., Jan. 16, 1996, at 27, col. 1 (unpublished opinion).

[107] *See* FREMONT-SMITH, *supra* note 13, at 16-17, 40-41.

[108] Dead hand control of property management does not concern us, nor does concentration of wealth or dead hand control of the equitable interests.

D. We are Well-Disposed Towards Trusts

To the extent we view the Rule as forbidding the creation of perpetual trusts, we live during a time when the general view is that modern trusts do not do much harm. Indeed, they do some good. At this point, getting excited about how long modern trusts last is somewhat difficult. How has this public sentiment come to be? The answer is actually quite simple.

First, in this day and age, few restraints on the alienation of the trust corpus by the legal titleholder, the trustee, exist. Therefore, no legitimate concern arises that the assets held in trust will fail to reach their highest and best use. Additionally, if the rare trust comes along that does provide a restraint on alienation that interferes with the wise investment of the corpus, other ways of dealing with the problem exist.[109] Indeed, at this point in time, there are arguments that assets held in trust may be better invested, or at least as well-invested, as nontrust assets. Many trustees can be counted on to do a good job of investing, and longer-lasting trusts give investing trustees more leeway to invest well. Furthermore, because of the trust investment reforms of the 1990s, there is a legally mandated mechanism requiring trustees to educate themselves about their duty to invest wisely, and more specifically, according to modern portfolio theory.[110] Individual investors do not have a similar duty, nor does any third party have a duty to inform these individual investors.[111] At least one can hope that a trustee's attorney will tell the trustee of the duty to invest wisely, according to the tenets of modern portfolio theory.

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[109] *See*, *e.g.*, Colonial Trust Company v. Brown, 135 A. 555 (Conn. 1926) (holding a restraint on alienation imposed by trust to continue during the existence of lives of persons in being and during lives of their children invalid and holding that a court may order the sale of real estate, devised in trust, after expiration of trustee's power of sale). The courts will not allow a settlor to interfere with the development of downtown Waterbury.

[110] *See* RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE, § 227-29 [hereinafter RESTATEMENT (THIRD) OF TRUSTS]; UNIF. PRUDENT INVESTOR ACT § 2 (amended 1994), 7B U.L.A. 280 (2000). This act is discussed in John H. Langbein, *The Uniform Prudent Investor Act and the Future of Trust Investing*, 81 IOWA L. REV. 641 (1996). The idea that money held in trust is lazy money, not efficiently invested, is a fading idea. One can find it in SIMES, *supra* note 18, at 60-61.

[111] This point derives from the author's reading of Thomas W. Joo, *Who Watches the Watchers? The Securities Investor Protection Act, Investor Confidence, and the Subsidization of Failure*, 72 S. CAL. L. REV. 1071, 1126 (1999).

One can reasonably argue and hope that money held in perpetual trusts will be invested wisely, with the long view in mind. If a trustee sees the trust fund as an endowment, then hope exists that the trustee will invest it wisely, and "for the ages," which many would see as investing a majority of value in equity with an emphasis on diversification and even venture capital investments. Inherent in thoughtful equity investing and stable pools of capital is social value.[112]

Second, one may rationally argue that assets held in trust in the modern world can grow dramatically. Assets held together swell.[113] As stated, we are inclined to the idea that bigger is better.[114]

Third, family corporations, with a commitment to a region or to employees, often are held in trusts to assure continuity. The *New York Times*, with its commitment to dignity and service, comes easily to mind.[115] Knowing that an institution like the *Times* is held together in part by a trust creates in the minds of many some mild good feeling for trusts.

Fourth, modern trusts give something akin to ownership to the equitable beneficiaries. In other words, modern trust interests are often more like fee ownership than some people realize. This trend is a relatively recent phenomenon. If a beneficiary has the trust income, a five and five power,[116] a broad special testamentary power of appointment, and the right to seek principal for health, education, support, welfare, and

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[112] Perpetual trusts offer the ultimate in time diversification of assets. Time diversification is the thought that "the risk of stocks declines as the investment horizon increases." Kenneth L. Fisher & Meir Statman, *A Behavioral Framework for Time Diversification*, FIN. ANALYSTS J., May-June 1999, at 88. If the trust lasts forever, the trustee can afford to hyperdiversify into equity investments and prosper. And society, thanks to that investment, will prosper, too. For a discussion of the proper annual pay-out from such a trust, *see* Garland, *supra* note 10, at 50.

[113] Two reasons combined assets swell are that large pools can attract superior management and can enter into arrangements to reduce transaction costs.

[114] *See* B. Pawlowski et al., *Evolutionary Fitness: Tall Men Have More Reproductive Success*, 403 NATURE 156 (2000).

[115] *See* TIFFT & JONES, *supra* note 34. We are quick to think of nice rich people like those that run the *Times*, or the Rothschilds. *See* FERGUSON, *supra* note 34.

[116] A five and five power is a nonrecurring, tax-oriented power in a beneficiary to remove the greater of $5,000 or 5% of the trust corpus annually. *See* DOBRIS & STERK, *supra* note 3, at 656-57.

maintenance,[117] we are less concerned that the beneficiary is not the owner of an equitable, or legal, fee simple. Trust law and drafting patterns give beneficiaries (and perhaps, therefore, the law) reasons to remain content to be deprived of a legal fee simple.[118] If one chooses to view many trust beneficiaries as the owner of a quasi-fee equivalent, then an important argument about beneficiary autonomy and personal fulfillment disappears.

To oversimplify, beneficial trust interests today are something like ownership. Accepting this notion explains, in important part, why we are lackadaisical about the potential for harm of perpetual trusts. Pliant trustees, especially in the case of perpetual trusts put into distant jurisdictions, combined with drafting of a sort of which judges of yesteryear could not even conceive, grant beneficiaries tremendous access to trust emoluments. Therefore, they are, in truth, less subject to dead hand control.[119] At that point, with the trustee able to sell the assets at any time and the beneficiaries often able to do much of what they wish with their equitable interests (even though they may be subject to spendthrift restraints[120] on alienation), a legitimate question arises: "What dead hand?" Arguably, and theoretically, the current arrangements are not perpetuities from the

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[117] All the powers enumerated in the text are blessed in section 2041of the Internal Revenue Code. *See* Amy Morris Hess, *The Federal Taxation of Nongeneral Powers of Appointment*, 52 TENN. L. REV. 395 (1985).

[118] The advent of modern portfolio theory for trustee investors and the advent of presumably pliable and distant mutual-fund-associated trustees supports the view expressed in the text. If trust property were going to be tied up in perpetuity in trusts that did not allow for modern investing, then the willingness to tolerate perpetual trusts might vanish, even though alternatives to freeing the property from trust every 90 or 100 years exist that can alleviate burdensome administrative restraints. The tax savings and the protection from creditors that most settlors will be seeking arguably outweigh the financial risk, if not the moral hazard. Modern portfolio theory is discussed in Andrew S. Butler, *Modern Portfolio Theory and Investment Powers of Trustees: The New Zealand Experience*, 7 BOND L. REV 119 (1995).

[119] Someone surely will argue that there is nothing like ownership. True, but as ownership comes more and more to mean passive ownership of a bland index of financial products, it is more difficult to get excited about the difference between owning something outright and being a beneficiary of the modern trust that owns it. There is the risk, not much noticed in current discussions (but real nonetheless), that a distant trustee may become a tyrant and may be unwilling to reduce or terminate a trust when it means the loss of trustee fee income. There are real issues of capture of assets and beneficiaries.

[120] A spendthrift restraint typically prohibits the voluntary or involuntary transfer of the beneficiary's equitable interest in the trust. *See* DOBRIS & STERK, *supra* note 3, at 513-30.

beneficiaries' point of view. Therefore, the legal system's historic interference with the donor's freedom of disposition is perhaps less justified.[121] It is necessary to complain from the viewpoint of creditors or society. Ultimately, society's complaint is reduced to: "We don't like barons and dukes and permanently rich people." Paradoxically, the truth is that we actually do like them at this moment in time.

Fifth, today there is no strong sense of trusts' having a bad effect on beneficiaries. There once was a time when the general consensus was that trusts were bad for beneficiaries, and that trusts made beneficiaries weak or lazy. Today, fewer people talk about the "sissification" of beneficiaries. The only people who do are a few law professors[122] and some old-fashioned trustees. Expressed differently, there is little concern about a moral hazard in a beneficiary's having an equitable interest in assets not earned and, when it is the case, assets creditors cannot reach.[123]

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[121] *See* Alexander, *supra* note 93, at 1264. In addition, trusts that allow access to more than about 3% of the combined income and assets of a trust are unlikely to last in perpetuity. They will be consumed by invasions or by the overproduction of investment return taken in the form of traditional income. Thus, this is a bit of a tempest in a teapot.

[122] *See* Mary Louise Fellows, *Spendthrift Trusts, Roots and Relevance for Twenty-First Century Planning*, 50 REC. ASS'N B. CITY N.Y. 140 (1995). Professor Susan French raises the possibility that money is good for trust beneficiaries. *See* French, *supra* note 4, at 352. Oscar Wilde leaves the question open in Lady Bracknell's allusion to the topic: "Her unhappy father is, I am glad to say, under the impression that she is attending a more than usually lengthy lecture by the University Extension Scheme on the Influence of a permanent income on Thought." Oscar Wilde, *The Importance of Being Earnest* (1895), *reprinted in* THE OXFORD AUTHORS, OSCAR WILDE 489 (Isobel Murray ed., 1989).

[123] For a discussion of moral hazard, generally and in another context, *see* Joo, *supra* note 111, at 1126, 1129-35. We live in a world where concern about moral hazard is not particularly high. We save hedge funds and savings and loans. As to hedge funds, *see* ROGER LOWENSTEIN, WHEN GENIUS FAILED: THE RISE AND FALL OF LONG TERM CAPITAL MANAGEMENT (2000). As to savings and loans, *see* LAWRENCE J. WHITE, THE SAVINGS AND LOAN DEBACLE: PUBLIC POLICY LESSONS FOR BANK AND THRIFT REGULATION (1990). One of the arguments against all trusts, including perpetual ones, is that they offer a safety net for beneficiaries that creates a moral hazard as to their conduct. If we are less open to that attack on trusts, then trusts look less bad to us. And if trusts in general look less bad to us, then so do perpetual trusts. Work is an important component of a healthy life. The concern has always been that the trust beneficiary denied the opportunity or need to work will become a waste. One argument for allowing a settlor to so undermine her children and grandchildren is that she knows them best and has their personalities in mind and their interests at heart. If she still insists on undermining them then she likely knows what she is doing and must have internalized the moral hazard. It is hard to make this argument as to unborn generations in perpetuity. At that point, the balance is gone. *See* HOBHOUSE, *supra*

The traditional view is that the Rule is a complex, but sensible, compromise between the donor's freedom to donate and dominate as the donor wishes and the donee's freedom to have untrammeled access to capital.[124] Given the new millennium world of compliant trustees and broad powers of invasion in trustees and even beneficiaries, there is room to argue that the modern trust beneficiary's equitable interest is akin to outright ownership.[125] Given this conclusion, there is room to argue that no dead hand dilemma exists. To hold such an interest is to be an autonomous person and not a weak and constrained trust beneficiary.[126] In further support of this line of reasoning, Professor Susan French has pointed out that we cannot be so sure that a nice family trust is bad for people or for society.[127]

To conclude this subsection, with assets held in trust being traded every day and with modern trusts, particularly those expected to last a long time, in the same vein as fee ownership, property is free to migrate to its highest and best use. Thus, the common law's traditional antipathy toward restraints on alienation is not buttressed as meaningfully as it once was by the Rule Against Perpetuities.[128] We do not seem to care much about the idea that it is good for property to be owned outright at least once every 100 years, just as it is good to reboot your computer every so often,[129] or, if you live in the desert, to take your dog to the High Sierra to kill its fleas once every winter. The thought that it is good for society if trusts end every 100 years to kill that which is wrong with them is not weighty these

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note 40.

