

American Philanthropy and the Buck Trust

By JOHN G. SIMON

Augustus Lines Professor of Law, Deputy Dean, Yale Law School; A.B., Harvard College (1950); LL.B., Yale Law School (1953).

Introduction

HYPERBOLE, CALUMNY, AND APOCALYPTICA enveloped the Buck Trust litigation ever since the San Francisco Foundation ("Foundation") filed its cy pres petition in January 1984. The petition was characterized as a threat to the sanctity of wills and the health of philanthropy, and as an offense against capitalism, the American way of life, and God. Foundation personnel were said to be corrupt and dishonest and, in the language of a Marin County Supervisor, "grave-robbing bastards."¹

To consider the merits of this case, we must hack our way out of this thicket of rage and follow the advice Hamlet's mother gave to Polonius, "More matter, with less art."² Here, the "matter" is to be discovered by looking at the Foundation's petition itself, the rationale that undergirds it, and the relationship between that rationale and the concept of cy pres. That is the primary focus of this Article, which is in large part adapted from two documents I filed in support of the petition during the course of the litigation.³

1. Marin Independent Journal, July 26, 1986, at 2.

2. W. Shakespeare, *Hamlet*, Act II, Sc. II, 1.95.

3. Declaration of John G. Simon in Support of Petition for Modification of the Terms of Trust, *In re Estate of Buck*, No. 23259 (Jan. 30, 1986, Cal. Super. Ct., Marin County); Expert Witness Statement of John G. Simon, *In re Estate of Buck*, No. 23259 (Feb. 7, 1986, Cal. Super. Ct., Marin County).

Although I participated in the case in connection with the preparation and filing of these documents, I did not participate as counsel to the Foundation. Accordingly, I have not read, and do not purport to be familiar with, all the evidence taken and documents submitted in this litigation and, therefore, do not offer this Article as a comprehensive review of

This Article commences with a brief look at the two dominant factors that informed the petition and their congruence with the principles of *cy pres*. Next, these factors and principles, as they arose in the Buck Trust litigation, are examined more closely, paying special attention to an over-arching theme that helps us to understand the petition: the role of the nonprofit sector, the "voluntary" or "independent" or "third" sector, in the American legal order. The Article concludes with some conjectures about the consequences that would have flowed from granting the petition and with a comment on the actual, rather startling denouement of the case.

I. THE PETITION AND *CY PRES* PRINCIPLES

For several months before filing the petition, the Distribution Committee and officers of the Foundation went through the process of trying to construe Beryl Buck's intentions in the light of drastically changed circumstances—the posthumous increase in the value of her gift from \$7-10 million to \$340 million, all to be spent in one small and very affluent county—and, in the light of these changed circumstances, figuring out how to discharge the Distribution Committee's trusteeship duties. The deliberations, even according to the two dissenting Committee members from Marin County, were "thorough, legitimate, careful, precise . . . [and] very open" and with an "attempt to provide more light than heat . . . [and] carefully thought out"⁴

Following much study and intense debate, and the changes in course that are an inevitable part of the business of making difficult decisions, the Foundation determined two things:

1. That, despite the indisputably "clear language" of Mrs. Buck's will, unprecedented later economic events, resulting in an enormous posthumous increase of her gift, had created, at a minimum, uncertainty concerning Mrs. Buck's intentions, and that this uncertainty could best be resolved by concluding that Mrs. Buck would have permitted *some part* of this massive gift to benefit neighboring counties served by the Foundation.

the Buck Trust case. Nor do I purport to offer an exposition of *cy pres* case law and legislation, in California or elsewhere.

4. Deposition of Richard Madden at 182-83 (Dec. 17, 1985); Deposition of Peter Behr at 193 (Jul. 17-18, 1985).

2. That a narrower resolution of the interpretive uncertainty not only would fail to honor the Foundation's obligations to Mrs. Buck but would force the Foundation to allocate these resources in an unacceptably inefficient manner, inconsistent with the Foundation's obligations as a charitable trustee.

In light of the foregoing, but mindful of conflicting community views, the Foundation decided to adopt what has to be viewed as a compromise position: grants would not be confined to Marin County, but Marin would enjoy a preferred position at all times, and this new policy would not commence until after three more years, or roughly \$90 million more, of Marin-only grantmaking. This position would likely have provided Marin County with many times the amount of resources that Mrs. Buck thought she was allocating to Marin County.

The determinations made by the Foundation were congruent with two principles that are at the heart of the *cy pres* doctrine. *First*, *cy pres*, which is properly understood as an intent-enforcing doctrine, seeks to avoid a frustration of donor intention arising out of changed circumstances.⁵ In other words, *cy pres* deals with the fact of *surprise*—either because the gift is irrevocable or, as in Mrs. Buck's case, because the donor is dead. Surprise was the subject of the first of the Foundation's determinations. *Second*, *cy pres* seeks to avoid charitable waste—to preserve what Professor Karst called “the efficiency of the charitable dollar.”⁶ Where the donor's plan, if carried out in unreconstructed fashion would be “illegal,” “impossible,” “impractical,”⁷ “inexpedient,”⁸ “unsuitable,”⁹ “unwise,”¹⁰ or of diminished “usefulness”¹¹ or “significance,”¹² to use the language of judicial, legislative, and scholarly authorities over the years, *cy pres* offers a way to restore the bene-

5. 4 A.W. SCOTT, *THE LAW OF TRUSTS* § 399.2, at 3094 (3d ed. 1967).

6. Karst, *The Efficiency of the Charitable Dollar: An Unfulfilled State Responsibility*, 73 HARV. L. REV. 433 (1960).

7. The first three adjectives are the most commonly used. See RESTATEMENT (SECOND) OF TRUSTS § 399 (1977).

8. G.G. BOGERT & G.T. BOGERT, *THE LAW OF TRUSTS AND TRUSTEES* § 439, at 560 (2d rev. ed. 1977).

9. *Aleman v. Wensinger*, 40 Cal. 288, 293 (1970).

10. A.W. SCOTT, *supra* note 5, § 399.4, at 3124.

11. *Pell v. Mercer*, 14 R.I. 412, 435 (1884), cited in G.G. BOGERT & G.T. BOGERT, *supra* note 8, § 431, at 491.

12. *Wachovia Bank & Trust Co. v. Morgan*, 182 S.E. 2d 356, 358-59 (N.C. 1971).

faction to full power. This theme of efficiency was the subject of the Foundation's second determination to which I have referred.

The two factors of surprise and efficiency interact. Where the charitable purpose is illegal, no specific finding of surprise resulting from changed circumstances is required.¹³ Even in this situation it could be said that *cy pres* plays an intent-enforcing or surprise-avoiding role for no donor would have wanted to see his or her gift wiped out on the grounds of illegality. But as one moves away from clear cases of "illegality" or "impossibility," the importance of surprise increases. Thus, a determination by charitable trustees that they cannot operate effectively under donor-imposed constraints (whether they assert "impracticability" or one of the other difficulties listed above) probably would not support a *cy pres* order in the absence of significant surprise. Where the conditions that produce charitable inefficiency are not very different from those the donor experienced, or might reasonably have anticipated, the donor may be assumed to have known what he or she was doing. In such a case there is no basis for others (including trustees) "to substitute their judgment for that of the trustor—however wrong-headed most people might consider that judgment to have been."¹⁴

Where there has been major surprise, however, one cannot assume that the donor acted knowingly, that he or she intended or contemplated the inefficient outcome, and it is therefore appropriate for the trustees, with court approval, to reinterpret the donor's will to protect the donor gift from an unintended miscarriage caused by changed circumstances. Such reinterpretation, Mitchell Polinsky has contended, "enhances the value of the charitable trust to the testator since, if circumstances change, he or she can rely on the trustee and the court to fill in the 'gaps' in the charitable trust in a way that promotes the testator's interests."¹⁵ Similarly, Richard Posner has stated that, where there have been

13. See RESTATEMENT (SECOND) OF TRUSTS § 399 (1977).

14. Communication from Stephen Bomse, counsel to the San Francisco Foundation during the Buck Trust litigation, to the author (Dec. 1, 1987). I am indebted to Mr. Bomse for commenting on an earlier draft of this Article.

15. Expert Witness Statement of A. Mitchell Polinsky at 12, *In re Estate of Buck*, No. 23259 (Jan. 24, 1986, Cal. Super. Ct., Marin County). Professor Polinsky's testimony was rejected by the court on grounds of relevance; the quotation comes from his proffered testimony.

changed conditions, "A policy of rigid adherence to the letter of the donative instrument is likely to frustrate both the donor's purposes and the efficient use of resources."¹⁶

The interaction between the factors of surprise and efficiency has a second consequence: the fact of surprise alone, without a finding of inefficiency, is not likely to support cy pres. Where the trustees find that they can continue to make productive use of the gift, even though the underlying conditions have significantly changed, adherence to the donor's express language will probably not, in Richard Posner's words, frustrate either "the donor's purposes [or] the efficient use of resources."¹⁷

This brief sketch of the role played by the surprise and efficiency concepts is based on the logic of the basic intent-enforcing and resource-conserving purposes of cy pres rather than on the existing case law. That case law is not well developed in the factual context of the Buck Trust case. What precedents there are do not give consistent guidance,¹⁸ making it difficult to predict how the case would have been decided had it been fully litigated in California¹⁹ or had it arisen in another state.

