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## ARTICLES

### **SPENDTHRIFT TRUSTS AND PUBLIC POLICY: ECONOMIC AND COGNITIVE PERSPECTIVES**

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#### TABLE OF CONTENTS

INTRODUCTION .....	1
I. VOLUNTARY ALIENATION .....	9
<i>A. Economic Perspectives</i> .....	9
<i>B. The Psychology of Saving</i> .....	17
<i>C. The Psychology of Inheritance</i> .....	33
<i>D. The Problem of Paternalism</i> .....	44
II. INVOLUNTARY ALIENATION .....	56
III. EXCEPTIONS .....	72
CONCLUSION .....	92

#### INTRODUCTION

In the next little while, I want to address a problem that once captured, then somehow lost, the hearts and minds of legal scholars: to wit, the public policy of spendthrift trusts.

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The spendthrift trust is a device whereby benefactors shield gratuitous transfers from immediate consumption by their beneficiaries. Adorned with a spendthrift clause (or a “disabling restraint,” as it is technically known),<sup>1</sup> a trust provides benefits that are legally inalienable. Though the trust generates a steady income stream with an ascertainable present value, the beneficiary is powerless to accelerate her interest by selling it for a lump sum; the trustee will ignore the sale and continue paying over the income to the beneficiary. Likewise, creditors cannot satisfy their claims by levying execution against the corpus; courts will enforce no lien against the trust.<sup>2</sup> Spendthrift trusts thus differ from ordinary income-producing trusts, whose beneficial interests can be sold at will and used for any purpose at all. A disabling restraint does not dictate the *substantive* use of trust income (that is, it does not require one sort of spending or another),<sup>3</sup> but it does limit the *temporal* use of income to the singular purpose of periodic consumption. Once a trust distribution is in her hands, the beneficiary is free to consume it as prudently or as frivolously as she pleases. And once a trust distribution is in her hands, the beneficiary’s creditors are also empowered to reach it—assuming they can find it, for in practice what may follow is a game of hide-and-seek, the trustee (at the beneficiary’s direction) depositing the income each month into a different bank.<sup>4</sup> In short, a spendthrift trust provides a stable source of passive income, conducing to the beneficiary’s long-term support.<sup>5</sup> If the income suffices, it can enable

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1. On the linguistic origins of the term “spendthrift trust,” see ERWIN N. GRISWOLD, SPENDTHRIFT TRUSTS § 33 (2d ed. 1947).

2. For a technical discussion, see GEORGE G. BOGERT & GEORGE T. BOGERT, THE LAW OF TRUSTS AND TRUSTEES §§ 226-27 (rev. 2d ed. 1992 & Supp. 1994). When the beneficiary of a spendthrift trust *contracts* to assign her rights to future trust income, courts have refused specifically to enforce the assignment, although many have given the assignee a right to recover for breach of contract out of the *general* assets (such as there are) of the trust beneficiary. *Id.* § 226, at 491-94; 2A AUSTIN W. SCOTT, THE LAW OF TRUSTS § 152.6 (William F. Fratcher ed., 4th ed. 1987 & Supp. 1992); RESTATEMENT (SECOND) OF TRUSTS § 152 cmt. k (1955).

3. For a discussion of the public policy of trusts restricting the substantive use of trust income, see Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 18-27 (1992).

4. Austin W. Scott, *Protective Trusts*, in HARVARD LEGAL ESSAYS 419, 424-25 (1934) (observing that spendthrift trusts “introduced into the law a sporting element”). Nevertheless, if a beneficiary seeks to avoid creditors by contriving for the trustee to *retain*, and simply accumulate, income that has become due for distribution, courts have permitted creditors to reach it in the hands of the trustee. This stratagem, at least, has been deemed ineffective. BOGERT & BOGERT, *supra* note 2, § 227, at 514-16.