A lesser argument is that we live in a time when people become adults more slowly than ever, and therefore need the protection of a trust for a longer period of time. This justification for property in trust is one more modest reason to be disposed toward trusts.

[124] *See* Alexander, *supra* note 93.

[125] *See* Dobris, *supra* note 50.

[126] *See* Alexander, *supra* note 93, at 1208; Fellows, *supra* note 122. Simply stated, a trust designed to stick a finger in Uncle Sam's eye should not be ended because of a sentimental concern about the "sissification" of beneficiaries *if* the beneficiaries' equities approach fee ownership.

[127] French, *supra* note 4, at 352.

[128] *See generally* Epstein, *Past and Future*, *supra* note 88 (claiming that the common law Rule Against Perpetuities is no longer needed in contemporary society).

[129] The need to reboot one's computer is discussed in Tom Foremski & Christopher Price, *Software & Computer Services, Microsoft Stresses Value Against Rivals, Gates Heralds Windows 2000*, FIN. TIMES, Feb. 18, 2000.

days. We do not believe in "Brigadoon."[130] The current attitude is that there is nothing wrong with trusts.

E. Fighting About Perpetual Trusts May Be a Tempest in a Teapot

We may well have concluded that whether trusts are allowed to last 90 or 100 years, or forever, is not a matter of great import—that it is all a tempest in a teapot. Even though interest in perpetual trusts is high, one wonders how many trusts are created, and if the effort to beat the dynastically minded at their own game is worthwhile. One also wonders how long these trusts actually will last. The point is, why bother fussing?

It may well be that so few people will create, or want to create, perpetual private trusts that whether they exist simply does not matter, especially in a world full of perpetual pension trusts, foundations, and corporations.

Or, it may well be that whether or not we allow such trusts does not make much difference either way.

Scholars can argue that the true social purpose of the Rule is to rein in the rich, or to mix animal restraint metaphors, to put a collar on them. However, they also can argue that we have come to see that the RAP really does not affect rich folks much at all. At that point it becomes more efficient simply to drop the Rule because it has become a paper tiger. That is, if the Rule does not do its job of keeping the rich off balance, why bother? We are less interested these days in sticking pins in rich folks and, to the extent we feel the need, we do so with antitrust and criminal prosecutions, not by tearing down their trust structures.[131]

Moreover, the RAP may be a tempest in a teapot to the extent that many rich folks are creating perpetual instruments through foundations and business corporations. These entities are sanctioned perpetuities, and the

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[130] *See* ABE LAUFFE, BROADWAY'S GREATEST MUSICALS 101-05 (rev. ed. 1977) (discussing *Brigadoon*, a musical by Alan Jay Lerner and Frederick Lowe about a town that comes to life every 100 years).

[131] And not by taxing them, either. A rule designed to control the conduct of the landed aristocracy seems unnecessary to many today.

rich seem to know how to use them over the generations for their own profit.[132] So, maybe the barn is empty and we should address other entities to the modest extent we are levelers.

Why not let rich people make messes, especially if the trustees are continuing to invest rationally in society's assets? If they disadvantage their offspring, this just demonstrates survival of the fittest. Why not let the devil take the hindmost? Why should we care so long as the money is invested properly from a social viewpoint? If there is no stealing, no tax evasion, and the beneficiaries are kept off the welfare rolls, what is the harm? All trusts inevitably involve laxity, moral hazard, and externalities.

F. The Hunger for Money Outweighs Concerns About Perpetual Trusts

Another reason for the perception that perpetuities are less harmful is that money hunger is very strong these days. The standard perception is that trusts are devices to conserve wealth and save taxes. To make a joke of it, the only problem with a trust today is that the trust is not big enough.

The point is, more people want more money than ever before. The new millennium finds the nation obsessed by money.[133] And even you, dear reader, would be happy to have some. Many readers of this Article, especially if their characters and situations seem set and secure, would be delighted to have extra, unearned money. On a sliding scale, they likely

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[132] The author has always believed that operating a private foundation or public charity in a completely above-the-board manner while still deriving great advantage from it is very easy. Without creating a manual for such activity, consider these ideas: one can buy necessary, quality products at a fair price from friends and relatives; one can make charitable distributions to favorite charities of one's friends; one can give their children summer jobs or put them on the board; and one can schedule board meetings in resorts. For a discussion of some of the property aspects of foundations in a specific context, *see* Evelyn A. Lewis, *When Entrepreneurs of Commercial Nonprofits Divorce: Is It Anybody's Business? A Perspective on Individual Property Rights in Nonprofits*, 73 N.C.L. REV. 1761 (1995).

[133] Our love of money is nothing new. "I know of no country, indeed, where the love of money has taken stronger hold on the affections of . . . [people] . . . ." ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, BOOK ONE 42 (Random House 1972) (1835). What has changed is the 18th century American's "nearly universal disdain for aristocracy and any non-republican show of wealth." WILLIAM W. BEACH, THE CASE FOR REPEALING THE ESTATE TAX 3 (1996).

would prefer to have money (1) outright or (2) in a very flexible trust with the reader as trustee. They would even derive pleasure from a more traditional, and perhaps even a stingy, trust. Most would not fear the influence of the money or the trust on their lives or personalities. They might, however, be concerned about the effect on their offspring.[134] In other words, you probably do not see any harm in the money or the trust beneficiary status for you. As we know, dear reader, you are not materialistic or greedy.[135]

G. The General Public Does Not See the Perpetuities Issue

The harm is so esoteric that seeing it or caring about it is difficult.[136] Perpetuities are a silent killer, if you will. In discussing this Article with laypeople, one finds little comprehension of why a Rule Against Perpetuities exists, or why this Article was written. Hating the perpetuity is a sophisticated and cerebral emotion, one akin to the feeling of the social leveler (a rare bird these days). The body politic is likely to hate only a rich cad or splasher who splashes on us in ways we cannot appreciate. As Professors Ackerman and Alstott have stated, "The general public has no patience for a policy debate that speaks a technocratic language accessible only to people with advanced degrees."[137] As Professor Schama has related, we have "to make it clear to people just what they were fighting for."[138] If people are going to care about perpetuities, the idea must be explained to them with stories of excess and of baronies that deeply offend.[139] There must be a clear public policy justification, which arguably

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[134] *See* Silverman, *supra* note 62, at 1.

[135] An "anonymous" author has noted that "[M]any intellectuals in the West still consider capitalism to be immoral: too devoted to a vulgar worship of money, too dependent on greed, too deeply founded in adversarial individualism." *The 20th Century*, *supra* note 15, at 9.

[136] A successful, bright, and well-educated lawyer friend asked once, "What are you teaching today?" to which I answered, "The Rule Against Perpetuities." He replied, "What's that?"

[137] BRUCE A. ACKERMAN & ANNE L. ALSTOTT, THE STAKEHOLDER SOCIETY 188 (1999).

[138] Schama, *supra* note 55.

[139] *See* Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255, 263-69 (1994). *See generally* Kevin R. Johnson, *"Melting Pot" or "Ring of Fire"?: Assimilation and the Mexican-American Experience*, 85 CALIF. L. REV. 1259 (1997), 10 LA RAZA L.J. 173 (1998) (discussing the limitations on assimilation for Mexicans entering United States

is missing in this day and age.

H. The Rule is a Land-Based Relic in a World of Financial Assets

At heart, the Rule is about land,[140] and we are no longer land-minded in the areas of wealth or trusts.[141] We only care about land when an issue of land use is before the court. Today, wealth lies in securities. And we cannot become very excited about whether or not some shares get tied up forever. The corporate assets likely will reach their highest and best use even if owned by the trustee of a perpetual trust. Additionally, to the extent land fails to reach its highest development use, a meaningful segment of the population is delighted.[142] When we are faced with land use issues, we still care about perpetuities, but we virtually never think about land in the context of perpetual trusts. Perpetual equitable servitudes affecting land use get short shrift in the courtroom. When that happens, a close reading of the case shows meaningful judicial hostility to the perpetuity.[143] If a trust is set aside because there is a violation of the Rule, there is a musty odor in the air when the judge strikes down the perpetuity.[144] There is no genuine judicial, or indeed social, concern manifest. It is just a case in which another lawyer blew it and got caught out after dark.

Why do we still care about perpetuities affecting land but not trusts in perpetuity (probably even trusts of land)? Why does no one seem to want covenants and equitable servitudes to last forever? The likely difference is that trustees of perpetual trusts can sell the property so the

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society).

[140] As Lady Bracknell declared, "What between the duties expected of one during one's lifetime, and the duties exacted from one after one's death, land has ceased to be either a profit or a pleasure. It gives one position, and prevents one from keeping it up. That's all that can be said about land." Wilde, *supra* note 124, at 493. For a recent discussion of English land law in an American context, *see* David A. Thomas, *Anglo-American Land Law: Diverging Developments From a Shared History*, 34 REAL PROP. PROB. & TR. J. 143 (1999).

[141] Some states have dealt with the residual concern about land by repealing the Rule only as it applies to trusts of personalty. *See, e.g.*, 765 ILL. COMP. STAT. ch. 305/4 (2000).

[142] *See generally* John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816 (1994) (stating that property rules often are pro-development, arguably to the detriment of conservation and environmental interests).

[143] *See* Eagle Enter., Inc. v. Gross, 349 N.E.2d 816 (N.Y. 1976).

[144] *See* Estate of Coates, 652 A.2d 331 (Pa. Super. Ct. 1994).

legal title, or the use of the property, is not tied up forever. Only the equitable title in the trust corpus exists in perpetuity. Thus, the assets can migrate to their highest and best use,[145] except to the extent that trustees are too conservative as investors. The bugaboo of the conservative trustee investor is losing power in the new, mandatory world of trustee investors who must hyperdiversify, measure risk, and take risk as appropriate.[146] Our willingness to undo perpetuities affecting land use and our disinterest in perpetuities affecting trust interests suggest that we know perpetual harm when we see it, and we zap it.[147] This distinction and disinterest further suggest that we might know what we are doing when some of us seem willing to tolerate perpetual trusts.

When land is important (or when anything becomes as important as land once was), we will not tolerate dead hand control. Simply stated, the *Colonial Trust* case[148] tells us we are not going to let some dead guy mess up the face of downtown Waterbury, Connecticut. Similarly, if one guy tried to put all of Alaska into a perpetual trust, then you would hear some howls. We also are protected to the extent that most meaningful land transactions involve bank financing, and banks possibly will not do business with perpetual trusts in the foreseeable future. Often banks want more than the real estate as security, and trustees are unlikely to sign loans in their individual capacity. Also, foreign trusts are likely to be unattractive to the typical loan officer.[149] So, the innate conservatism of the lending officer may protect society for a while.

Financial securities do matter, and two points are relevant. First, in our current global economy, there is no equivalent of land as it mattered in England in an earlier time. Second, no one has devised a method for, or is

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[145] *See* French, *supra* note 4, at 352.

[146] *See id.* at 349 (discussing the pre-Restatement view of trustee investors).

[147] One can argue that we do not care about land in perpetual trusts because we care less about land as part of our disinterest in civil society. The prosperous among us live inside land moats and do not care what is done to land outside our gated communities. The waning interest in civil society is mirrored in a waning interest in public land use.

[148] *See Colonial Trust,* 135 A. 555. *See generally* French, *supra* note 4, at 348.