Because, however, it is my contention that the case law, if it is to honor the basic purposes of cy pres, should generally follow the contours of the surprise-efficiency analysis, the surprise and efficiency themes deserve the following, more detailed scrutiny in the context of the Buck Trust litigation.

II. THE CONCEPT OF SURPRISE

A. *Intent-Agnosticism*

The trigger to the application of the cy pres doctrine in the Buck Trust case was surprise. This was, after all, not a case in which a donor left what she believed to be \$340 million to be spent all in one small, affluent county and where an attempt was made to alter this disposition. This was instead a case where a donor left what she believed to be \$7 to \$10 million for that purpose, and

16. R.A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 390 (2d ed. 1977).

17. *Id.*

18. Pertinent cases are discussed in Comment, *Cy Pres Inexpediency and the Buck Trust*, 20 U.S.F. L. REV. 577 (1986) and in Trial Brief of the San Francisco Foundation, *In re Estate of Buck*, No. 23259 (Jan. 23, 1986, Cal. Super. Ct., Marin County).

19. See *infra* text at note 61.

after her death an unprecedented surprise produced a forty-fold increase in the size of the benefaction.

Such a dramatic leap in the level of the gift, taking it from a respectable but unspectacular level to one of the two dozen largest charitable funds in the country²⁰ (and probably the world), unavoidably raises this question: is it reasonable to assume that a donor's distributional pattern will be the same for X dollars as for 40X dollars? If I have shares of stock that I think are worth \$1,000 and I am about to give them to my church at Christmas time, and at the last moment I am told that the shares of stock are worth \$40,000, is it clear, or even likely, that I will give all of the stock to the church? Mrs. Buck had created a trust that reasonably might have been calculated to produce \$750,000 a year for Marin County; if, on the eve of executing her will, or at a later time when there was still an opportunity to change it, she had been told that the property would produce \$30 million a year—and knowing, as she must have, that there were other charitable needs and opportunities outside of Marin County in the San Francisco Bay Area—would such a surprise have affected her charitable program? I suggest that it contradicts common sense and our knowledge of ourselves as human beings to deny that her intentions might well have been modified by the timely receipt of this information.

In fact, of course, the tidings arrived after Mrs. Buck's death; the surprise was *not* timely. However, that fact does not eliminate the need to consider the consequences of surprise. It means only that death cut short Mrs. Buck's own opportunity to respond. Those who lived after her and were made responsible for translating and implementing her charitable goals, the officers and Distribution Committee members of the San Francisco Foundation, were left to grapple with the reality of this major posthumous surprise.

At this point in the analysis, assuming no further information about intention, the fact of significant surprise would leave us in a condition that may be called "intent-agnostic." In other words, the fact of drastically changed circumstances would generate uncertainty about Mrs. Buck's intentions. This uncertainty entitled—indeed, as I shall suggest, *required*—the Foundation, the institution Mrs. Buck designated to carry out her charitable purpose,

20. See Appendix, Table 1.

to enlist the attention and cooperation of the court in a reexamination that would address the puzzle caused by this "intent-agnostic" situation.

That does not mean, as some have suggested, that modest discrepancies should cause such reexamination. Few donors know precisely what their estates will be worth or how the market value of their assets will fluctuate. The law cannot deal with minor shifts that are too small to cast us into an "intent-agnostic" situation. But the law has to be able to cope with the truly exceptional surprise. In commercial transactions, the law copes with major surprise, under the "commercial impracticability" doctrine, where unforeseen supply shortage has caused a "marked" cost increase,²¹ or, under contract law doctrine, when an "extreme and unreasonable" increase in cost may excuse non-performance.²² For cy pres purposes, whatever criterion of surprise may be used, the facts here would surely meet it and exceed it. The late Justice Potter Stewart's famous remark, "I know it when I see it,"²³ may or may not have been a satisfactory way of determining the existence of hardcore pornography, but when it comes to determining the existence of extraordinary surprise for cy pres purposes, in Mrs. Buck's case we have seen it.

B. *The Philanthropic Standard*

The facts of the Buck Trust case permit us to go one step further then to say that we are "intent-agnostic." We do in fact know a fair amount about the impact of the scale of wealth on philanthropic behavior and what happens to donative patterns when a donor finds himself or herself in the very biggest philanthropic league. Tables 1 and 2 set forth the record of large-scale foundation philanthropy in recent decades.²⁴

Table 1 lists the sixty-three foundations that appear on either of two lists of fifty largest American foundations, a list ranked by assets and a list ranked by annual grants, together with information about each foundation's geographic scope and subject-matter

21. U.C.C. § 2-615 comment 4 (1972).

22. RESTATEMENT OF CONTRACTS § 454 (1932).

23. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

24. See Appendix.

coverage.²⁵ Large as these foundations are, most of them are much smaller than the Buck Trust; valuing the Buck Trust's assets and grants as of June 30, 1982, it would rank nineteenth in grants and twenty-first in assets among the sixty-three foundations in Table 1.

Table 2 is a list, as comprehensive as possible, of gifts and bequests exceeding \$30 million made to foundations during the preceding thirty years with information about each foundation's geographic scope and subject-matter coverage.²⁶

What emerges is a pattern of philanthropic behavior that is, with the solitary exception of the Buck Trust, remarkably consistent, so much so that we can refer to it here as "the philanthropic standard." We may describe the standard this way:

Large-scale charitable giving, regardless of the particular objectives it pursues, serves a community that is broadly defined in terms of population size and socioeconomic class. In its infancy, a foundation's charitable program may be narrowly constricted, with severe limits on the size and shape of the beneficiary community. But as the resources grow, the giving program reaches out beyond its parochial origins to address a more populous and diverse slice of humanity. In short, charity may begin at home, but *large-scale* charity does not stay there.²⁷

25. The contributions that created these foundations were not all recent gifts; some were made during the earlier decades of this century. The giving patterns followed by the foundations themselves, however, reflect modern-day philanthropic behavior and therefore are properly included in a discussion of large-scale giving patterns in recent decades.

26. I am grateful to Mr. John A. Swain, formerly a student at Yale Law School, for assembling these Tables and for other research assistance.

27. A few of the foundations listed in Table 1 illustrate the textual observation that a charitable fund may begin with a narrow compass and then undergo expansion of purpose and program, proportional to size. Sometimes this happens when the fund itself grows; the Ford Foundation's grantmaking activities expanded dramatically, from a focus on certain charities in Dearborn, Michigan and Detroit, to a national and even global orientation, when bequests from the Ford family in the 1950's brought about an enormous growth in assets. The program expansion may also result from a recognition by the fund managers that massive resources should be deployed to meet major challenges. The Charles Stewart Mott Foundation—as of 1982 at roughly the same grantmaking level as the Buck Trust—furnishes an example. During the years following a major infusion of assets in 1963, the Foundation moved from predominant focus on Flint, Michigan to engagement in a variety of national programs, representing somewhat more than half of all annual expenditures. Flint, it may be noted, has a population with notorious unemployment and significant social and economic problems. Even so, the Mott Foundation trustees found it important to cast a wider net: "From [the] start, the Foundation's major concern has been the well-being of the community This interest has continued to find expression in Flint and also has taken

To clear up some of the misconceptions about this philanthropic standard, it must be stressed that it is not a legal standard to be imposed by courts or legislatures on charitable donors. It is simply a factual description of a pattern of donative behavior—a description that may help us to ascertain what Mrs. Buck might have done had she known the true scope of her benefaction.

What explains this standard? There are several possible explanations, three of which will be briefly discussed here. One draws on the history of philanthropy, another invokes the “general economic theory of demand,” and a third refers to principles of proportionality.

1. *Historical Explanation*

The philanthropic standard so uniformly reflected in the Tables is not simply a trend of the times. The concept that large-scale charity addresses itself to a world beyond the donor's home parish and to a wide variety of human conditions, has its origins in concepts that date from the early history of almsgiving. These concepts have been reiterated across centuries of philanthropy, and are reinforced in America by developments in federal and state tax law.²⁸

Biblical concern for the relief of “the stranger” and the poor introduce us to a concept of charity that transcends a donor's familiar and affluent world: “And when ye reap the harvest of your land, thou shalt not make clean riddance of the corners of thy field when thou reapest, neither shalt thou gather any gleanings of thy harvest: thou shalt leave them unto the poor, and the stranger”²⁹ Jesus' passage on the sheep and the goats describes the blessed state of those who tend to the stranger: “For I was hungry, and ye gave me meat: I was thirsty, and ye gave me drink: I was a stranger, and ye took me in”³⁰ Similarly, a celebrated twelfth century restatement of Jewish law, by Rabbi Maimonides, reiterates both themes, declaring that the highest two levels of charitable worthiness are occupied by (1) “the person who

us far beyond our home city.” CHARLES STEWART MOTT FOUNDATION, 1982 ANNUAL REPORT 2 (1980).