5. The spendthrift trust is not the only variety of trust that creates an inalienable interest in property. Discretionary trusts and support trusts also feature this element, *without* guaranteeing the beneficiary a fixed stream of income. Forfeiture restraint trusts (also known as protective trusts) are another structural relative of the spendthrift trust: they provide the beneficiary a fixed income stream,

her to live in high style, even as her creditors go empty-handed.<sup>6</sup>

Though seemingly artful, disabling restraints are hardly unusual. Nowadays, estate planners typically (if wrongly!) add them to instruments of trust as boilerplate.<sup>7</sup> The general validity of the device is accepted in virtually every American jurisdiction,<sup>8</sup> and in four states all trusts are

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but are forfeited upon the occurrence of the conditions subsequent that a creditor levies execution against, or the beneficiary seeks to alienate, the trust. Thus, interests in a forfeiture restraint trust may be lost but not alienated. Here, debtor-creditor relations can also degenerate into a game, not of hide-and-seek but of "chicken," wherein creditors threaten to take action against the trust both to the beneficiary's and their own detriment, unless the beneficiary comes up with the funds to satisfy their claims. On the game theory of "chicken," see for example DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 43-44 (1994). Strictly speaking, this Article will focus on spendthrift trusts, although many of the policy arguments pertinent to them are also relevant to other sorts of inalienable trusts.

6. It happens. *E.g.*, *Congress Hotel Co. v. Martin*, 143 N.E. 838 (Ill. 1924).

7. For the conventional estate planning wisdom, see JAMES F. FARR & JACKSON W. WRIGHT, JR., *AN ESTATE PLANNER'S HANDBOOK* § 36, at 225 (4th ed. 1979 & Supp. 1992) ("[S]peaking broadly, it seems wise to include such a [spendthrift] provision wherever the law allows. It is a natural part of the overall protective mechanism which the trust provides."). *But see* René A. Wormser, *Spendthrift Trusts as Part of an Estate Plan*, 5 INST. ON EST. PLAN. ¶ 71.900, at 9-1 to 9-2 (1971); *infra* note 166 and accompanying text. Noting the empirical fact of typical inclusion of spendthrift clauses in trusts, see BOGERT & BOGERT, *supra* note 2, § 222, at 385 n.7; W. BARTON LEACH & JAMES K. LOGAN, *CASES AND TEXT ON FUTURE INTERESTS AND ESTATE PLANNING* 165 (1961); LAWRENCE W. WAGGONER ET AL., *FAMILY PROPERTY LAW* 677-78 (1991); Willard M. Bushman, *The (In)validity of Spendthrift Trusts*, 47 OR. L. REV. 304, 304 & n.4 (1968); Wormser, *supra*, at 9-1. This has been true for a long time. *See* GRISWOLD, *supra* note 1, at iii (noting the frequency of spendthrift trusts as of that writing); Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 576 & n.105 (1964) (noting scattered examples of spendthrift trusts dating from the Jacksonian era). As anthropologists have observed, the idea of inalienable property has roots in primitive culture. Annette B. Weiner, *Inalienable Wealth*, 12 AM. ETHNOLOGIST 210 (1985).

8. Only New Hampshire and North Carolina presently deny effectiveness to spendthrift trusts (which are also void in Great Britain, *see infra* note 17). In Kansas and South Dakota, the statutes authorizing spendthrift trusts apply only to trusts containing *real property*, thus perpetuating the anachronistic distinction between realty and personalty that has lingered in many other aspects of American property law. It is probable, however, that the common law of these states would also acknowledge the validity of spendthrift trusts containing personalty; other American statutes mirroring Kansas' and South Dakota's limitation have since been repealed. *See* *Everitt v. Haskins*, 171 P. 632 (Kan. 1918) (prestatutory law); *First Northwestern Trust Co. of South Dakota v. Internal Revenue Service*, 622 F.2d 387 (8th Cir. 1980) (inferring state law); *Farmers State Bank v. Janish*, 410 N.W.2d 188 (S.D. 1987) (*dicta*).