[149] Local jurisdiction over the trust may be nonexistent when there is no property within, or trustee contacts with, the jurisdiction and when the beneficiaries have no way of influencing the trustee. However, many offshore trustees might well respond to contempt proceedings against a beneficiary who has the trustee's ear. A local court could not directly, or likely even indirectly, affect a trustee's administration or the trust's terms without the cooperation of the jurisdiction in which the trust is located.

currently interested in, tying up securities in perpetuity.[150] How could you redeem stock to affect stock prices, merge, acquire bank loans, hire MBAs with stock options, or engage in "creative destruction" if the stock was tied up in knots?[151]

An important part of the social policy behind the Rule was to make land and other assets more mobile.[152] We live in a world where much of America's wealth is incredibly mobile. Much of that wealth is held in perpetual pension trusts where those financial assets retain their mobility. Capital mobility, formerly land mobility, fails as an explanation for the Rule because wealth no longer equates to land and because today's wealth is very mobile[153] and often is successfully held in perpetual trusts.

Historically, capital mobility has been constrained by the conservative investment policies of trustees.[154] This drag on mobility became an argument for forcing assets out of trust every 90 or 100 years. The argument that trustees invest too conservatively for society's good, necessitating that assets are owned outright every hundred years or so, is undone by the new prudent investor rule.[155] Now trustees can invest in almost anything and may end up as better investors than their fee-owning neighbors.[156]

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[150] We can be certain that if one person controlled the Internet, or the World Wide Web, and put it into a perpetual trust in Alaska, something would be done.

[151] *See In re Pulitzer's Estate*, 249 N.Y.S. 87.

[152] *See* Alexander, *supra* note 93.

[153] *See* THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999) (emphasizing the incredible mobility of today's investment assets). Capital mobility is cited as a partial explanation for the rise of the so-called "International Trust." *See id.*; Jeffrey A. Schoenblum, *Preface, The Rise of the International Trust*, 32 VAND. J. TRANSNAT'L LAW 519, 520 (1999) (including as explanations "[t]he rise of the geographically extended family . . . [t]he rise of a universalist culture . . . [t]he rise of the offshore jurisdiction . . . [e]nhanced national and state regulatory regimes . . . [and] [t]he clash of legal regimes").

[154] *See* Gordon, *supra* note 44.

[155] *See* UNIF. PRUDENT INVESTOR ACT, *supra* note 110. *See generally* Langbein, *supra* note 110 (summarizing the Uniform Prudent Investor Act).

[156] *See* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 110; UNIF. PRUDENT INVESTOR ACT, *supra* note 110; BEVIS LONGSTRETH, MODERN INVESTMENT MANAGEMENT AND THE PRUDENT MAN RULE (1986); Halbach, *supra* note 3, at 531. CalPERS, the California public pension system, is investing in hedge funds. *See Hedge Funds Galore*, FIN. NEWS, Jan. 3, 2000. Yale invests in everything. *See* James M. Clash, *By Invitation Only*, FORBES, Apr. 17, 2000, at 446 (recounting Yale investments in so-called "private equity funds" which out-hedge-fund hedge funds). Were trustee investment patterns to become socially

To conclude this subsection, let us note that land is less economically important today, and that is part of the disinterest in RAP.[157] What is important economically, choses in action, currently are not being enmeshed in perpetual restraints on alienation. Finally, to the extent that we do care about land, we have ways of dealing with perpetuity perpetrators.

I. Wealth Held in Corporate Form Does Not Require a Perpetuities Restraint

The previous subsection suggested that we are not concerned with who owns our choses in action, our corporate securities. We may be flirting with the idea that who owns corporate stock is irrelevant for purposes of efficiency and growth, because the managers really have the opportunity to manage the corporate assets and are, in some vague sense, the actual owners,[158] or close enough for capital efficiency and protection purposes. Therefore, we do not care if the shares are held by a trustee, who can always sell them, or if the owner of the income stream, the equitable beneficiary, is far removed from ownership. In truth, "all" the shareowners are far removed from ownership.[159]

J. Trusts No Longer Interfere with the Functioning of the Credit Economy

The modest argument that trusts can be bad for commercial creditors (and that perpetual trusts would be even worse), to the extent trusts are spendthrift, has lost its power. Perpetuities had the weak effect of protecting creditors indirectly because, even if the trust was a spendthrift trust, the underlying assets eventually were owned outright once every 100

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unwholesome, we might prefer a return to the RAP, forcing assets into fee ownership every 100 years.

[157] Professor Bruce Wolk, Professor of Law at the University of California, Davis, School of Law, has suggested to the author in conversation that the lack of interest in land as a public good suggests a lack of interest in public and civic space, which is symptomatic of the deterioration of civil society.

[158] This view can be traced back to BERLE & MEANS, *supra* note 15.

[159] Professor Alexander sees more import in the ownership of an equitable trust interest than is demonstrated in the text. *See* Alexander, *supra* note 93. Exploring such a thought is beyond the scope of this Article but is worthy of note and instructive in this discussion.

years and then creditors could feast. In other words, the assets came to life once every 100 years like Brigadoon. We do not seem to care much about creditors these days socially,[160] and so the weak pro-RAP argument that it is good for creditors is weightless. Moreover, it can be argued that lenders and creditors do not care about spendthrift trusts because they have such dramatic computer power to determine a borrower's assets and to collect their debts.[161] Lenders and creditors also have the power to demand interest sufficient to cover their computer-calculable bad debt losses. So the cry of creditors' rights is a hollow one. The tort creditors (also known as "creditors of adhesion" or involuntary creditors) are the ones who care. They basically are protected, to the extent they are, by the tortfeasors' insurance, if any,[162] and the failure on the part of the settlor to make the trust spendthrift. Continuing to restrict the life of trusts to the RAP period will do little or nothing to enhance the functioning of our credit economy.

K. The Support that the Rule Gives to Civil Society is of No Interest These Days

Lastly, we live in an era in which the commitment to a so-called "civil society"[163] and the interest in public life is at a low point. One of the

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[160] The one group who does care is credit card companies, who overextend credit to spendthrifts and want Congress to make it harder to shed credit card debt in bankruptcy. *See* Robert Reno, *Free Market Solved Bankruptcy Crisis*, PLAIN DEALER, Mar. 10, 2000, at 9B. Professor Lischer likely would disagree. *See generally* Henry J. Lischer, *Domestic Asset Protection Trusts: Pallbearers to Liability?*, 35 REAL PROP. PROB. & TR. J. 479 (2000) (disapproving of debtors' ability to evade creditors through asset protection trusts).

[161] *See* Tina Kelley, *When Collection Software Runs, Debtors Can't Hide*, N.Y. TIMES, May 6, 1999, at G1. The credit card companies seem to feel differently. *See* Reno, *supra* note 160. Ex-spouses and children are another group who may be greatly affected.

[162] Society could require spendthrift trustees to buy liability insurance for beneficiaries, but is not likely to do so.

[163] In a sentence, "civil society" comprises citizens, in their own communities, solving problems. *See* Pam Solo, *Beyond Theory: Civil Society in Action*, BROOKINGS REV., Fall 1997, at 8. That we do not care as much as we should about civil society is frequently discussed. *See generally* STEPHEN L. CARTER, CIVILITY: MANNERS, MORALS, AND THE ETIQUETTE OF DEMOCRACY (1998) (examining ways incivility is reflected in our culture and looking for a way to change it); EDWARD SHILS, THE VIRTUE OF CIVILITY, SELECTED ESSAYS ON LIBERALISM, TRADITION, AND CIVIL SOCIETY, (Steven Crosby ed., 1997) (arguing that civility is a societal necessity). David Starkey, writing of Anthony Giddens and civic culture, wrote: "Now we are consumers, not citizens. And we primarily look to business, not government." David Starkey, *The LSE, Blair's College Cabinet*, THE SUNDAY

most powerful arguments against perpetuities is that they undermine democracy and, thus, civil society and public life. Given our apparent current disinterest in such things, one of the most powerful standard arguments against perpetual arrangements is not heard as clearly as it once was. Commentator Russell Baker recently stated, "[N]owadays . . . political discourse is limited to exalting material excess and the acquisitive instinct."[164] We are in a moment in time when we do not care about such things as civic virtue. To the extent perpetual trusts interfere with civil, or civic, society, we are not too interested. This is discussed more in section C of this paper.

To conclude this section, we no longer care as much about the anti-perpetuities bogies of restraints on alienation and long duration, poor investing of trust assets, or the "sissification" of trust beneficiaries; therefore, we do not see the harm in perpetuities we once saw. Perhaps the RAP has done such a good job in dealing with those problems that we have lost track of the evils. Perpetuities, in the abstract, frighten only a few law professors,[165] a few left-of-centrists, and the law students who must learn the Rule.[166] Although some law professors see in perpetuities a dog that, at best, has not bitten in a while, laypeople see a good dog, or no dog at all. We are at a point in time when trusts are on a pedestal, and the idea of allowing a trust to last longer looks like an encore at a good concert, not a dreadful societal error. Trusts are being sold everywhere as good, no one is selling perpetuities as bad, and all kinds of *petite* and *haute bourgeois* are pretending they are, or soon will be, rich. We continue to believe that if we are good and work hard, then we will become rich. The belief conjures Horatio Alger all over again[167] and explains why the people of California

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TIMES, Mar. 21, 1999 (News Review), at 7.

[164] Baker, *supra* note 58, at 6. In diction not often seen these days, Baker refers to "Big money's arrogance . . . ." *Id*. Bill Gates is not arrogant in the eyes of many people. Just as we are sure the Queen would like us if she knew us, we are sure Bill would, too.

[165] Professor Mark Ascher puts forth his arguments against aggregations of wealth in Mark L. Ascher, *Curtailing Inherited Wealth*, 89 MICH. L. REV. 69 (1990). According to Professor Angela M. Vallario, the abolition of the Rule in Maryland was accomplished without informing the academic community. *See* Vallario, *supra* note 6, at 160 n.194.

[166] Perpetuities repeal is referred to neutrally and under the heading "Modernization of Trust Law" in Marc S. Bekerman & Gerry W. Beyer, *Trusts and Estates Practice into the Next Millennium,* PROB. & PROP., Jan./Feb. 1999, at 7, 9-10. *See also* Kent A. Gernander, *Remembering Justice Blackmun*, *at* http://www2.mnbar.org/benchandbar/2000/jul00/prezpage_7-00.htm (last visited Oct. 29, 2000).

[167] *See* GARY SCHARNHORST, HORATIO ALGER, JR. (1980).

overturned the state death tax by popular referendum.[168] We do not hate the rich, we are not social levelers, and therefore we cannot support the RAP. People also often pretend that the rich are just like them and would surely like them if they knew them. No one remembers the Czar. We have lost interest in the Brigadoon argument—that owning assets outright once every hundred years is good for society in the following ways: (1) a family will be free of the crippling, weakening, "sissifying" effects of trusts; (2) the property will be free of restraints on alienation; and (3) if the trusts are spendthrift then creditors will be getting a shot at some assets.

So, we have seen the primary reasons why society is unafraid of perpetual trusts, and we have spoken briefly of whether society should be afraid or not. Obviously, this era of good feeling is cyclical, and the day will come when the rich will be unloved. Many implications may follow from that change someday.

III. THERE IS INCREASED PRESSURE TO ALLOW PERPETUAL TRUSTS

Let us turn to the idea that the need, or at least the hunger, for perpetuities (perpetual or very long-term trusts) is greater than in the past. This Article takes the position that the wealthy population's perception of the increased need for trusts,[169] and for perpetual trusts in particular, has contributed to these recent changes in the law. In other words, the pressure to allow perpetual trusts is greater than usual, and the debate is asymmetrical.[170]

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[168] *See* Michael J. Graetz, *To Praise the Estate Tax, Not to Bury It*, 93 YALE L.J. 259, 285 n.150 (1983).