28. See *infra* notes 37-40 and accompanying text.

29. *Leviticus*, 23:22 (King James).

30. *Matthew*, 25:35 (King James).

assists a poor Jew . . . by putting him where he can dispense with people's aid;" (2) "one who gives alms . . . in such manner that the giver knows not to whom he gives and the recipient knows not from whom he takes."³¹

The secular tradition of charity has also emphasized these elements. In the Roman Empire "private citizens established . . . organizations which supplied food, clothing and education to needy children."³² Strangers were the object of Herodes Atticus' charity in the second century. "In the Greek tradition of broad gifts for the populace as a whole," Herodes, although a citizen of Athens, "gave a water supply to the city of Troas, a theatre to Corinth, a stadium to Delphi, aqueducts for Canusium in Italy, baths for Thermopylae."³³ Similarly, Cosimo the Elder, one of the founders of the Medici dynasty, did not restrict his philanthropy to his Florentine headquarters. "Even in distant Jerusalem he endowed a hospice for the use of pilgrims."³⁴

The Anglo-American legal tradition has reinforced these themes ever since the 1601 Statute of Charitable Uses,³⁵ which listed as the first example of charitable activity to be legally protected the "relief of aged, impotent and poor people," and which specified the relief of "poor maids" and "poor inhabitants" as legislatively recognized objects of charity. This concept was reiterated almost 400 years later in an English tax case that produced a celebrated legal definition of charity.³⁶

A reminder of the "stranger" theme is found in the major distinction the Internal Revenue Code makes between (a) social clubs, horticultural societies, business leagues and other mutual benefit associations, groups established mainly to provide reciprocal assistance among friends, colleagues or co-workers, and (b) "public service" organizations that seek to support a wider range of purposes and activities lying beyond peer-group interchange and collabora-

31. MOSES BEN MAIMON, A. MAIMONIDES READER 136-37 (I. TWERSKY ED. 1972).

32. E. FISCH, D. FREED & E. SCHACTER, CHARITIES AND CHARITABLE FOUNDATIONS 10 (1974). See also A. WARNER, AMERICAN CHARITIES 4 (1908).

33. W. WEAVER, U.S. PHILANTHROPIC FOUNDATIONS: THEIR HISTORY, STRUCTURE, MANAGEMENT, AND RECORD 7-8 (1967).

34. 15 ENCYCLOPAEDIA BRITANNICA 191 (1960).

35. 43 Eliz. I, c. 4.

36. Commissioners for Special Purposes of the Income Tax v. Pemsel, 1891 A.C. 531, 583.

tion.³⁷ Both categories of organization are exempt from income tax,³⁸ but only groups in the latter category—the one that is more oriented to strangers—are classified as “charitable” and entitled to receive contributions that are deductible from income, estate, and gift taxes.³⁹

These tax law echoes of older notions of charity are buttressed by an important consequence of charitable status under the federal tax laws. This status provides the donor with a reduction in income, estate or gift taxes that would otherwise be taxed at progressive rates and subsequently spent for the benefit of the entire nation—that is, for the benefit of strangers. I do not suggest that charitable giving must replicate these allocative features of the federal tax and expenditure process, because that would undermine the pluralistic reasons for tax deductibility. But the fact that the tax system, from which the charitable donor is permitted benefits to the extent of his or her deductible giving, has these distributional aspects helps to explain the survival in modern tax law of the venerable concepts of traditional charity.⁴⁰

2. “Economics of Demand”

Turning from history to economics, one encounters another explanation for the donative pattern reflected in the philanthropic standard. Kenneth Arrow, in a statement filed in the Buck case, offered the following rationale based in part on the “general economic theory of demand”:

If one looks at spending in any field, one generalization always holds. Spending on different items virtually never rises proportionally to purchasing power. To draw an analogy, we know that at very low levels of income, individuals spend a dominant part of their income on food, as they do today in very poor countries. As income rises, the proportion spent on food de-

37. I.R.C. §§ 170, 501(c)(3)-(22), 2055(a), 2552(a) (West Supp. 1986).

38. *Id.* § 501(c)(3)-(22).

39. *Id.* §§ 170, 2055(a), 2522(a).

40. I make this point without taking a position on whether the tax deduction represents a “subsidy,” or “tax expenditure,” as is commonly asserted, or an implementation of the theory that moneys contributed to charity should not be counted as part of one’s taxable income. For the former interpretation, see S. SURREY, *PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES* 223-32 (1973). For the latter interpretation, see Andrews, *Personal Deductions in an Ideal Income Tax*, 86 HARV. L. REV. 309 (1972) and Bittker, *Charitable Contributions: Tax Deductions or Matching Grants?*, 28 TAX L. REV. 37, 47-49 (1972).

clines and that on shelter and clothing rises. More striking, commodities that are not purchased at all at low income levels enter the budget, for example, automobiles or travel to foreign countries.

We have no reason to doubt that the same is true of charitable bequests. As the size of the estate rises, we expect not a simple expansion of the same kinds of expenditures but a growing variety. There are gains to concentrating expenditures when the total levels are low, but as the aggregate rises, we expect activities not previously deemed worthwhile to be encouraged. The good that can be achieved in a narrow area, defined geographically or functionally, is exhausted, and we may reasonably suppose the testator to be aware that this will be the case and to provide for a broader set of charitable activities.⁴¹

3. *Proportionality Principle*

Finally, and most simply, there is the principle of proportionality, familiar in other contexts: a punishment should fit the crime, self-defense should be proportionate to the threat, proportionality explains beauty. Philanthropy's version of this principle is that the impact area of charitable giving is roughly proportionate to the amounts involved.

The proportionality principle is noteworthy because it helps both to explain and to describe the donative behavior that is part of the philanthropic standard and that is documented in the Tables. What is remarkable about the Buck Trust is that it departs so dramatically from this prevailing behavior. The Buck Trust is the only example of large-scale giving I have been able to find that does not observe the principle of proportionality.

C. Application of the Philanthropic Standard to the Buck Trust

At this point one may ask: Why does the Buck Trust depart so dramatically from the standard apparently followed by every other major philanthropy—and from the precepts of history, economics and proportionality we have just mentioned? The answer that

41. Expert Witness Statement of Kenneth Arrow, *In re* Estate of Buck, No. 23259 (Jan. 24, 1986, Cal. Super. Ct., Marin County).

stares us in the face is posthumous surprise. Mrs. Buck did not know the true size of her benefaction—no one did—until after her death. The gift she *thought* she was making was not inconsistent with the philanthropic standard. But her gift turned out, *in fact*, to be so grossly out of line with that standard as to require the Foundation and the court, because *cy pres* is an intent-enforcing procedure,⁴² to consider the possibility of an amendment of her dispositive scheme, an amendment that death prevented her from undertaking on her own.

In many areas of the law drastic surprise, affecting the basic factual assumptions of the parties, permits the reconstruction of the parties' arrangements: contracts are reformed, treaty obligations restructured, marriages annulled. It is true that in the law of private trusts we do not vary so readily. If I leave equal sums to my children, and one strikes oil while the other suffers a catastrophic illness, my trustees may be able to obtain an emergency invasion of principal for the latter child but not a basic reallocation of trust income. Charitable trusts are different, however; the *cy pres* doctrine applies to them and is not available for private trusts. An understanding of this difference necessitates a consideration of the role of the nonprofit sector in America.

D. *The "Third Sector" and Its Implications*

The fact that the United States is not a binary society explains, in part, why the law can deal with "surprise" in charitable trusts but can not generally do so in the case of private trusts. America is not populated solely by private individuals and institutions owning personal or corporate property on the one hand, and state agencies presiding over public property on the other hand. Likewise, the work of the society is not carried on only by private actors operating in their own personal or corporate self-interest and by governmental actors obeying electoral majorities.