In four other jurisdictions (Alaska, Idaho, Utah, and Wyoming), no statutes or cases have addressed the validity of spendthrift trusts. In every other state, spendthrift trusts are enforceable, either by statute or case law. (In Mississippi, the validating case law appears to conflict with the statute.) Other states have recently reversed, by statute or case law, prior proscriptions of disabling restraints. *E.g.*, *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077 (Ohio 1991). There exist, however, many variations in the minutiae of spendthrift trust doctrine. For a state-by-state analysis, see BOGERT & BOGERT, *supra* note 2, § 222, at 406 n.59. For additional discussions of modern spendthrift trust doctrine, see *id.* §§ 222-28; WILLIAM M. MCGOVERN, JR. ET AL., *WILLS, TRUSTS AND ESTATES* § 8.7 (1988); 2A SCOTT, *supra* note 2, § 151; 4 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* §§ 42.25-.26 (Patrick J. Rohan ed., 1993

deemed spendthrift as a rule of construction.<sup>9</sup> A few jurisdictions limit the size (or fraction) of the corpus that can be rendered inalienable,<sup>10</sup> and most states permit special classes of creditors to prise open a spendthrift trust.<sup>11</sup> In some jurisdictions, a spendthrift provision can only encompass an estate for life or years; it cannot prevent a beneficiary from accelerating

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& Supp. 1994); LEWIS M. SIMES & ALLAN F. SMITH, *THE LAW OF FUTURE INTERESTS* § 1146 (2d ed. 1956 & Supp. 1994); 5 HERBERT T. TIFFANY, *THE LAW OF REAL PROPERTY* §§ 1354-58 (Basil Jones ed., 3d ed. 1939 & Supp. 1993); William S. Huff, *Spendthrift Clauses: Legality and Effect on Post-Transfer Estate Planning*, 18 INST. ON EST. PLAN. ¶ 1200 (1984). Spendthrift trusts are also effective in a federal bankruptcy proceeding to the extent that they would be under state law. 11 U.S.C. § 541(c)(2) (1988); Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start,"* 45 HASTINGS L.J. 175, 241-42 nn.221-24 (1994).

9. In New York and Tennessee, all trusts are construed to be inalienable, whether by creditor's levy or by voluntary sale by the beneficiary, unless the instrument of trust expresses a contrary intent. In Illinois and Washington, all trusts are immune from creditor levy but still subject to voluntary sale. BOGERT & BOGERT, *supra* note 2, § 222, at 416-17, 430-34, 438-40, 443-44; 2A SCOTT, *supra* note 2, § 152.1, at 102-03, § 152.3, at 115; 4 POWELL, *supra* note 8, § 42.25[5][c] (discussing New York law in detail). Though the Illinois and Washington statutes are silent on the matter, commentators have assumed that the Washington enactment, like those now in effect in New York and Tennessee, is a nonmandatory rule of construction, subject to a contrary provision in the trust instrument permitting creditors to levy against it (or, *e contra*, barring sale by the beneficiary). Thomas W. Read, Note, *Spendthrift Trusts in Washington—the Statutory Restraint upon Involuntary Alienation*, 58 WASH. L. REV. 831 (1983); William H. Wicker, *Spendthrift Trusts*, 10 GONZ. L. REV. 1, 8 (1974). Nevertheless, a former statute in New York had barred alienation as a mandatory rule of law, irrespective of the benefactor's intent. 4 POWELL, *supra* note 8, § 42.25[5][c][ii], at 42-426 to 42-427, § 42.25[5][c][iii], at 42-430 to 42-431. In Minnesota, a trust for the benefit of named close relatives is rebuttably presumed to be inalienable. BOGERT & BOGERT, *supra* note 2, § 222, at 423 n.59. In Michigan, trusts containing real property, but not other trusts, are by statute inalienable, a measure that again pays homage to the feudal roots of American property law. *Id.* § 222, at 402-03 & n.49; William F. Fratcher, *Restraints on Alienation of Equitable Interests in Michigan Property*, 51 MICH. L. REV. 509 (1953); *see supra* note 8.