[169] David Schaengold, a New York City CPA active in the trusts and estates field and law reform, has suggested, in a private communication, that individuals of a given level of wealth who formerly had one trust, now have five, because of their perceived need for trusts. Internal Revenue Service figures suggest that the number of trust income tax returns (1041s) is increasing annually. *See* Frank Zaffino, *Projections of Returns to Be Filed in Calendar Years 1999-2005*, 1998-1999 IRS STATISTICS OF INCOME BULLETIN, PUBLICATION 184. Computer technology and techniques have reduced the costs of administering trusts, especially when discretion need not be exercised and little hand-holding is required. And there are always new uses for trusts in our era of trustification.

[170] The statement that there is a perceived increase in a "need" for perpetual trusts is based on subjective judgment, observation, and decades of working in the trust field. According to Mr. Schaengold, there seems little doubt that the use of trusts is increasing.

Obviously, the feeling that there is a need for perpetual trusts by an articulate and prosperous segment of the community increases the pressure to allow trusts, especially if resistance is low. Let us consider the reasons for the perceived need for perpetuities. Why is demand up?

A. People are Obsessed with Money

The first reason for the increased demand for perpetuities is that we are more interested in money than we have been in a long time. We are money-obsessed. People who care about money feel they need more of it.[171] Perpetual trusts offer a way to lever assets by way of tax advantage and concentration, and they offer a way to protect capital assets "forever."[172]

Why the obsession with money? There are several explanations. The first is the "Mean Streets" explanation. In a tough world, people feel they need all the money they can lay their hands on. At first, this idea may seem absurd. In the fall of 1999, when these words were first written, the economy was in splendid shape.[173] However, there are clouds on the

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See Schaengold, *supra* note 169. IRS figures support his perception. *See* Zaffino, *supra* note 172 (indicating that 3,406,000 fiduciary income tax returns on Form 1041 are expected to have been filed in 1999. Form 1041 filings are expected to go up by 1.28 % a year through 2005.).

[171] "I know of no country, indeed, where the love of money has taken stronger hold on the affections of . . . [people] . . . ." TOCQUEVILLE, *supra* note 133. But, money hunger does not necessarily induce extra risk taking. Indeed, risk aversion when wealth is achieved makes rich settlors more interested in sure returns obtained from tax advantage. *See* Dobris, *supra* note 14, at 279-80, 286-88. This is, paradoxically, a risk-averse era, and all anchors to windward are welcome.

[172] Putting assets into a trust "forever" does not doom them to underperformance. Trust law reforms of the 1990s freed virtually all United States trustees to invest in a modern fashion. *See* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 110; UNIF. PRUDENT INVESTOR ACT, *supra* note 110. *See also* Langbein, *supra* note 110 (discussing in detail the motivations and effects of the reforms under the Uniform Prudent Investor Act).

[173] On October 1, 1999, the *New York Times* carried a story of people moving from welfare to the work rolls, arguably vindicating the discredited "trickle-down effect" of the 1980s. *See* Elisabeth Bumiller, *A Night for Giuliani to Pay Tribute to the Reagan Legacy*, N.Y. TIMES, Oct. 1, 1999, at B7. As the cartoon character in *The New Yorker* stated, "See, Jimmy? If they give a big tax cut to the wealthy, those guys'll feel good and have us come fix their roof and stuff." Weber, THE NEW YORKER, Sept. 6, 1999, at 27.

horizon. Financially, these are frightening and volatile times.[174] There is a hunger for protection, for insulation from the cruel world and isolation from its problems.

Indeed, we might call this the age of insulation and isolation. Many people want to be insulated from society and isolated from its problems. There is nothing like money for insulation and isolation, and one of the many things money buys is access to skilled legal advice. Skilled legal technicians have always worked in equity. Today, they produce the equitable servitudes that make a gated community work[175] and the trust terms that make a variety of clever trusts, including the trusts we are talking about, work. Forgetting what is socially "good" or "best,"[176] these equitable interests are so obviously good for isolating and insulating the prosperati that the only negative aspect of the devices is that being isolated and insulated is bad—bad for the isolated and bad for society. Equitable interests are insulating the prosperous folks as part of the assault on civil society.[177]

Just what is to fear out there? Let us catalog a few of the monsters in the closet.

Wealth seems at risk. Much of the new wealth is recently captured and seems unlikely. It often is (or should be) hard to have faith in the possibility of accumulating more wealth that will not evaporate. At that point there is a strong desire to secure, conserve, and maximize wealth.[178]

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[174] "[C]apitalism has proved worryingly unstable." *The 20th Century*, *supra* note 15, at 12. And worried people save more. *See id.* at 17. "[I]n the mid-1990s, when richer people have been scared that their luck was about to turn," repealing the Rule was in vogue. *Id.* at 27. If rich folks are scared, it is because they perceive a risk to their situation. Perceptions of risk in finance are discussed by many, including PETER L. BERNSTEIN, AGAINST THE GODS: THE REMARKABLE STORY OF RISK 178 (1996) [hereinafter *Against the Gods*].

[175] *See* Nahrstedt v. Lakeside Vill. Condo. Ass'n., 878 P.2d 1275 (Cal. 1994).

[176] Professor Lischer discusses this fact in quoting a highly visible asset protection lawyer. *See* Lischer, *supra* note 160.

[177] For general discussions of civil society, *see* CARTER, *supra* note 163.

[178] "'It requires a great deal of boldness, and great deal of caution, to make a great fortune; and when you have got it, it requires 10 times as much wit to keep it.' So said Nathan Mayer Rothschild, the leading figure of the Rothschild banking dynasty, at a dinner party in 1834." John Gapper, *Dynasty's New Direction*, FIN. TIMES, Oct. 28, 1996, at 18 (quoting DAVID KYNASTON, THE CITY OF LONDON: A WORLD OF ITS OWN (Chatto &

It seems impermanent. It is not like land, or even a brick and mortar manufacturing business with lots of machines making things. Prospect theory tells us that the fear of loss is very powerful in making financial decisions.[179] If I have grown rich from one piece of software, or a plan sketched on a napkin to offer free Internet service and make money on commissions from the telephone company,[180] or a financial spasm that led me to pay a few thousand dollars for a web notion, then I may doubt whether I can continue to earn a living in that way or transfer my vision or my skills to my offspring.[181] All I have is money, at best, or stock in a new company. I may want to protect the asset (or at least some of it) more than the nineteenth-century brewer or manufacturer who could imagine the real estate, the machinery,[182] and the franchise passing to descendants who could be trained to continue the business. Physical capital is devalued, and therefore the hunger for perpetuities is stronger. People want to safeguard their prosperity.

Wealth based on knowledge seems to some more ephemeral than wealth based on natural resources or bricks and mortar.[183] Human capital is less secure in its value than physical capital once was. This feature is especially true if the value depends on the ability of one mind to create

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Windus 1994).

[179] There is a curious chiastic relationship between willingness to take risks to earn money and risk aversion once the money is earned. Arguably, this explains the desire to protect oneself with a trust, and partly explains the desire to protect one's descendants with a perpetual trust. *See* Dobris, *supra* note 14.

[180] *See* Caroline Daniel, *Hybrid Freeserve Seeks Pathway to the Internet's Riches*, FIN. TIMES, July 12, 1999, at 20 (entailing how Freeserve receives commissions from telephone company for encouraging toll-paid use).

[181] Jack Ayer, Professor of Law at the University of California, Davis, School of Law, has commented that new wealth that falls out of the sky on you must appear impermanent to thoughtful people.

[182] Peter L. Bernstein, the eminent finance commentator, has called these assets "kickables" in his private newsletter. *See* Robert H. Jeffrey, *Reflections on Portfolio Management After 25 Years*, ECON. AND PORTFOLIO STRATEGY (Peter L. Bernstein, Inc., New York, N.Y.), Nov. 1. 1999, at 1. Bernstein is also the author of *Against the Gods*, *supra* note 174.

[183] Today's knowledge economy is discussed in W. Chan Kim & Renee Mauborgne, *Strategy, Value, Innovation and the Knowledge Economy*, 40 SLOAN MGMT. REV. 1, 41 (1999).

wealth. That person will grow old and die someday.[184] That person may be "washed up" at an early age.

As stated, today's wealth seems impermanent. New wealth often does. This means one must make hay while the sun shines.[185] No participant in the new economy is any different than a sports star. That means make money fast and tuck it away. Some investors do not have sincere faith in the new economy[186] and thus become poseurs. They become the equivalent of arms dealers at that point. If you trust no one you are more ready to play trust games of various sorts. This wealth is all so ephemeral that we have to salt it away. Once upon a time you could trust land, but not today's wealth.

Paradoxically, the new wealth being captured is large in amount. Professors Ackerman and Alstott tell us that a small part of the population is capturing more and more of the wealth.[187] So, perpetual trusts capture not only wealth, but also relative advantage. Once you capture wealth and relative advantage you want to keep them. The best way to keep them may well be in a perpetual trust.

Fortunes are being made and the fortunate want to secure them. The more ordinary population in our society, the middle-class, who are really upper-middle class, want to secure their "fortunes" too.[188] The new economy is so new that many people do not believe its advantages are transferable.[189] Only the cash is transferable, and so we are interested not

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[184] Society's social capital is volatile, too. *See* Fukuyama, *The Great Disruption*, *supra* note 92, at 59. Thurow, *supra* note 54. Thurow, who sees this era as the third industrial revolution, might well disagree. Professor Gregory Alexander also has noted that trust law changes at times of industrial revolution as people scramble to protect their families. Professor Alexander focuses on changes in spendthrift trust doctrine at the end of the 19th century during the second industrial revolution. *See* Alexander, *supra* note 93.

[185] To stick with the "weather" imagery in the text, some settlors fear a global tsunami.

[186] All things degrade to the mean, including extraordinary stock returns.

[187] *See* ACKERMAN & ALSTOTT, *supra* note 137.

[188] The blue-collar perpetuity, the job at the mill for your offspring, is gone. The working stiff is out of this game.

[189] It is the frightening "amorphous globalization of cyberspace." Schama, *supra* note 55. *See also* Joe Rogaly, *Ethics Today: We are Far from a Globalised Globe*, FIN. TIMES, Apr. 10, 1999, at 3 (Weekend Section) (discussing Professor Anthony Giddens' Reith Lecture on BBC Radio 4 on the ethics of globalization, published as ANTHONY GIDDENS, RUNAWAY WORLD (1999)).

only in providing a grubstake for our kids, but also in protecting more than that. In this strange time, it is not clear what can be transferred other than property and money.[190] Great law firms close and partners without enough clients have only their savings and a few straggler clients left. Other great firms survive, but partners are fired.[191] Again, those without clients have only their savings left. Strange people succeed, and well-prepared people fail.[192]

Insecurity in life lends legitimacy to the quest for security through trusts.[193] Wanting to arrange family property settlements unimpeded is natural, and courts often have looked the other way.[194] Much that is questionable gets done in the name of the family. Never eat in a "Family Restaurant" is one way of putting it. Another way of putting it is that the most dangerous place in suburban traffic is in front of the grade school as the morning bell is about to ring.

Today's society has become very dangerous, and more and more kids need protection because they will not be able to earn a good living. It is easier to believe that grandpa's money must last forever because his shiftless offspring (1) are going to need more of it in the dangerous new world (2) and are not as likely to be able to make their own way in the new technocratic world. Many children will not succeed, and they will "need" to be trust beneficiaries. Not all offspring will be smart or educable. It is harder to pass opportunities to one's nearest and dearest.[195]

Just when we lose faith in government and society,[196] it gets worse

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[190] We all understand that you must invest in your kids early on. *See* John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988). Why not invest in more than just an education, and why not put it in a trust? And, while you're at it, bartender, make it a double – a perpetuity.