A distinguishing characteristic of the American social order, remarkable to de Tocqueville as a foreign visitor 150 years ago,⁴³ is that it does not rely exclusively on "private sector" or "public sector" actors to carry out the nation's business. Instead, there is major dependence on a third, nonprofit sector to teach us, heal us,

42. See *supra* note 5 and accompanying text.

43. 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 306 (P. Bradley rev. ed. 1956).

entertain us, expand our scientific and cultural frontiers, and protect our rights, opportunities, and natural resources. With the possible exception of Israel, no other country approaches America's reliance on the nonprofit sector to shoulder important social and economic tasks. Although social clubs, trade associations, labor unions, and many other "mutual benefit" groups are part of the nonprofit sector, the emphasis here is on the "charitable" groups—the schools, hospitals, churches, social service bodies, and other "public interest"⁴⁴ organizations embraced by section 501(c)(3) of the Internal Revenue Code.⁴⁵ A crucial source of nourishment for this charitable sector is private philanthropy: individual, corporate, and foundation giving, amounting to \$87 billion in 1986.⁴⁶

There are many explanations for this country's reliance on the nonprofit sector. Some economists see the nonprofit organization as a vehicle that provides some assurance to donors or consumers that their gifts or contracts will be honored, in contexts where they would have difficulty policing the performance of for-profit firms.⁴⁷ Other economists view the charitable world as the provider of "public" or "collective" goods, those yielding external benefits to the larger society, in situations where a majority of the electorate is not willing to use appropriated funds for these purposes.⁴⁸ Some political scientists and lawyers view the nonprofit sector as provid-

44. The "mutual benefit" and "public interest" descriptions come from Bittker & Rahdert, *The Exemption of Nonprofit Organizations from Federal Income Taxation*, 85 *YALE L.J.* 299 (1976).

45. I.R.C. §501(c)(3) (1986). Subsection (3) of section 501(c) provides:

(c) List of Exempt Organizations. . . .

. . . .

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

Id.

46. AMERICAN ASSOCIATION OF FUND RAISING COUNSEL, *GIVING USA* (1987).

47. See, e.g., Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835 (1980).

48. See, e.g., B. WEISBROD, *THE VOLUNTARY NONPROFIT SECTOR: AN ECONOMIC ANALYSIS* (1977).

ing goods and services that the government cannot constitutionally provide (like religious functions), or cannot practically provide (like evaluation of government itself), or is unlikely to offer in a diverse, innovative fashion because of majoritarian constraints.⁴⁹ Some historians explain the prevalence of nonprofits by pointing to a Colonial-era distrust of big government, and a resulting quest for decentralization. Other observers seek out more "affirmative" explanations for the use of nonprofits: they recruit and deploy voluntary labor; they contribute to the building of associational and community values; they permit a spirit of caring and altruism to express itself—or, more simply, they were the form of non-family organization that came first, ahead of government or business, and therefore possibly the "first sector."

What most of these explanations have in common is their perception of the charitable world as a setting that avoids the constraints and liabilities of the purely "private" or "public" sectors that are dominated, respectively, by market and ballot, while drawing from the strengths of each of them. Thus, the charitable organization and the philanthropy that supports it are driven, more than any government activity is driven, by an individual choice system of decision-making. Yet these decisions must be informed, more than in the case of any purely private actor, by an overriding obligation to perform in the public interest. This obligation, in the case of a charitable trust (or a charitable corporation) can be seen as a corollary of the state's supportive and regulatory role. That role is rather pronounced:

The trust becomes operative only after a court has found, either specifically or by inference, that it is charitable. Nor has government remained neutral. To encourage a continuous flow of funds into philanthropic enterprises, it bestows privileges, of which tax immunity is only one. The state creates and defines charitable trusts, grants them perpetual existence, modernizes them through *cy pres*, appoints and regulates the trustees, approves accounts, construes ambiguous language in the trust charter and sometimes goes so far as to impose a less stringent standard of tort liability on such trusts than on their private counterparts.⁵⁰

49. See, e.g., J. DOUGLAS, *WHY CHARITY?: THE CASE FOR A THIRD SECTOR* (1983).

50. E. Clark, *Charitable Trust, the Fourteenth Amendment and the Will of Stephen Girard*, 66 *YALE L.J.* 979, 1003-04 (1957).

The hybrid quality of the nonprofit sector in general, and the charitable trust in particular, was overlooked in much of the argumentation offered by the opponents of the Foundation's petition. A binary view, containing only the pure-private or pure-public models, dominated the rhetoric. The pure-private model was invoked when Mrs. Buck's language was construed as a private testamentary choice, the kind one makes when dividing up property within the family. Thus, the rhetoric of the litigation was replete with talk about "breaking the will" and other language that is appropriate to the pure-private model. The pure-*public* model appeared to be attributed to the Foundation, as though it were claiming government-like power, an effort to wield the power of kings over Mrs. Buck's legacy, regardless of her intention.

A binary view of the world not only encourages hyperbolic argument, but it also precludes understanding of the *cy pres* doctrine and why it should have been available in this case. Thus, if Mrs. Buck's bequest is viewed like a private family benefaction, *cy pres* looms as a threat to her autonomy and to the security of her last will and testament. The charitable donor, however, operates from the very start in the hybrid setting. His or her individual choice is honored, not (as in the pure-private setting) for its own sake—to protect the right of the donor to dispose of private personal property for private personal ends—but because individual choice is an allocative mechanism far better suited than governmental choice to achieve the diversity, pluralism, and decentralization that are the special virtues of the third sector. In short, individual choice is thought to assist the nonprofit sector to operate in the public interest. Indeed, the charitable donor is assumed to be exercising his or her choice for the very purpose of furthering the public interest, as compared to the personal or family goals that are properly attributed to the non-charitable donor. That is, in fact, a major premise underlying federal income and estate tax deductibility for charitable gifts.⁵¹ Indeed, in the Buck case, the donor evidenced such a general charitable intent.

Because individual choice *exercised in the charitable setting* is inextricably connected to advancement of the public interest, the law provides a mechanism to prevent the connection from being broken. *Cy pres* is the vehicle by which the law ensures that

51. See *supra* notes 37-40 and accompanying text.

changed circumstances will not result in a situation where literal obeisance to the donor's text departs from what a public-interest-regarding donor probably would have intended had he or she lived to witness and respond to the drastic change.

The resulting irony is that the way the charitable nonprofit sector copes with changed circumstances, where testamentary transfers are concerned, turns out to be *more* respectful of individual choice than the way in which the pure-private sector handles the same problem. Strict, literal obeisance to a donor's text, the rule for non-charitable trusts, often turns out *not* to be the best way of faithfully interpreting donative purpose. The fact that the *cy pres* doctrine, with its intent-enforcing capability, provides a superior opportunity to respect individual choice is one aspect of the Buck Trust litigation that was not grasped by those who referred to it as a "will-breaking" enterprise.

The character of the American nonprofit sector thus contributes to an understanding of the issue of surprise in the Buck Trust case. It also illuminates the other issue that played a part in the Foundation's decision to seek *cy pres*: the issue of charitable efficiency.

III. THE ISSUE OF EFFICIENCY

Surprise, even stupendous surprise, is not enough to bring about the final *cy pres* order reconstructing a donor's literal plan. There must also be a finding that the unreconstructed pattern is not serving the interests of efficient philanthropy. I have used "efficiency" language, but such a finding can be expressed in various ways. The judicial, legislative, and scholarly *cy pres* authorities cited earlier⁵² have used several adjectives ("impracticable," "inexpedient," etc.) to describe the occasion for modification in the face of changed circumstances. As noted above,⁵³ where there is no surprise, such an inefficiency finding, except in cases of illegality or impossibility, would probably not support a *cy pres* order. Presumably, a donor, in the presence of all the facts, can command substandard charity. But surprise should open the door to a finding of charitable inefficiency.

52. See *supra* notes 7-12 and accompanying text.

53. See *supra* note 14 and accompanying text.

A. *The Trustees' Role*

In the first instance it is typically the trustees or other charitable fiduciaries entrusted with the donor's gift who make a finding of inefficiency and propose a remedy. The law permits the trustees to take the lead.⁵⁴ Indeed, while the court has the final word, the trustees appear to have a duty to address the problem in the first instance.

Although it might seem inappropriate to let private persons make a finding that the public interest is not being effectively served as a result of changed conditions, it would be inconsistent with the values of diversity, pluralism, and decentralization to turn this function of explication over to a governmental agency. *Cy pres* has a better way, one that grows out of the donor-trustee relationship and out of the hybrid nature of the third sector.

In the American system of private philanthropy, it is the trustees, of a foundation or other recipient body, to whom the donor entrusts funds for deployment. Once the donor is gone, the trustees serve as the donor's vicar, giving meaning and reality to the gift. In accordance with that relationship, the trustees play the paramount role of translation and implementation, subject to judicial review.

This donor-trustee relationship, in turn, reflects the underlying structure of the nonprofit sector in the United States. The nonprofit organization, managed by its trustees, is the central actor in this sector. Thus, charitable groups and their trustees receive, manage, and dispense the nation's philanthropic resources. Their decisions give shape to the voluntary sector. The dominant role of these groups is respected in the federal tax laws, which permit only *organizations* to receive deductible contributions; person-to-person altruism does not qualify.⁵⁵ Similarly, state property tax laws recognize only the *organization* as entitled to the charitable exemption.⁵⁶ State statutes, in turn, subject these organizations to control by their trustees.

The responsibility that the law imposes on charitable organi-

54. E. FISCH, D. FREED & E. SCHACHTER, *CHARITIES AND CHARITABLE FOUNDATIONS* 462 (1974) (trustees as well as the attorney general may apply to the court for application of *cy pres*).

55. I.R.C. §§ 170, 2055 (West Supp. 1986).

56. See *e.g.*, CAL. REV. & TAX. CODE § 214 (West Supp. 1987).

zations and their trustees includes, as I have noted, an initiating role in cy pres litigation. It follows that charitable trustees also have the authority to play a leading part in the cy pres decision-making process. Once the fact of major "surprise" has been established, what the trustees find and recommend with respect to the need for a cy pres solution should have the benefit of a presumption of correctness, analogous to the presumption that favors the directors of a business corporation under the "business judgment rule." As long as the reviewing court finds that the trustees are acting in good faith and within the conventional bounds of reason, the trustees have the responsibility and the authority to make a finding that changed circumstances have resulted in inefficient or ineffective pursuit of the public interest.

Just as a binary view of the legal order (pure-public vs. pure-private) precludes a proper understanding of the cy pres doctrine itself, so a binary view cannot accommodate the trustee role set forth here. Under a binary view, either the state becomes the dominant decision-maker, or no one does; the binary view does not accept the hybrid notion of private fiduciaries deciding how best to carry out public purposes. Private actors in a binary world would mind their own business. As the "third sector" expression itself tells us, however, that is not the world we inhabit.

B. The Trustees' Role Under Assault

The Foundation, as trustee of the Buck Trust, sought to exercise its duty and authority in the cy pres process. The trustee's governing body, the Distribution Committee of the Foundation, took such action on the basis of its conclusion, not only that there had been posthumous surprise of monumental proportions, but that the resulting situation forced the Foundation to engage in substandard grantmaking. The Foundation sought to explain this conclusion at the trial by comparing, in terms of efficacy, the grants made in Marin County to the grants that could *not* be made in the other counties served by the Foundation. The Foundation did not assert that needs were "saturated" in Marin County, or in other words, that there was no remaining "need" at all for the projects being funded in that county. Instead, it sought to show that, because of the level and urgency of unmet needs in the other counties, the productivity of grant dollars being spent in Marin was not as high as the productivity of the grant dollars that could

have been spent elsewhere in the Bay Area.

The trial court excluded this testimony on the ground that the Foundation's criterion of inefficiency, one of relative inefficiency, was unacceptable. The court's notion of inefficiency became clear later on. After the case had been settled among the principal parties, and the Foundation's *cy pres* petition had been withdrawn, the court ruled negatively on a demand by a group of intervenors to grant the Foundation's petition. Although stating that inefficiency was not the proper legal standard—only “illegality, impossibility, or strict impracticability” would suffice⁵⁷—the court nevertheless devoted a considerable part of its opinion to its own ideas about inefficiency. The Foundation could have been more effective in Marin County, the court stated, if it had been willing to make endowment grants, if it had funded religious and medical research programs, if it had not insisted on 50% matching for capital grants, if it had been more initiatory, less reactive, more risk-taking.⁵⁸

In short, the trial court rejected the trustees' assessment of efficiency and substituted its own philanthropic preferences. Some readers of this Article may find the court's philanthropic views more appealing than the Foundation's. But it is a fact that Mrs. Buck did not name the superior court of California as her trustee; for better or for worse, she named the Foundation. Moreover, the court's rejection of the trustee's role in the *cy pres* process ignores the role charitable trustees play in the nonprofit sector. The result allows an agency of the state to become the grantmaking supervisor, thus undermining the decentralized, or “privatized,” structure so carefully nurtured in our legal order.

The court's role, indeed, has been carried a step further. On July 25, 1986, the Attorney General of the State of California, the County of Marin, and the Marin Council of Agencies entered into an agreement, which was adopted by the court six days later, providing that 20 to 25% of income from the newly reconstituted Buck Trust would be set aside for one to three “major projects” of “national and international importance,” that a hearing would be held by the court in July 1987, and that at the conclusion of the

57. *In re Estate of Buck*, No. 23259, slip op. at 98 (Cal. Super. Ct., Marin County Aug. 15, 1986).

58. *Id.* at 33-47.

hearing, "the court may select one or more projects to be funded by the Buck Trust as determined by the court."⁵⁹

On August 7, 1987, the court directed that Buck Trust funds be allocated in certain prescribed amounts to three "major projects": The Buck Center on Aging, Institute on Alcohol and Other Drug Problems, and Marin Educational Institute. The court appointed a special master to monitor all three "major projects," approve their budgets, and attend all meetings of their governing bodies. The court ordered that it would "review the progress and operations of each major project annually" and reserved the right to impose additional conditions, to alter any project's Buck Trust funding, or to modify or terminate it as a Buck Trust beneficiary.⁶⁰

Whatever one's view of the Buck Trust case, this result should be arresting to anyone who cares about *private* philanthropy in the United States. The superior court has removed from the Buck Trust management and reserved to itself the right to decide how a major part of Beryl Buck's legacy will be used to help the nation or the world. The binary view triumphs. Philanthropy has "gone public" with a vengeance.

IV. CONCLUDING THOUGHTS

A. *Conjectures About Outcomes and Consequences*

1. *Ultimate Result?*

If the Buck Trust case had been fully litigated and then reviewed by the California Supreme Court, what would have been the outcome? Would the court have supported the trial judge's opinion that only "illegality, impossibility or strict impracticability" supports a cy pres modification? Or would recognition of the intent-enforcing and efficiency-preserving policies of cy pres have led the California Supreme Court to take into account posthumous surprise, the "philanthropic standard," and the decisional role of charitable trustees—and thereupon reach a favorable response to

59. The Agreement Among Attorney General, John K. Van de Kamp, Marin County, and the Marin Council of Agencies at 5, *In re Estate of Buck*, No. 23259 (Jul. 25, 1986, Cal. Super. Ct., Marin County) [hereinafter Agreement]. The "major projects" provision was adopted in the Order for Appointment of Successor Distribution Trustee, *In re Estate of Buck*, No. 23259 (Jul. 31, 1986, Cal. Super. Ct., Marin County) [hereinafter July 31 Order].

60. Order Establishing Major Projects and Related Matters, *In re Estate of Buck*, No. 23259 (Aug. 7, 1987, Cal. Super. Ct., Marin County).

the petition? The judicial precedents can be said to point in both directions;⁶¹ the final result would not have been an easy call.

2. *The Chilling of Charity?*

Let us suppose, however, that the California Supreme Court had approved a modification of the Buck Trust terms. Some observers feared that such a result would chill future charitable giving, by leading donors to worry that their intentions count for naught. I am persuaded that there is little basis for such a prediction. The only accurate message a Buck Trust cy pres order could have sent to the world of potential donors is this one:

If an extraordinary event multiplies your bequest beyond any size you could possibly have imagined, *and* if you had imposed narrow restrictions on your bequest not anticipating this circumstance, *and* if the trustees you have selected to carry out your wishes decide that your gift cannot be put to efficient use given the narrow restrictions, *and* if a court finds that the trustees are acting reasonably and in good faith, then the court may authorize the trustees to spend some of the income on closely related charitable objectives, still leaving the original objects of your bounty with several times what you thought you were giving them.

Perhaps this is not how donors would have understood the point of a Buck Trust modification. More difficult and subtle lessons, however, have been successfully communicated to affected populations, as a result of past court decisions. Those potential donors who grasped the Buck Trust message would have had no reason to cut their charitable bequests. The conditions such a message spells out are rare enough to approximate the "100-year flood." And those who did not like the message could word their wills to specify a response in the event of the 100-year flood.

Furthermore, past experience points away from a chilling effect on gifts. It is my understanding that the rate of giving to the Foundation did not decline in the wake of the filing of the Buck Trust petition in early 1984. Indeed, the late Austin Wakeman Scott wrote that giving in England actually *increased* following cy pres developments that were much more unsettling to donors than

61. See *supra* note 18 and accompanying text.

any message the Buck Trust case could send.⁶²

Not only would harm to philanthropy have been improbable as a result of a Buck Trust modification; long-run positive benefits would have been likely. These are difficult days for the nonprofit sector and for the process of philanthropy that largely supports it. Voluntary organizations are being asked to shoulder an increasing share of society's tasks in the wake of a reduction in the federal government's social role. This effort requires increasing reliance on donations from the general public and supportive legislation that provides favorable federal tax treatment and postal rates, generous property tax exemptions, and a modest level of regulation. It is not easy to maintain a favorable climate for such philanthropic and legislative assistance without public confidence in the fairness and equity of the philanthropic system. In Western Europe, private philanthropy has been under attack both because it is controlled by the "rich and powerful" and because "[s]ome charities such as private schools or hospitals are seen as havens of wealthy privilege"⁶³ Similar sentiments about private foundations in the United States contributed to the passage of restrictive legislation in the Tax Reform Act of 1969. Another season of public or legislative hostility is not out of the question for the charitable community, particularly if trustees are prevented from taking what is essentially a form of philanthropic self-regulation to cope with bizarre situations like this one. The perception of an adventitious windfall, from the Buck Trust, that lets the "rich get richer"—and that philanthropic mechanisms can do nothing to correct—could contribute to the apprehension that philanthropy, despite the tax "subsidy" it enjoys from the public at large, is an avenue to "welfare for the rich."