[191] The author tells his students that they all will be fired, that they should have a year's living expenses in the bank if at all possible, and that they should live as frugally as they can bear to live until they have enough money to support themselves and their dependents, if any, for the rest of their lives. Of course, this is an exaggeration for emphasis, but a useful one nonetheless.

[192] *See* Thurow, *supra* note 54, at 66; NICHOLAS LEMANN, THE BIG TEST: THE SECRET HISTORY OF THE AMERICAN MERITOCRACY (1999).

[193] *See* Thurow, *supra* note 54, at 68.

[194] *See* Alexander, *supra* note 93, at 1195.

[195] *See* JOHN A. BRITTAIN, THE INHERITANCE OF ECONOMIC STATUS (1977).

[196] *See* Cherlin, *supra* note 89; Brooks & Elliott, *supra* note 56.

out there. And so, we need the money and perpetual trusts. As the state does less and less for us[197] (because it is weak, because it does not care about us, or because we demand more) the prevailing feeling is that me and mine need more money than ever before. Me and mine need to save taxes and avoid creditors, via trusts, more than ever before. In other words, "We demand that you let us put more away for our ever more needy loved ones. We all need an anchor to windward, a bolthole, a safety net."[198]

The law is sentimental about the family, and Professor Gregory Alexander notes that judges have been flexible when changing trust law for families. As he has stated, the "unforeseen needs of families" inspire a special interest in trusts and trust law reform.[199] Families can have tough times, or fear they will, and they think society should cut them some slack. Sentimentality about the family combined with tolerance for perpetual corporate organizations and charities means we are learning to live with perpetuities.[200]

Our society also suffers from a declining faith in government. We have lost trust in government[201] as a source of necessities, amenities, and

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[197] In an essay about Belgium, Professor Tony Judt describes the very dreary state of government and society in that prosperous, but unhappy, nation. He writes that "[s]ome observers even hold the country up as a postnational model for the twenty-first century: a virtually stateless society, with a self-governing, bilingual capital city whose multinational workforce services a host of transnational agencies and companies." Tony Judt, *Is There a Belgium?* N.Y. REV. BOOKS, Dec. 2, 1999, at 49. If that is the future, is it any wonder that people want protection through trusts?

[198] "As an aggressive investor, therefore, I want my . . . [conservative] investments to be my harbor from stormy seas . . . ." DAVID W. HUNTER, NEVER OUT OF SEASON 138 (1992).

[199] *See* Alexander, *supra* note 93, at 1217.

[200] The only way to sell the right to create a perpetual trust, to sell a license, if you will, in our federal system, is through the tax system. Perhaps a perpetuities stamp sold by the federal government might be more useful than the generation skipping transfer tax.

[201] Basically, we have lost faith in government's taking care of us. In addition, large numbers of Americans in the year 2000 have given up on the government as an agency to redistribute wealth (if that is a goal of many people today). The agency costs are too high. Similarly, the interest in the government providing community amenities or ameliorating poverty is small. *See* ACKERMAN & ALSTOTT, *supra* note 137. Of course, this will change someday. Professor Wilentz of Princeton University claims the turning point has arrived. *See* Sean Wilentz, *For Voters, the 60s Never Died*, N.Y. TIMES, Nov. 16, 1999, at 27. Professor Wills assures us we hate Washington. *See* GARY WILLS, A NECESSARY EVIL: A HISTORY OF AMERICAN DISTRUST OF GOVERNMENT (1999). Others call it a "temporary

protection. We also have lost faith, or perhaps interest, in civil society and the rejuvenation of public life.[202] In the last few years, large numbers of Americans have given up on the idea that the government is a better spender or redistributor of money than individuals or charities.[203] One must be prepared to provide for and protect oneself and one's descendants and provide what the government does not. When one does not have faith in society and government, one tends to want money. Detective novel authors have been making the point for years.[204] Money hunger leads inevitably to trusts and then quickly to perpetuities. Lost faith in government means that it is easier to hear the siren song of legitimate, dramatic, tax avoidance using perpetual trusts. The public perception is: why waste one's money on a "useless" government?[205]

The perception is that government is doing less for the type of people who set up perpetual trusts. From their point of view, "everything" is private, including education,[206] pension,[207] street protection,[208] and recreation.[209] The general feeling is: why pay more taxes than you must? Why assume that you or yours will be a consumer of government services beyond roads, cops, soldiers, Coast Guard rescues, and some basic research

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anti-political era." Brooks & Elliot, *supra* note 56.

[202] *See* Dobris, *supra* note 52; Fukuyama, *supra* note 187, at 70. To expand on this point is dramatically beyond the scope of this Article.

[203] *But see* Jeff Madrick, *How New is the New Economy*? N.Y. REV. BOOKS, Sept. 23, 1999, at 42. Of course, interest in redistributing society's assets is at a low.

[204] *See*, *e.g.*, JOHN D. MACDONALD, THE SCARLET RUSE (1973).

[205] At least one author has suggested that loss of faith in government is a function of a poor economy and has further suggested that the better economy of the late 1990s has increased American confidence. Taken at full value, this could lead to a decrease in interest in perpetual trusts. *See* Madrick, *supra* note 203. Professor Lischer suggests that legitimate trust planning easily can lead to illegitimate trust planning. *See* Lischer, *supra* note 160.

[206] *See* Robert M. Berdhahl, *Remarks and Addresses at the 76th Annual Meeting*, A.L.I. 43 (1999). The costs of education (and health care and old age) seem huge to the middle class.

[207] *See The End of the Company Pension*, THE ECONOMIST, May 15, 1999, at 77. We refuse to see Social Security as a reliable pension, in that we feel that we must rely more on ourselves and less on government. *See NPR Morning Edition: Taking Care of Themselves* (NPR radio broadcast, May 21, 1999).

[208] *See* Bradley T. Hudson, *Changes Hurting Tempe*, THE ARIZ. REPUBLIC, Apr. 5, 2000, at 4 (Chandler Community section).

[209] *See* Berdhahl, *supra* note 206, at 45.

that offers no profits for industry?[210]

We also do not trust government because the increased information about politics and politicians available everywhere, including the Internet, leaves the body politic with an ever-greater contempt for, and despair about, government. People working for giant firms see those firms forming their own private governments and utilities and are inspired to make their own arrangements in their private lives.

Part of our lost faith in government comes from the fact that we live in a global economy. The global economy seems to be one where the protection of a (perpetual) trust, offshore if necessary, is especially nice. National governments are losing their powers to control the global economy.[211] The need for protection through money is intensified. It is becoming a Dutch world of international trading with land not being the center of the economy and with the global view of the world being the triumphant view. Globalization and the Internet create more opportunities to cheat[212] and undermine state and national government, which provides another excuse as to why it is necessary to cheat. Additionally, creating a trust offshore is very easy.[213]

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[210] We are clearly taken by the corporate view of things. Michael Elliott recently posed the question, "Has there ever been a time when business people had higher prestige and fewer sworn enemies? I don't think so." Brooks & Elliot, *supra* note 56.

[211] *See* Thurow, *supra* note 54, at 69. The global economy is considered in many works, including BENJAMIN R. BARBER, JIHAD VS. MCWORLD (1996); FRIEDMAN, *supra* note 153; WILLIAM GREIDER, ONE WORLD, READY OR NOT (1997). The globalization of law is discussed in William Twining, *The MacDermott Lecture*, 50 NO. IR. L.Q. 12 (1999).

[212] Opportunities to beat local laws by buying wine on the Internet, gambling offshore, or buying medicines are simple examples. *See* Phaedra Hise, *Grapes of Wrap, Net vs. Norm*, FORBES ASAP, May 31, 1999, at 35 (explaining how a fledgling Internet entrepreneur takes advantage of state laws to sell wine on the Internet); Robert Pear, *Online Sales Spur Illegal Importing of Medicine*, N.Y. TIMES, Jan. 10, 2000, at A1 (explaining new problems created by Internet sales of illegally imported medicine). There is another way to relate globalization to this topic. It can be argued that our new-found comfort with global commerce and finance lead to a comfort with fancy foreign trusts. This comfort with such trusts and the foreign jurisdictions' easing impeding rules of common law led to our comfort with repealing the Rule at home.

[213] "Offshore" signifies what Professor Jeffrey Schoenblum calls the "unregulated bazaar for free capital." Schoenblum, *supra* note 153, at 522. In a sense this article is about rich folks' response to what General Electric calls the "three big 'external' shocks . . . globalization, the move from manufacturing to services and the Internet." *General Electric, The House that Jack Built*, *supra* note 99, at 25-26.

All of this occurs at a time when we seem to have lost faith and interest in a civil, communitarian society and in the rejuvenation of public life. "Every boat on its own bottom" is the motto in today's world.[214]

People want and feel they need more protection. The protective and dynastic functions of trusts that Lawrence Friedman[215] saw as essentially separate in 1964 appear to be converging. The world looks sufficiently dangerous that settlors do not want simply to protect the known weak and the sick in their families. They want to protect everybody. Interestingly, in a book review,[216] Friedman describes the danger the new economy and the new flattening of hierarchies presents for people of privilege. Previously, they might have passed on a place in the hierarchy to their children. Today they cannot.[217]

People are money-hungry because expectations are higher, things cost more, and being a garden-variety millionaire is not of great use.[218]

So, to conclude this subsection, at the *fin de millennium*, it is useful to repeat that we look at a world of people over-interested in money.

B. Trust Law Gets Reformed in Changing Times

Professor Gregory Alexander has convincingly stated that social and economic changes and capital formation often lead to changes in trust law.[219] These are such times. So, it is not unusual to find that there are changes in trust law occurring. The ground is fertile. Arguably, the general process of changing trust law has been underway since the mid-

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[214] Professor Cherlin tells us that in Fall 1999, "only 35% [of those surveyed] say that most people can be trusted." *See* Cherlin, *supra* note 89, at 3. As Professor Ullmann states, "One of the striking things is the absence of a feeling of common endeavor. Everyone seems to be out for himself [sic]." Richard Ullmann, *The US and the World: An Interview with George Kennan*, N.Y. REV. BOOKS, Aug. 12, 1999, at 4.

[215] *See* Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547 (1964).

[216] *See* LAWRENCE M. FRIEDMAN, THE HORIZONTAL SOCIETY (1999).

[217] *See id.*

[218] Pity the man with only $12 million. *See* Dobris, *supra* note 52, at 561 n.81; Dobris, *supra* note 14, at 255. *See also* Benjamin M. Friedman, *The Power of the Electronic Herd*, N.Y. REV. OF BOOKS, July 15, 1999, at 40 (reviewing THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE (1999)).

[219] *See* Alexander, *supra* note 96, at 1193.

1980s.[220] We are now getting around to fiddling with the Rule and with spendthrift trust doctrine.[221] Capitalism is the process of creative destruction.[222] This social uncertainty[223] intensifies and perhaps justifies the desire for the family protection offered by a trust. In a time of chaotic change everyone wants a little safeguard. And everyone understands that desire. It is a sensible thing to do, like putting your money in your shoe in a tough neighborhood. As a sensible thing to do, it attracts a certain amount of sympathy.

C. The "Dynasty Trust" Craze Feeds the Frenzy

The idea that people need perpetual trusts is fed by, among other things, the estate planning industry, the productization of trusts, and the specific peddling of dynasty trusts.[224]

Clearly, estate planning has become an industry.[225] This has come

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[220] *See* RESTATEMENT (THIRD) OF TRUSTS, *supra* note 110; UNIF. PRUDENT INVESTOR ACT, *supra* note 110; Langbein, *supra* note 110. The latest is the Uniform Trust Code, formerly called the Uniform Trust Act, adopted on August 3, 2000, by the National Conference of Commissioners on Uniform State Law. *See* www.law.upenn.edu/bll/ulc/uta/trust1009.htm (last visited Feb 9, 2001).

[221] *See* Dobris, *supra* note 50. The only difference is that the reforms of the 1980s and early 1990s were, for better or worse, in the hands of the professors and the Grandees of the Probate Reform Establishment. These Rule Against Perpetuities and asset protection trust changes are in the hands of others who are arguably leading a race to the bottom. *See* Sterk, *supra* note 4. Even England plans a loosened Rule of 125 years. *See* THE LAW COMMISSION THIRTY-THIRD ANNUAL REPORT 1998: MODERN LAW FOR MODERN NEEDS 36 (Law Com. No. 298). The number 125 also was suggested by Professor Paul Haskell in *A Proposal for a Simple and Socially Effective Rule Against Perpetuities*, 66 N.C. L. REV. 545 (1988). Perhaps 250 years is long enough to make people give up on perpetual trusts. The author hopes to explore these issues in a forthcoming essay.

[222] *See* SCHUMPETER, *supra* note 15, at 81-86. Thurow, *supra* note 54, at 63.

[223] As Joyce Carol Oates states in another context, it "must have to do with *fin-de-siecle* anxiety about the imminent century and its vistas shrouded in mist, a longing for the . . . past . . . in the midst of our continuous, exhausting technological revolution. As the actual lived lives of most Americans become ever more complex and fractured and, in a sense, more generic and impersonal, we yearn for . . . ." Joyce Carol Oates, *Wearing Out the West*, N.Y. REV. BOOKS, Oct. 21, 1999, at 30, 32 (reviewing KENT HARUF, PLAINSONG (1999)).

[224] The dynasty trust is defined and discussed many places. *See* DUKEMINIER & KRIER, *supra* note 50, at 316; Dobris, *supra* note 50, at 572 n.135; Layman, *supra* note 29.

[225] *See* Dobris, *supra* note 50.

about for several reasons, including the pressure on lawyers in firms to produce more income, the inclusion in the estate planning process of business people as well as learned professionals, and the increase in the stakes caused by the passing of enormous sums from the Depression Generation to the Baby Boomer Generation.[226]

Also, trusts clearly have become products in the new world of estate planning. "Trustification" and "productization" are with us, at least as long as there are federal transfer taxes and advantages under those systems for using trusts.[227] The trust as a product goes hand in hand with the industrialization, or commercialization, of estate planning.

The product of special interest in this Article is the so-called dynasty trust.[228] Simply stated, a dynasty trust is a trust of a little more than $1 million[229] that is designed to take full advantage of the exceptions to and exemptions from the gift, estate, and generation-skipping transfer taxes.[230] Dynasty trusts often are made creditor-proof. After the year 2006, an unmarried person in some states will be able to place $1 million into a trust that can exist in perpetuity, supporting a dynasty, to the extent of trust income, without any transfer taxes ever being paid. In theory, only income taxes will be collected. This is "hot planning" and is easy to sell.

Thus, freedom from the Rule Against Perpetuities is being merchandized along with other trust "products." People interested in buying a trust learn about perpetual trusts, and many seemingly come to want one. It seems like a sensible way to leverage a million dollars (or two, if people are married)—to put an anchor windward for the family. If the settlor has

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[226] *See id.*

[227] *See id.* How long the transfer tax will last is another question. *See* Joel C. Dobris, *A Brief for the Abolition of All Transfer Taxes*, 35 SYR. L. REV. 1215 (1984).

[228] Dynasty trust planning is discussed in Dukeminier, *supra* note 47; Pierce H. McDowell, III, *The Dynasty Trust: Protective Armor for Generations to Come*, TR. & EST., Oct. 1993, at 47. A similar term was used in Friedman, *supra* note 215.

[229] The Section 2631 generation-skipping transfer tax exemption is $1,030,000 in the year 2000. The figure is increased for inflation. *See* I.R.C. § 2631(c).

[230] *See* DUKEMINIER & KRIER, *supra* note 50, at 316-19; Dukeminier, *supra* note 47. That the dynasty trust is a product is shown by the diction in *Citi Private Trust Services: A New & Enhanced Offering*, TR. & EST., Aug. 1999, at S11. It is open to argument whether the tax-favored dynasty trust leads to more savings or just to the transfer of assets already saved to the trust. The possibility that preferred treatment for long-term trusts might lead to additional savings is discussed in French, *supra* note 4, at 349.

more than $20 million, then placing some of it into a special product trust appears to be wise estate planning diversification. Once a client is ready to buy a trust product, the more features, the better, in terms of justifying the decision to create the trust and the planner's fee. It is a bit like leather upholstery in a new car.[231]

The leveraging attraction of the dynasty trust should not be underestimated. We are obsessed with the power of compounding. Einstein once stated that compound interest was humankind's greatest achievement.[232] When compounding is combined with tax deferral by way of tax-efficient investing,[233] the lure of a fortune[234] to buttress a dynasty for "only a couple of million dollars" is strong.

D. "Everyone" Wants a Trust These Days

We are in love with trusts, and as trust lovers we want to intensify the effect—we want more and better.[235]

We are trust-minded. More people are estate-tax-conscious because of prosperity, long-term inflation, and the passage of the trillions of dollars from the Depression Generation to the Baby Boomer Generation. Once people are interested in avoiding estate taxes they become interested in

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[231] Consistent with the consumer imagery in the text, these trusts also have become items of conspicuous consumption, like Rolex watches. They are what are called "positional goods." *See The 20th Century*, *supra* note 15, at 11.

[232] *See Count on Compound Interest*, *at* http://www.aarp.org/confacts/money/compinterest.html (last visited Oct. 29, 2000).

[233] Tax-efficient investing involves taking tax effects into account in making investment decisions. *See* Robert H. Jeffrey & Robert D. Arnott, *Is Your Alpha Big Enough to Cover Its Taxes?*, J. PORTFOLIO MGMT., Spring 1993, at 15. IRA compounding is discussed in Virginia Munger Kahn, *In Estate Planning, A Roth I.R.A. Shines*, N.Y. TIMES, June 28, 1998, § 3, at 7. Professor Bruce A. Wolk has prepared an illustration showing how $1 million before taxes, put in an IRA at age 70, can grow to $11 million after taxes, under the right circumstances. *See* LANGBEIN & WOLK, *supra* note 20, at 430.

[234] In Summer 1998, Deloitte Touche Tohmatsu, one of the "Big Five" accounting firms, was circulating a general interest newsletter suggesting that $1 million in a dynasty trust could grow to $159 million for the benefit of the settlor's great-great-grandchildren. *See* Deloitte & Touche Review (July 20, 1998) (copy on file with author).

[235] One is reminded of Spike Lee's movie title, MO' BETTER BLUES (Universal Pictures 1990).

trusts and more sympathetic with the truly rich. More folks become avoidance-minded. Currently, when millions of Americans are waiting hopefully for their inheritances from the Depression Generation, the idea that inheritances and interests in estates and trusts are bad is laughable. "More and sooner" is the basic thought. In this era of flexible and heavily sold trusts, few people are afraid of the trust's interfering with enjoyment of their money. Of course, this can change if, and when, those trusts begin interfering with the beneficiaries' enjoyment of money.

Middle-class people want trusts for many purposes, including Medicaid planning,[236] ERISA planning,[237] credit shelter planning,[238] and splitting assets between second wives and children of first marriages. The middle class also sees advantages in quasi- and pseudo-trusts such as those in IRAs[239] and Uniform Transfers to Minors Act accounts. Trusts look good to many people, and perpetuities are an unknown devil, if noticed at all.

Trusts have become good for the middle class, and the law changes when change is good for the middle class. This insight is used by the left to build a base for social reform for the poor,[240] and by the right to build a base for tax reform for the rich. Social Security was sold to the middle class as a program of insurance for everyone.[241] Reducing the bite of transfer taxes or capital gains taxes is sold as a boon to the middle class.[242] Prosperity enables more people to believe that they can strike it rich. If that is so, why attack the wealthy? Members of the middle class want a level playing field for the wealthy, in case they join them someday. The present discounted value of their share of the estate tax, as distributed to them by government, is less than the current value of their fantasy of success.

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[236] *See* Joel C. Dobris, *Medicaid Asset Planning by the Elderly: A Policy View of Expectations, Entitlement and Inheritance*, 24 REAL PROP. PROB. & TR. J. 1 (1989).

[237] *See* Bruce Wolk, *The New Excise and Estate Taxes on Excess Retirement Plan Distributions and Accumulations*, 39 U. FLA. L. REV. 987 (1987).

[238] *See* Joel C. Dobris, *Marital Deduction Estate Planning: Variations on a Classic Theme*, 20 SAN DIEGO L. REV. 801 (1983).

[239] A conversation about this Article with a retired corporate treasurer of a nonprofit organization, who is not a rich person, led to his extolling Roth IRAs for grandchildren as a way to keep money "working tax-free forever."

[240] *See* Dobris, *supra* note 238.

[241] *See* William Blatt, *The American Dream in Legislation: The Role of Popular Symbols in Wealth Tax Policy*, 51 TAX L. REV. 287, 350 (1996).

[242] *See* ACKERMAN & ALSTOTT, *supra* note 137.

To sum up this subsection, people feel an increasing need for more money,[243] trusts in general, and perpetual trusts in particular. Perpetual trusts promise the family more money through tax savings, superior investing through aggregation of assets, reduced fractionalization of assets, and reduced dissipation of donated assets.[244]

There has been a convergence of Professor Lawrence Friedman's trust categories of the protective and the dynastic[245] in ways that are new to us.[246]

IV. NO ONE IS GUARDING THE CHICKEN COOP

Society's and law's guardians are asleep at the gatehouse. It seems reasonable to suggest that rich people will always seek advantages.[247] When they obtain an advantage, one explanation is that the advantage is theirs because the watchdogs are sleeping. As discussed, the citizenry seems to not care, and those who govern or who have the job of protecting society do not seem to care, either. Some legislatures and most lawyers, in their public utterances, are hardly concerned about perpetuities.[248]

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[243] One is reminded of the joke in the Woody Allen Movie, *Annie Hall*. The man goes to the psychiatrist and complains that his brother thinks he is a chicken. The doctor tells him to simply inform his brother he is not a chicken. The man says he cannot, "because we need the eggs." Vanessa Thorpe, *Focus: When All the Talk Has to Stop*, THE INDEPENDENT, Jan. 3, 1999, at 16 (Features section). People think they need the money.

[244] *See* French, *supra* note 4 (discussing the possibility that long-term trusts might be good for families).

[245] *See* Friedman, *supra* note 215.

[246] One might speculate, fancifully, that we are witnessing a modest, partial return to feudalism. We are looking at a world of weak nation-states, private armies, and baronial leaders of large corporate entities. A world without effective government is, in some sense, feudalistic. And, where one finds feudalism, one finds an interest in perpetuities. Thoughts of feudalism are in the air. *See* DOUGLAS COPELAND, MICROSERFS (1995).

[247] *See* Alexander, *supra* note 93 (citing Chancellor Kent).