This concern would not have been, and is not, an appropriate basis for judicial approval of a *cy pres* petition. The Foundation's petition had to be justified on the other grounds discussed in this Article. But the possibility that *cy pres*, in the circumstances of the Buck Trust case, could protect respect for and support of American philanthropy does provide another rebuttal to the "chilling effect" arguments that have been so strenuously advanced.

62. 4 A.W. SCOTT, *supra* note 5, § 399.4, at 3123-24.

63. Kandell, *Private Charity Going Out of Style in West Europe's Welfare States*, N.Y. Times, Jun. 30, 1978, at 1, 4.

3. *A Slippery Slope?*

One additional concern about a *cy pres* order was that it could not be contained: once the Buck Trust was opened up to extra-Marine grants, it would be subject to a sea of demands from meritorious applicants from around the world. The trial court's opinion in the Buck Trust case, for example, criticized the Foundation's efficiency arguments on the ground that the "relative need" premise that they embraced would cause "all charitable gifts and the fundamental basis of philanthropy [to] be threatened, as there may always be more compelling 'needs' to fill than the gift chosen by the testator Similarly, needs in the Bay Area cannot be equated with the grueling poverty of India or the soul-wrenching famine in Ethiopia."⁶⁴ The court apparently assumed that notions of efficiency or relative need would routinely be used to challenge bequests, that "all charitable gifts" would be questioned on efficiency grounds even *in the absence of major surprise*. That was not the Foundation's position—certainly it is not mine—and it would not conceivably have been the position of any court that approved a *cy pres* petition in circumstances similar to those present in the Buck Trust case.

Moreover, in the Buck case itself, the "why not Ethiopia?" riposte is answered by considering the meaning of "*cy pres*," which is short for *cy pres comme possible* ("as close as possible" in Norman French), thus, a modification as close as possible to the donor's intention. Beryl Buck named as her trustee the Foundation, which is committed to serving the five counties of the Bay Area. Unless one makes the rather strenuous assumption that her choice of the Foundation to carry out her charitable purposes had nothing to do with the fact that it was the local community foundation, some interpretive significance should attach to that selection. This choice of trustee in fact provides an answer to the fear of an open-ended Buck Trust modification, a plausible catch-point on the slippery slope that otherwise could lead to Ethiopia and elsewhere. In short, it might well have been concluded, with reference to the Bay Area, that the Buck Trust stops here.⁶⁵

64. *In re Estate of Buck*, No. 23259, slip op. at 97-98 n.6 (Cal. Super. Ct., Marin County Aug. 15, 1986).

65. At a panel discussion on October 6, 1987 on the Buck Trust case, sponsored by the New York University Institute on Federal Taxation, Daniel L. Kurtz responded to my pro-

B. *The National-International Share*

It is this issue of the Bay Area as against the rest of the world that prompts a final comment on the actual denouement of this case. As noted, on the basis of an agreement among the Attorney General, Marin County, and the Marin Council of Agencies, providing for major projects of "national and international importance and significance," the court's July 1986 order requires that a share of Buck Trust income (starting at 25% and perpetually continuing at 20%) be dedicated to one or more "major . . . projects . . . located in Marin County, the benefits from which will inure not only to Marin County but all of humankind."⁶⁶

My first thought, upon receiving a vague and fragmentary account of this provision, was one of modest satisfaction. Some part of Mrs. Buck's hugely swollen benefaction was to serve a purpose larger than Marin County. Charity had begun at home, but some part of large-scale charity was now going to reach beyond. To that extent, the outcome of the case accommodated the fact of posthumous surprise, Beryl Buck's probable adherence (had she lived longer) to the "philanthropic standard," and the quest for efficient disposition of charitable dollars. Moreover, this result would probably never have been achieved had the Foundation not commenced the litigation. Accordingly, the cost and travail of this long and bitter case were not a total loss.

These views are tempered, however, by disquieting second thoughts, based on a reading of the court's orders of 1986 and

position along the following lines: If one argues that, had Mrs. Buck known about the true size of her benefaction, she would have modified her geographic restrictions, then the same reasoning might also suggest that, in this new wealth posture, she would not necessarily have chosen the San Francisco Foundation as her distributive vehicle; she might well have chosen a more broadly-based organization not limited to the Bay Area. Mr. Kurtz suggested, therefore, that the choice of the Foundation should not be treated as a given when dealing with the "slippery slope" issue. The point is a strong one, but, for me, not dispositive. Once *cy pres* is invoked, one searches for clues that will suggest what the donor might have wanted as a next-closest outcome. The choice of the Foundation is a clue, not a powerful one in the light of Mr. Kurtz's criticism, but better than no clue at all.

It should be noted that "the point urged by the Foundation was not that distribution throughout five Bay Area counties was necessarily required (although that was the modification which the Foundation, as trustee, proposed as representing a desirable *cy pres* alternative) but that, as opposed to maintaining the status quo, some type of modification was appropriate in light of unanticipated developments subsequent to Mrs. Buck's death." Communication from Stephen V. Bomse, *supra* note 14.

66. July 31 Order, *supra* note 59, at 8.

1987, dealing with "major projects." The extraordinary command role the court reserved for itself over the decision-making process, discussed earlier, violates the basic concept of private philanthropy and disregards the role assigned to charitable trustees in the non-profit sector. Turning to the substance of the "major projects" orders, they presumably seek to implement Mrs. Buck's expressed intention, but serious doubts arise on this point. In its opinion on the Foundation's *cy pres* petition, the court suggested that nationwide programs headquartered in Marin County would have pleased the donor. This suggestion arose as part of the court's general finding that Buck Trust funds could "continue to be spent effectively and efficiently in Marin County"⁶⁷ and that the Foundation had dropped the ball during its stewardship. The court wrote that the Foundation had improperly insisted that all Buck Trust grants must "*primarily* benefit Marin County and its residents."⁶⁸ Thus the Foundation had rejected grants for the National Guide Dogs for the Blind organization, which is based in Marin, and for a nationally-distributed children's television series produced by a Marin-based organization. The court wrote that "Mrs. Buck intended and contemplated that, while the expenditures of the Buck Trust would be limited to Marin, its benefits would and should extend beyond Marin's border," citing, without further detail, trial testimony by her lawyer.⁶⁹

It was true enough that the Foundation, trying to honor what it thought was a faithful interpretation of Mrs. Buck's language, had refused to support national programs headquartered in Marin County that did not primarily benefit Marin residents. This policy was also directed against what the Foundation's Director referred to as "carpetbaggers" trying to base their programs in Marin

67. *In re Estate of Buck*, No. 23259, slip op. at 111 (Cal. Super. Ct., Marin County Aug. 15, 1986).

68. *Id.* at 43 (emphasis in original).

69. *Id.* at 43-44. The cited testimony, by John Elliott Cook, in its entirety, is as follows:

Well, there is a matter of funding and there is a matter of the results of the funding. The funding was due in Marin. Mrs. Buck wanted it there. She wanted Marin to be identified as the area from which the Buck Trust arose.

. . . I have never suggested that all the money had to be spent in Marin besides being the focus from which the benefit of that money funnel out from Marin. That's her idea. She wanted that sort of identification throughout the country even.

Trial Transcript at 8498-99, *In re Estate of Buck*, No. 23259 (Cal. Super. Ct., Marin County).

County in order to capture Buck Trust grants.⁷⁰ Mrs. Buck's language seemed to support the Foundation's position. She had directed that income should be used "for exclusively non-profit charitable, religious or educational purposes in providing care for the needy in Marin County, California, and for other non-profit charitable, religious or educational purposes in that county."⁷¹ Despite her lawyer's trial testimony, this is not the language a testator would use if she wished to support a national or international grant program merely headquartered in Marin County. Instead, the clear implication is that the Buck Trust was intended to help the "needy" of Marin County and to provide other charitable, religious and educational assistance to the non-"needy" of that county—in short, to confer benefit on Marin residents. Under the terms of Mrs. Buck's will, therefore, it is, to put it mildly, very difficult to justify a national-international "major projects" scheme.

One might, however, explain the "major projects" order not as a straightforward implementation of the Buck will but as the court's effort to interpret what Mrs. Buck *might have wanted* to do with some of her income if she knew its true magnitude. In that context, the notion that she would have wanted some Buck Trust funds to go to projects that do not primarily benefit Marin residents, but that assist larger national or international purposes, would be an arguable inference. It must be observed, however, that this explanation of the "major projects" order assumes that changed circumstances have forced the court to look beyond the express language of the testator and to search for the next-closest solution. There is a name for this approach. It is called *cy pres*!