[248] Those legislatures seeking to repeal the Rule are arguably in a race to the bottom. *See* Sterk, *supra* note 4. Judges, however, do appear to genuinely care about direct and indirect restraints on the alienation of the fee, of the property itself, and of the duration of the restraint. *See Eagle Enter.*, 349 N.E.2d at 816. And, of course, if a perpetuities violation is brought to their attention, the judges will do their duty and void the offending interest, but with no social concern. It is just a case of some stupid lawyer, or settlor, who blew the drafting. It is a game of "gotcha," not a question of social policy. If the RAP disappears, judges will end trusts as they now end equitable servitudes, with a changed

A. The Rule is too Technical to Sustain Interest

Most people do not understand the problem. The question is hard to understand and too technical and boring for lawyers and laypeople alike.[249] It is similar to a game of "insider baseball." Investigative reporters with the skills to discuss this material and make it understandable to laypeople deal with sexier stuff. Their bright, non-investigative siblings are personal finance reporters for magazines that cater to people who use trusts of this sort. The perception is that the RAP is hard to understand, so why not just abolish it?

Many teachers are no better. The teaching of the RAP is at an all-time low. This state of affairs is both a symptom of the lack of interest and an explanation for it.[250] In July 1999, contrary to the predictions of the bar review courses and many professors, there was a major Rule Against Perpetuities question on the California Bar Exam. The howl of outrage and pain of the recent graduates surely reached the grave of John Chipman Gray. Whether he heard them or not, we cannot know. The mutual pact between law teachers and law students to hive off the old-fashioned and boring bits is taking its toll. Indirect restraints on alienation are boring. No one wants to teach them. The RAP is hard to learn, and students are customers now. Why risk bad evaluations when teaching sexy topics is so easy? Many professors would say that the RAP is not a sexy research topic, either.[251]

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circumstances doctrine.

[249] Despite its being boring, the RAP did figure in the plot of the movie *Body Heat*, which was not boring. *See* BODY HEAT (Warner Brothers 1981).

[250] The lack of interest in the RAP is arguably part of a general lack of interest in anything that did not "happen" in the 20th century. *See* David Bates, *University History: Undergraduate History 1999*, HISTORY TODAY, Aug. 1999, at 54.

[251] Of course, many distinguished modern scholars have written "recently" about perpetuities. At the risk of leaving out professors who deserve mentioning, the list includes: ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES, 277-305 (1996); Ira Mark Bloom, *Perpetuities Refinement: There is an Alternative*, 62 WASH. L. REV. 23 (1987); Jesse Dukeminier, *Perpetuities: The Measuring Lives*, 85 COLUM. L. REV. 1648 (1985); Carolyn Burgess Featheringill, *Understanding the Rule Against Perpetuities: A Step-by-Step Approach*, 13 CUMB. L. REV. 161 (1983); Fellows, *supra* note 5; Robert L. Fletcher, *Perpetuities: Basic Clarity, Muddled Reform*, 63 WASH. L. REV. 791 (1988); French, *supra* note 4; Haskell, *supra* note 221; Amy Morris Hess, *Freeing Property Owners From the RAP Trap: Tennessee Adopts the Uniform Statutory Rule Against Perpetuities*, 62 TENN. L. REV. 267 (1995); Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead*

B. Americans Have Lost Touch with Their Populist Roots

Our guardians are asleep because we just do not care. We think we like rich people and aristocrats.[252] Populism is at an all-time low.[253] Virtually no class war instincts remain in the United States. Socialism is at its ebb. Social outrage about money is at an all-time low. Society is unmoved by a few fire-eaters at the Treasury, in the IRS, or on some law faculty. Many opinion-molding law professors are very prosperous and interested in other topics. Populists at the IRS or in the Treasury are irrelevant because perpetuities is a matter of state law,[254] and no states have bureaus of perpetuities. The perpetuities populists seem to be tax techies who are accustomed to rejecting the special pleading of the rich[255] and are normally either professors or work for the IRS or the Treasury. People do not like government bureaucrats or professors[256] and are unlikely to be led by them. Muckraking is at an all-time low.[257]

C. Society's Commentators are too Prosperous to Go After the Rich

A partial explanation for the lack of attention paid to the RAP is the general prosperity among the chattering classes, including the relatively prosperous law professors. The members of the chattering classes are moneyed and identify with the more prosperous. Pundits are

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Hand, 68 IND. L. J. 1 (1992); 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 (1996); Robert J. Lynn, *Perpetuities Literacy for the 21st Century*, 50 OHIO ST. L.J. 219 (1989); S. Alan Medlin & F. Ladson Boyle, *What Every South Carolina Lawyer Should Know About the (Ugh!) Rule Against Perpetuities*, S.C. LAW., May-June 1991, at 27; Lawrence W. Waggoner, *Perpetuities: A Perspective on Wait-and-See*, 85 COLUM. L. REV. 1714 (1985). A number of these articles refer to the USRAP, the Uniform Statutory Rule Against Perpetuities. *See* authorities cited in note 4, *supra*.

[252] Paradoxically, we believe there are no aristocrats in the United States. We are all middle class. We are all capitalists. Barbers speculate. Professors speculate.

[253] Whether populism is up or down is, of course, cyclical. *See* Baker, *supra* note 35.

[254] Professor Ed Halbach has stated that "trust law in the United States is primarily a matter of state law . . . ." Halbach, *supra* note 3, at 531.

[255] *See* Ascher, *supra* note 165, at 69.

[256] Professor Susan French brought this to my attention. Every reader knows the popular culture demonizes the IRS.

[257] "Has there ever been a time when business people had higher prestige and fewer sworn enemies? I don't think so." Brooks & Elliot, *supra* note 56.

millionaires.[258] Reform-minded trust lawyers are thin on the ground in the face of the great transfer of wealth underway from the Depression Generation to the Baby Boomer Generation. Society has delegated trust law reform to the lawyers for the rich. No puritanical voice of reform is heard in the land. We are blinded by gold's glitter in this moment of prosperity. The rage that John Chipman Gray felt against the spendthrift trust (first cousin, once removed, to the perpetual trust) is inconceivable today.[259] The meritocrats and technocrats who might be expected to be unhappy about perpetuities empathize with the desire to secure and transfer advantage to descendants and often see no harm in letting rich folks do it, too. People whom you might think would rail against trusts want them for Medicaid and splitting interests between second marriage spouses and the issue of first marriages. No one in the audience, or with an audience, is interested. There is no political will to upset the apple cart.

D. Perpetual Restraints are Rarely Imposed on Assets

Perpetuities criticism is on the back burner because fewer settlors than ever want to impose them on assets (as opposed to equitable interests). There is too much money to be made by wild investing. The restraints are on the equitable interests that emerge from the easily transferred assets and that are not perceived as dangerous.

E. Trust World Standards are Eroding

Generally speaking, standards in the trust world are being diluted. The trust professional's sense of duty is pale these days.[260] Therefore, to the extent this is a trust matter, the watchdog is not barking.[261] There is a

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[258] *See* ERIC ALTERMAN, SOUND AND FURY, THE MAKING OF THE PUNDITOCRACY (1999).

[259] See GRAY, *supra* note 5, at vii-ix, *quoted in* Alexander, *supra* note 93. Gray is also quoted in Lischer, supra note 160, at 482.

[260] *See* Dobris, *supra* note 50.

[261] *See* Sir Peregrine Worsthorne, *How Western Culture was Saved by the CIA*, THE LITERARY REV., July 1999, at 16 (reviewing FRANCIS STONOR SAUNDERS, WHO PAID THE PIPER? (1999)).

> The CIA was then part of the American Establishment and, as such, run by civilised, God-fearing Second World War heroes, mostly with private incomes,

general breakdown in the fusty Old World of trusts in every aspect, including inevitably the RAP. Legislatures are falling all over themselves to lower trust standards to attract out-of-state trust business. This phenomenon is what Professor Stewart Sterk has called, in a first cousin context, the race to the bottom.[262]

F. Love of Default Rules Has Changed Our View of Law's Social Role

We are becoming accustomed to the idea that most rules involving private arrangements are default rules.[263] We have grown so used to the law of private arrangements being changeable at the will of the parties, and we are so taken by changeable default rules as the efficient way to order private affairs, that we have grown short-sighted. We do not see a social threat in many trust arrangements short of meaningful restraints on marriage[264] or racist discrimination.[265] We live in a world of default rules. Default rules are those that control in absence of a contrary expression and can be easily set aside. It is beginning to seem as though almost every rule of law can be set aside. So what is the big deal if we allow grantors to set aside the RAP?[266]

> beautiful wives and somewhat disturbingly progressive views (very anti Joe McCarthy), who lived in charming Georgetown houses full of modern art and antique furniture. . . . Only later . . . did standards begin to fall . . . as . . . zealots . . . began to replace the East-Coast gentry.

Id.

The East-Coast gentry, for all of its many, dreary infirmities, set a certain trust standard that often is found missing today.

[262] *See* Sterk, *supra* note 4.

[263] *See* THE FALL AND RISE OF FREEDOM OF CONTRACT (F.H. Buckley ed., 1999).

[264] *See* Halbach, *supra* note 3, at 535-36.

[265] *See id.*

[266] *See, e.g.*, Bernard S. Black, *Is Corporate Law Trivial?: A Political and Economic Analysis*, 84 NW. U. L. REV. 542, 555-59 (1990) (stating that seemingly mandatory rules often can be set aside with clever lawyering). Trust default rules are discussed in Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 447, 469 (1998). Their discussion cites John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627 (1995). When clever lawyering is not enough, then clever legislating is in order. The Alaska opt-in community property system is an example of changing the law to get delicious results for the prosperous. *See* ALASKA STAT. § 34.77.060 (a) (2000). In a sentence, often there are tax advantages to community property and the Alaska legislature has created an optional community property system for outsiders, just as it has modified trust law to attract trust

G. Trusts Can Never Be a Problem

The current love affair with trusts means there is no reason to be on guard against them. It is a period of "trustification." The trustification of the prosperati's planning world leaves no room for distrust of trusts. Not unlike the Trojan Horse, all trusts are welcome and pass by the guards with ease. We are in a moment in time when people love trusts. No one seems to wonder if this loveable thing—the trust—works, partly because there has always been a Rule Against Perpetuities. Rather, folks seem to want more of a good thing—a double dose; if a prescription of two pills is good for me, imagine what four will do. If 100-year trusts work so well, how about 200- or 500-year versions?

H. Law Reform Mantras are Being Misappropriated

The current law reform shibboleths confuse the issue. Clarity and

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business. *See* Jonathan Blattmachr et al., *Tax Planning with Consensual Community Property: Alaska's New Community Property Law*, 33 REAL PROP. PROB. & TR. J. 615 (1999). *See also* George Cooper, *A Voluntary Tax? New Perspectives on Sophisticated Estate Tax Avoidance*, 77 COLUM. L. REV. 161 (1977) (arguing that the estate tax is easily avoided and thus, like to the Rule, also "voluntary"). Common sense suggests that default rules work well in a commercial and corporate context because the creditors can protect themselves via contracting and charging more money to make risky loans, and the shareholders (and creditors) can diversify their risks away. One might say that beneficiaries in need of protection cannot fall back on such devices. This concern is somewhat undermined by the idea that many of these trusts are not protective in nature, but designed to save taxes for likely-to-be able beneficiaries. The voluntary nature of the Rule is captured in this quote from the leading estate planning treatise:

> [Perpetuities is] a topic that fills more students of the law . . . with dread . . . but fortunately it is very nearly a dead letter. Between reforms that have ameliorated the harshness and a trend of various states to suspend the Rule as it applies to interests in trust, the only issue for an estate planner today is knowing how (or where) to create future interests that will not violate the Rule. In virtually all cases that is no more difficult than knowing to include an effective perpetuities savings clause. . . . [Basically the Rule is] far less likely ever to be a concern to efficient estate planning.