Assuming that the court in reality stepped into a *cy pres* mode, the next question must be whether *cy pres* principles were correctly applied. From Mrs. Buck's point of view, would the next-closest solution take the form of grants to three national programs on aging, on alcohol and drug abuse, and on education? One argument for this conclusion is that Marin County headquartering will provide jobs to Marin County residents, although some of these residents will surely be brand new ones. Another Marin-benefit ar-

70. *In re Estate of Buck*, No. 23259, slip op. at 44 (Cal. Super. Ct., Marin County Aug. 15, 1986).

71. *Id.* at 4.

gument is suggested by a sentence in the July 25, 1986 agreement, incorporated in the court's July 1986 order: "To the extent practical, such . . . projects . . . shall be consistent with her desire to bring respect and admiration to Marin County."⁷² One may ask, however, whether these contentions have much substance. Many or most of the job openings created by the sophisticated research, training and media institutions that receive "major projects" funding call for highly professional, technical or artistic qualifications. Presumably, Marin County residents possessing these qualifications already have good jobs. Moreover, the trial court's canvass of testimony regarding Mrs. Buck's feelings about Marin County makes no reference to any "desire to bring respect and admiration" to the county.⁷³ In his trial testimony, Mrs. Buck's lawyer, John Elliott Cook, referred, in brief and general terms, to her desire to have "Marin . . . identified as the area from which the benefits under her charity arose."⁷⁴ It is reasonable to assume that anyone who is fond of a place would like to see it acclaimed, but does the Cook testimony establish that this was a salient feature of Mrs. Buck's charitable outlook?

The point of these cavils is not that a national-international projects program would have been wholly unpalatable to the donor as a *cy pres* scheme. Rather, I mean to suggest that it is not obvious that these programs would have been *preferred* by the donor over distributions to neighboring Bay Area counties served by the Foundation. As noted above, the fact that she picked a community foundation focused on the Bay Area as the instrument of her charity cannot be ignored when shaping a *cy pres* solution.

My conjectures are under-informed, for the simple reason that we have neither evidence nor argument bearing on the question of what would be the solution *cy pres comme possible*. The reason, in turn, for that lack of information is that there was never an adjudication that this was a proper case for *cy pres*. The Foundation withdrew its petition before the trial was concluded. Moreover, in the court's rejection of the intervenors' case, the court ruled that *cy pres* was not available. Without a threshold decision that *cy*

72. Agreement, *supra* note 59, at 6; July 31 Order, *supra* note 59, at 8.

73. *In re Estate of Buck*, No. 23259, slip op. at 4-10 (Cal. Super. Ct., Marin County Aug. 15, 1986).

74. Trial Transcript at 8498-99, *In re Estate of Buck*, No. 23259 (Cal. Super. Ct., Marin County). See also *supra* note 69 and accompanying text.

pres was available, the door was not open to evidence and argument about a precise cy pres solution, including the choice between a Bay Area solution and a national-international projects solution.

And so, cy pres came to the Buck Trust after all, and at the hands of a court that had emphatically rejected the Foundation's cy pres petition. Cy pres came to the Buck Trust, however, not under its own name or with full cy pres procedures, but in disguise and lacking the inquiry that would help to insure a convincing fit between the final outcome and the testator's preferences.

Muddled though the outcome was, it had its positive aspects. For one thing, cy pres principles of surprise and charitable efficiency seem to have been vindicated by the "major projects" order, albeit in an indirect and flawed manner. Moreover, at a more symbolic level there is another, favorable fallout from the Buck Trust case.

A foundation, acting through its Distribution Committee, its staff, and its counsel, has established an important precedent in the annals of American philanthropy. It has faced up to the highest duty of trusteeship: to address difficult and novel dilemmas involving the fiduciary mission, to do so in a way that seeks to respect both the donor and the public interest, and then, having resolved the dilemma, to act upon that resolution, regardless of slings and arrows. It may well be the case that the Foundation could better have managed its relationships with its relevant constituencies, including Marin County officialdom. But in discharging its substantive duties, the Foundation has set a standard for other charitable institutions and for other trustees, both eleemosynary and corporate, to heed. The health of the American nonprofit world, and of the private sector in general, is a bit more robust because the Foundation grasped the nettle in the Buck Trust case. A congeries of pressures, some of them disreputable and all of them powerful, forced the Foundation to withdraw short of the final goal, but its effort to that point, in my view, merits the philanthropic equivalent of the Medal of Honor—plus, of course, the Purple Heart.

APPENDIX
TABLE 1

**GEOGRAPHIC AND SUBJECT MATTER SCOPE
OF THE 63 LARGEST U.S. FOUNDATIONS**

Notes: Foundations included are those listed in *The Foundation Directory* as either among the 50 largest foundations by assets or among the 50 largest foundations by annual giving. Fiscal year reporting periods vary, but all fiscal years end in 1981 or 1982. Foundations from the annual giving rankings are listed first, in descending order of annual giving. Those foundations included in the assets rankings but not in the annual givings rankings are then listed, in descending order of asset size.

Sources: *The Foundation Directory* (9th ed.) for dollar amounts. Information in the "Geographic/Subject Matter Scope" column is abstracted from *The Foundation Directory* summaries as supplemented by information provided by *Source Book Profiles* (which, like the *Directory*, is published by The Foundation Center).

Foundation	Geographic Scope Subject Matter Scope	Annual Grants Assets (in Millions)
Ford Foundation	No limitations.	89.1
	Broad purposes.	2,565.6
Mellon (Andrew W.) Foundation	No limitations.	58.4
	Broad purposes.	816.9
Pew Memorial Trust	No limitations.	57.8
	Broad purposes.	903.5
Kellogg (W.K.) Foundation	U.S. and Latin America.	52.4
	Broad purposes.	1,046.2
Rockefeller Foundation	No limitations.	42.6
	Broad purposes.	883.2
Lilly Endowment, Inc.	No limitations, except that grants for cultural programs are limited to Indiana.	42.3
		779.0
	Broad purposes.	

Foundation	Geographic Scope Subject Matter Scope	Annual Grants Assets (in Millions)
Johnson (Robert Wood) Foundation	United States. Improvement of health services.	42.0 1,421.1
Moody Foundation	Texas. Broad purposes.	37.5 225.0
Duke Endowment	North and South Carolina. Broad purposes.	36.7 462.7
Atlantic Richfield Foundation	Mainly in areas of company operations. Broad purposes.	32.3 12.5
Kresge Foundation	No limitations. Broad purposes.	32.3 681.5
MacArthur (John D. and Catherine) Foundation	No limitations. Broad purposes.	31.8 928.0
San Francisco Foundation	San Francisco Bay Area. Broad purposes.	30.1 377.5
Exxon Education Foundation	United States. Education.	26.0 52.3
McKnight Foundation	No limitations except for emphasis on Twin Cities Metropolitan area and Minnesota with respect to social and human service grants. Human and social services, neuroscience research, and basic plant biology research.	24.8 338.1
Keck (W.M.) Foundation	Primarily California. Broad purposes.	23.8 460.0
Mott (Charles Stewart) Foundation	No limitations. Broad purposes.	23.0 471.3
New York Community Trust	Priority to New York City area. Broad purposes.	22.8 302.5

Foundation	Geographic Scope Subject Matter Scope	Annual Grants Assets (in Millions)
Houston Endowment, Inc.	Continental United States. Priority to Houston area and Texas needs. Broad purposes.	18.8 254.9
Cullen Foundation	Texas. Broad purposes.	17.9 87.8
Sloan (Alfred P.) Foundation	No limitations. Broad purposes.	16.7 316.4
Cleveland Foundation	Cleveland area. Broad Purposes.	15.7 223.7
Brown Foundation, Inc.	Primarily Houston and Texas. Broad purposes.	15.1 203.0
Pew (J. Howard) Freedom Trust	No limitations. Broad purposes; primarily educational.	14.6 191.0
Weingart Foundation	Southern California. Broad purposes.	13.9 204.4
Kaiser (Henry J.) Family Foundation	No limitations. Largely health care.	13.7 219.9
Bush Foundation	Largely Minnesota, the Dakotas, Western Wisconsin, and Chicago. Broad purposes.	13.7 247.7
Rowland Foundation, Inc.	No limitations; some emphasis on Boston-Cambridge area. Broad purposes.	13.6 25.0
Carnegie Corporation of New York	United States and certain countries that have been members of the British Overseas Commonwealth. Broad purposes.	13.5 381.7
Shell Companies Foundation, Inc.	No limitations; some emphasis on communities where Shell employees reside. Community funds and education preferred.	13.2 56.1