2 A. JAMES CASNER & JEFFREY N. PENNELL, ESTATE PLANNING § 11.2, at 11-32, (6th ed. 1998). *See generally* Lynn M. LoPucki & Walter O. Weyrauch, *A Theory of Legal Strategy*, 49 DUKE L. J. 1405 (2000) (positing that good lawyering can avoid almost any rule), *cited in* Frances H. Foster, *Linking Support and Inheritance: A New Model from China*, WIS. L. REV. 1199, 1255 n.379 (1999).

efficiency are the watchwords of trust law reform.[267] Abolishing the RAP is clear and in some ways efficient. Abolishing a complicated rule looks like a wholesome part of the probate law reform landscape. The RAP is a hard rule for lawyers to deal with, so let us undo it.[268] Why suffer? Professor Jesse Dukeminier forecast that the rise of successful malpractice claims against lawyers would cause the rules that trip up lawyers, especially the RAP, to be simplified or dropped.[269] His prediction is coming true. Love of clarity is the order of the day for sincere law reformers. Nothing is clearer than no rule at all. Clients are sick of "mumbo jumbo"; therefore, clarity rules the day. Those who would race to the bottom are misappropriating the reformers' baton—love of clarity. A parallel universe of trust law reform exists to advantage the wealthy. In that universe, the intellectual traditions of the trust world are not important.[270]

More specifically, there has been much interest over the last few decades in reforming the Rule in a more traditional fashion, to clarify it and make it less daunting and less responsive to social concerns of yesteryear. This willingness to trim and tailor the Rule arguably has been misappropriated in pursuit of repeal.

I. Our Tools for Disciplining the Rich Have Changed

Since we apparently have lost interest in the historically primary social purposes of the Rule—to avoid dead hand control and to avoid the buttressing of aristocracies—then the only justification that remains is the social and cultural goal of keeping rich folks off balance.[271] However, our hearts are not in it. Moreover, it may be that we have switched to direct

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[267] Professor Jeffrey Evans Stake points out that the direction of perpetuities reform is to reduce the Rule's application. *See* Jeffrey Evans Stake, *Inheritance Law*, 2 NEW PALGRAVE DICTIONARY OF ECON. & L. 311 (Peter Newman ed., 1998). The ultimate form of reduction is, obviously, repeal.

[268] *See* Fellows, *supra* note 5, at 605 n.25 (noting the potential for misappropriating clarity's clarion call).

[269] *See* Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1907 (1986).

[270] The author hopes to explore this topic in a future article.

[271] *See* Joel C. Dobris, *A Brief*, *supra* note 227 (arguing that the estate tax exists to keep rich folks "on their toes").

attacks on a few rich scapegoats like those made on Michael Milken[272] and Bill Gates,[273] combined with a few toothless nips at the ankles of overcompensated corporate executives.[274] We show sporadic anger at managers' high earnings[275] but do not seem concerned about big pools of capital. A tempting label for this trend is a neurotic perversion of the guardian instinct. One is reminded of the almost inconsequential and easily avoidable estate tax.[276] We seem to be in the business of inflicting the most modest of harms on rich folks, but only on the rich who are unlucky or unwise.[277] Why we are content to attack only a few rich guys, and then in a desultory fashion, is ultimately outside the scope of this Article. However, a worthwhile question is whether we have been tricked into loving rich people by public relations.[278] Have we been tricked into taking out our anger against the rich with a few foolish feints against Michael Milken and Bill Gates? Or, are our muckraking, populist, socialist, and antimaterialist ideas simply in hibernation because of prosperity?

To conclude this subsection, the guardians of society are asleep at the gatehouse. Anti-rich, anti-aggregation, anti-aristocratic reformers are thin on the ground and not interested in RAP reform. Popular opposition will not be based on a true understanding of perpetuities. It will be based on outrage towards rich people. These days, we do not hate rich people and do not fear aristocracies or aggregations of wealth.

V. THE FUTURE

As Yogi Berra is reported to have said, "The future ain't what it used

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[272] *See* ACKERMAN & ALSTOTT, *supra* note 137.

[273] *See* Lacey & Schmitt, *supra* note 74.

[274] Management guru Peter Drucker would cheer on those who attack high management paychecks. *See* Fred Andrews, *The Sage of Value and Service: At 90, Drucker Still Preaches Customers Over Profits*, N.Y. TIMES, Nov. 17, 1999, at C1. Drucker's latest book is MANAGEMENT CHALLENGES FOR THE 21ST CENTURY (1999).

[275] *See A Survey of Pay: The Best . . . and the Rest*, THE ECONOMIST, May 8, 1999, at 57.

[276] *See* Cooper, *supra* note 266.

[277] "Has there ever been a time when business people had higher prestige and fewer sworn enemies? I don't think so." Brooks & Elliot, *supra* note 56.

[278] For a discussion of the modern public relations industry, *see* MARCHAND, *supra* note 69. For a discussion of cultural constructs in the estate taxation of the rich, *see* Blatt, *supra* note 69, at 225.

to be."[279] There are several predictions to make. How many states will repeal the Rule? How many settlors will create perpetual trusts? What effect will a world without the Rule have on society? What will happen if there is no RAP in the modern world? Nothing? Something awful?

For better or worse, the apparent answers are that only a minority of states will repeal the Rule,[280] only a minority of rich testators will create perpetual trusts, and nothing terrible will happen socially. If dramatic abuse of the repeal occurs, some ham-handed reform surely will follow.

Every large state will have one pesky law professor who will testify, perhaps successfully, against a total repeal. Inertia, the drama of establishing a perpetual trust, and the low present value of saving estate taxes for one's great, great, great, great, great-grandchildren, will keep down the number of perpetual trusts created. Those trusts created will cause little social harm for a variety of reasons, including: erosion through invasion of principal, excess production of income,[281] and the lack of restraints on the

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[279] Chris Moran, *Soothsayers 1999, 2000: Readers Offer Versions of What the Future Might Be*, SAN DIEGO UNION-TRIBUNE, Jan. 2, 2000, at B1. The author hopes to make a number of predictions in a future article.

[280] In addition to offshore jurisdictions, Alaska and Delaware have repealed the Rule. *See, e.g.*, Douglas J. Blattmachr & Richard W. Hompesch, II, *Alaska v. Delaware: Heavyweight Competition in New Trust Laws*, PROB. & PROP., Jan./Feb. 1998, at 32. Repeal in a minority of jurisdictions can be quite meaningful. Professor Edward Halbach wrote in a different context, "[O]ne should not underestimate the business protection or attraction incentives and lobbying effectiveness of bankers associations . . . ." Halbach, *supra* note 3, at 543. If bankers want the repeal they likely will get it. Two obvious ways to attack the use of these wild trusts is to end the tax benefits or criminalize their use and any participation in their use. The attempt to criminalize involvement with Medicaid asset planning trusts went nowhere in the 1990s. *See* Dobris, *supra* note 236. The terms of the Alaska and Delaware Acts are discussed in Jeffrey N. Pennell, *Recent Wealth Transfer Tax Developments*, SC75 A.L.I.–A.B.A. 193, 221-23 (1998). The author believes that if federal transfer taxes are repealed, then there will be more changes in trust law to make trusts more attractive. This likely will happen to make up for lost revenue when trusts to save taxes lose meaning. The result may be that more states will repeal the Rule than otherwise might have.

[281] The point is simple. Income in excess of 3% eventually will so greatly erode the principal that the trustee will not end the trust, nor will any of the beneficiaries or a judge with jurisdiction. If the trust survives, the amount involved will not support much of a barony. As to the 3% point, *see* Dobris, *supra* note 14; Garland, *supra* note 10; Roger Hertog and David A. Levine, *Income versus Wealth: Making the Trade-Off*, J. INVESTING, Spring 1996, at 5. Erosion will be accelerated in some cases by beneficiary demands for excess return. Of course, it is possible that trustees wanting to keep their commissions in

alienation of the trust principal.

The government likely will deny trust benefits to trusts that last for more than a certain number of years and has considered using the number 90.[282] Perhaps a larger number like 125, 200, or 250 would be useful. The lesser possibility exists that Congress will abolish transfer taxes.[283]

VI. CONCLUSION

Explanations for the present-day erosion of the RAP include: (1) the harm from perpetuities (real or perceived) has lessened; (2) the need for perpetuities (real or perceived) has become greater; and (3) the guardians of society, whose duty it is to sound the alarm against perpetuities, are asleep at the switch.

Not many people seem to fret about tax havens. Few seem to feel that wealth carries responsibility to society along with it. There is too little integration these days of wealth and duty.[284] The rich have "abdicated the responsibilities of their wealth."[285] Many of us do not even consider the

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perpetuity may resist termination. Professor David Hayton correctly points out that trustees often will properly tilt their administration toward a needy or beloved beneficiary. *See* David Hayton, *English Fiduciary Standards and Trust Law*, 32 VAND. J. TRANSNAT'L L. 555, 561 (1999). One wonders if tilting is still appropriate conduct if the trust is perpetual (probably) and if it will cease once the persons who are benefited by the trust who were known to the settlor die (possibly).

[282] *See* R. Zebulon Law et al., *The Rule Against Perpetuities: An Update*, 24 TAX MGMT, EST., GIFTS & TR. J. 222 (1999).

[283] In June 2000, the House passed a bill abolishing the estate tax and sent it to the Senate. *See* H.R. 8, 106th Cong. (2000). President Clinton followed through with his threat to veto the measure on August 31, 2000. *See* http://thomas.loc.gov/cgi-bin/bdquery/z?d106:HR00008:@@@x (last visited Oct. 10, 2000). The willingness to do this provides more proof of our comfort with dynasties. The author thanks Professor Bruce Wolk for this point. If transfer taxes are repealed it is likely that legislated trust law gimmickry will increase as part of an attempt to save trust bankers' business. The effort to repeal transfer taxes continues.

[284] *See* Dobris, *supra* note 50; Francis S. Philbrick, *Changing Conceptions of Property in Law*, 86 U. PA. L. REV. 691 (1938).

[285] CHATWIN, *supra* note 83, at 83. Chatwin goes on to say, "Wealth was divorced from its sources. A strong state . . . collapsed under the strain." *Id*.

issue of responsibility of wealth these days.[286]

Today's settlors have the perception that perpetual trusts are good and few disagree. There is a disconnect between the small population of professionals and populists who abhor perpetuities and the general population. This separation will make the Rule Against Perpetuities essentially unenforceable.

We are so accustomed to perpetuities that we do not distinguish between allowing them to exist and allowing them to be subjected to dead hand control. This apathy may exist because only since the 19th century has there been a meaningful uncoupling of allowing a perpetuity to exist and allowing dead hand control of property. The acceptance of perpetual corporate organizations and charitable trusts has transferred over to family trusts as we enter the 21st century.

When it comes to changing trust law for families, sentimentality and flexibility create fertile ground for changing the law.[287] Repealing the Rule Against Perpetuities is likely to be tolerated.

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[286] However, there is a movement afoot to try and convince cyber-millionaires to become charitable donors. Bill Gates is making donations. *See Lock and Key*, *supra* note 75. Ex-Stanford Professor James H. Clark, a founder of Silicon Graphics and Netscape, has given $150 million to Stanford. *See* John Markoff, *Former Professor Gives Stanford $150 Million*, N.Y. TIMES, Oct. 27, 1999, at A16. Charitable donations by technology multi-millionaires is discussed in Charles Piller, *Tech's Inventive Elite Can Reinvent Philanthropy*, L.A. TIMES, Oct. 4, 1999, at C1.

[287] *See* Alexander, *supra* note 93. As Professor John Langbein has stated, "[T]he trust has endured because it has changed function." Langbein, *supra* note 266, at 637. For a discussion of the effect of change in a trust context, *see* Dobris, *supra* note 50, at 544.