Foundation	Geographic Scope Subject Matter Scope	Annual Grants Assets (in Millions)
Welch (Robert A.) Foundation	Texas. Broad purposes; emphasis on chemistry education and research.	13.2 144.5
Irvine (James) Foundation	California. Broad purposes.	13.0 234.7
Amoco Foundation, Inc.	No limitations. Emphasis on higher education.	12.9 49.7
General Motors Foundation	No limitations. Broad purposes.	12.8 80.2
Krannert Charitable Trust	Primarily Indiana. Broad purposes.	12.7 44.0
Hewlett (William and Flora) Foundation	No limitations, except for regional grants program, which is limited to the S.F. Bay Area. Broad purposes.	12.4 531.5
Clark (Edna McConnell) Foundation	No limitations. Improving stable home environment for children; improving school-to-work transition for urban disadvantaged youth; improving penal system; controlling and curing schistosomiasis.	12.3 242.2
Noble (Samuel Roberts) Foundation, Inc.	Primarily Southwest, with Oklahoma emphasis. Broad purposes.	12.3 257.7
Mabee (J.E. and L.E.) Foundation, Inc.	Oklahoma, Texas, Kansas, Arkansas, Missouri and New Mexico. Broad purposes.	12.0 359.1
General Electric Foundation	U.S. and possessions. Broad purposes.	11.3 44.1
Mobil Foundation, Inc.	Areas of company operations. Broad purposes.	11.3 13.5
Chicago Community Trust	Cook County, Illinois. Broad purposes.	11.3 126.7

Foundation	Geographic Scope Subject Matter Scope	Annual Grants Assets (in Millions)
Ford Motor Company Fund	Primarily where Ford Motor Company has plants.	11.2
	Broad purposes.	23.9
System Development Foundation	No limitations. To support basic research in information processing by both machine and biological processors.	11.1 61.2
Fairchild (Sherman) Foundation, Inc.	No limitations. Broad purposes.	11.1 113.8
Rockefeller Brothers Fund	No limitations. Broad purposes.	10.7 161.8
Penn (William) Foundation	Philadelphia area. Broad purposes.	10.5 165.2
Joyce Foundation	The Midwest. Broad purposes.	10.0 150.7
Dana (Charles A.) Foundation, Inc.	United States. Broad purposes; eastern private liberal arts colleges; health.	9.9 92.9
Gannett Foundation, Inc.	Areas of Gannett Company operations in U.S. and Canada. Broad purposes.	9.9 355.9

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(The following foundations are among the largest 50 foundations ranked by assets, but not among the largest 50 foundations ranked by annual giving.)

Simon (Norton) Foundation	No limitations. Broad purposes (primarily an operating foundation which purchases and lends works of art.)	0.2 276.0
Starr Foundation	No limitations. Largely for education	3.9 211.4
Surnda Foundation, Inc.	Focus on Northeast. Broad purposes.	9.5 210.2
Wilder (Amherst H.) Foundation	Greater metropolitan St. Paul. Largely an operating foundation which finances and operates various community services.	0.3 190.8

Foundation	Geographic Scope Subject Matter Scope	Annual Grants Assets (in Millions)
Tandy (Anne Burnett) and Charles D. Tandy Foundation	Primarily Fort Worth and Texas. Broad purposes.	1.1 165.8
DeRance, Inc.	No limitations. Broad purposes.	9.5 151.4
Simon (Norton), Inc. Museum of Art	No limitations. Broad purposes. (Primarily an operating foundation which purchases and lends works of art).	0.4 147.3
Meyer (Fred) Charitable Trust	Primarily Northwest. Broad purposes.	1.0 142.8
Murdock (M.J.) Charitable Trust	Northwest. Broad purposes.	8.4 140.8
Alcoa Foundation	Primarily in areas of company operations. Broad purposes.	7.8 140.6
Ahmanson Foundation, Inc.	Primarily Los Angeles and Southern California. Broad purposes.	9.8 139.6
Myrin (Mabel Pew) Trust	Primarily Philadelphia, Pennsylvania. Emphasis on education and local cultural programs.	9.4 130.7
Commonwealth Fund	No limitations. Largely health care.	7.8 129.8

TABLE 2
GIFTS AND BEQUESTS MADE TO FOUNDATIONS
DURING THE PAST THIRTY YEARS
EXCEEDING \$30 MILLION

Note: This schedule does not purport to be exhaustive. It does, however, include all gifts and bequests set forth in the sources listed below.

Sources: *Giving USA* and data furnished by Dr. Ralph Nelson of City University of New York. Geographic and subject matter scope are abstracted from *The Foundation Directory* (9th ed.).

Foundation	Geographic Scope Subject Matter Scope	Donor Gift/Bequest	Amount of Gift or Bequest (in Millions)	Year of Gift or Bequest
Hartford (John A.) Foundation	No limitations. Broad purposes.	John A. Hartford Bequest.	53.4	1954
Fleischmann (Max C.) Foundation	No limitations. Broad purposes.	Max C. Fleischmann Bequest.	45.7	1955
Sloan (Alfred P.) Foundation	See Table 1	Mrs. Alfred P. Sloan Bequest.	73.0	1957
Astor (Vincent) Foundation	Primarily N.Y.C. Broad purposes.	Vincent Astor Bequest.	34.8	1959
Moody Foundation, Inc.	See Table 1	William L. Moody, Jr. Bequest.	100.0	1959
Rockefeller Brothers Fund	See Table 1	John D. Rockefeller, Jr. Bequest.	65.3	1960
Brown Foundation, Inc.	See Table 1	Herman Brown Gift.	43.0	1962

Foundation	Geographic Scope Subject Matter Scope	Donor Gift/Bequest	Amount of Gift or Bequest (in Millions)	Year of Gift or Bequest
Mott (Charles Stewart) Foundation	See Table 1	C.S. Mott Gift.	195.6	1963
Astor (Vincent) Foundation	Primarily N.Y.C. Broad purposes.	Vincent Astor Bequest.	30.8	1963
Kenan (William R., Jr.) Charitable Trust	United States. Education.	William R. Kenan Bequest.	95.0	1965
Clark (Edna McConnell) Foundation	See Table 1	Mr. and Mrs. Van Alan Clark Gift.	40.0	1966
Scaife (Sarah) Foundation	No limitation; some emphasis on Pittsburgh. Broad purposes.	Mrs. Sarah Mellon Scaife Bequest.	65.7	1966
Sloan (Alfred P.) Foundation	See Table 1	Alfred P. Sloan Bequest.	30.2	1966
Luce (Henry) Foundation	No limitations. Broad areas of public affairs.	Henry Luce Bequest.	68.6	1967
Rowland Foundation, Inc.	See Table 1	Edwin H. Land Gift.	107.6	1968
Bush Foundation, Inc.	See Table 1	Archibald G. Bush Bequest.	45.8	1968
Clark (Edna McConnell) Foundation	See Table 1	Mr. and Mrs. Van Alan Clark Gift.	93.0	1969
Brown (James Graham) Foundation	Primarily Louisville and Kentucky. Broad purposes.	James Graham Brown Bequest.	100.0	1969

Foundation	Geographic Scope Subject Matter Scope	Donor Gift/Bequest	Amount of Gift or Bequest (in Millions)	Year of Gift or Bequest
Spencer Foundation	No limitations. Behavioral science research.	Lyle M. Spencer Bequest.	88.0	1969
Mellon (Andrew W.) Foundation	See Table 1	Mrs. Ailsa Mellon Bruce Bequest.	376.0	1970
Kennedy (Joseph P., Jr.) Foundation	No limitations. Primarily con- cerned with rights of the powerless.	Joseph P. Kennedy Bequest.	200.0	1970
Johnson (Robert Wood) Foundation	See Table 1	Robert Wood Johnson Bequest.	1,004.0	1971
Pew (J. Howard) Freedom Trust	See Table 1	J. Howard Pew Bequest.	80.0	1971
Mellon (Richard King) Foundation	Largely Pittsburgh and Western Pa. (also nature preservation nationwide). Broad purposes.	Richard King Mellon Bequest.	63.7	1972
Dodge (Geraldine R.), Inc.	Emphasis on New Jersey. Broad purposes.	Geraldine Rockefeller Dodge Bequest.	85.0	1973
Mott (Charles Stewart) Foundation	See Table 1	Charles Stewart Mott Bequest.	40.0	1973
Murdock (M.J.) Charitable Trust	See Table 1	M.J. Murdock Bequest.	100.0	1975
MacArthur (John D. and Catherine) Foundation	See Table 1	John D. MacArthur Bequest.	1,000.0	1978

Foundation	Geographic Scope Subject Matter Scope	Donor Gift/Bequest	Amount of Gift or Bequest (in Millions)	Year of Gift or Bequest
McKnight Foundation	See Table 1	William L. McKnight Bequest.	128.9	1981
Meyer (Fred) Charitable Trust	See Table 1	Fred Meyer Bequest.	120.2	1981