10. In some jurisdictions, the income a spendthrift trust can protect is limited not to a set amount or fraction, but rather to an amount the court deems sufficient to provide for the beneficiary's necessary support. BOGERT & BOGERT, *supra* note 2, § 222, at 403 & n.50, § 227, at 516-19; 2A SCOTT, *supra* note 2, § 152.1, at 98-104.

11. Though states that formerly proscribed spendthrift trusts have come increasingly to recognize their general validity, *see supra* note 8, Professor Bogert perceives a "recent trend" in the direction of adding to the list of creditors entitled to reach a spendthrift trust, and thereby a growing threat to their practical effectiveness. BOGERT & BOGERT, *supra* note 2, § 222, at 402; *see also* Erwin N. Griswold, *Reaching the Interest of the Beneficiary of a Spendthrift Trust*, 43 HARV. L. REV. 63, 98 (1929). Among the creditors who may be permitted under state law to reach the corpus of a spendthrift trust are alimony and child-support creditors, purchase-money creditors for necessary services, tax creditors, and, in a very few jurisdictions, tort creditors. BOGERT & BOGERT, *supra* note 2, § 224. In a few jurisdictions, one finds the structural flip side of such limitations: statutes restricting spendthrift trusts to certain types of debtors. These restrictions are discussed in greater depth *infra* notes 179, 281-84 and accompanying text.

the remainder interest in a trust.<sup>12</sup> In no jurisdiction can a person “self-settle” a spendthrift trust, that is, create such a trust for herself,<sup>13</sup> although exactly what constitutes a self-settled trust is itself *unsettled*—for instance, case law fails to resolve conclusively whether a structured settlement of a tort claim wherein the tortfeasor creates a spendthrift trust for the victim falls into this category.<sup>14</sup> These limitations aside, the general effectiveness of spendthrift trusts is today unquestioned, and benefactors have poured into them altogether hundreds of billions of dollars.<sup>15</sup>

Yet, for all of that, no one seems to be thinking about spendthrift trusts anymore. John Chipman Gray thundered his wrath against them late in the

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12. BOGERT & BOGERT, *supra* note 2, § 222, at 389-93, 395-96; 2A SCOTT, *supra* note 2, § 153; *see also* BOGERT & BOGERT, *supra* note 2, § 402. The modern trend and weight of authority favors the validity of disabling restraints upon remainders. Compare RESTATEMENT OF TRUSTS § 153(b) (1935) with RESTATEMENT (SECOND) OF TRUSTS § 153(1) (1955). For recent cases, see *In re Edgar's Estate*, 389 N.W.2d 696 (Mich. 1986); *Knight v. Knight*, 589 N.Y.S.2d 195 (App. Div. 1992); *Domo v. McCarthy*, 612 N.E.2d 706 (Ohio 1993).

13. BOGERT & BOGERT, *supra* note 2, § 223; 2A SCOTT, *supra* note 2, § 156; *see, e.g., In re Brackett*, 54 B.R. 57 (Bankr. D.N.M. 1985); *In re Witwer*, 148 B.R. 930 (Bankr. C.D. Cal. 1992); *Speed v. Speed*, 430 S.E.2d 348 (Ga. 1993).

14. Brad J. Berkness, Comment, *Abusive Discretion: Discretionary and Supplemental Trusts Created in Settlement of Personal Injury Claims*, 67 WASH. L. REV. 437, 445-47, 450-51 (1992); *cf.* Randee K. Carson & David J. Tong, Commentary, *Structured Settlements: Customized Compensation for Personal Injury Plaintiffs*, 13 STETSON L. REV. 309, 313 & n.35 (1984) (suggesting that statutes exempting disability income benefits from creditors' claims may apply to structured settlements). Virginia recently enacted a statute indicating that trusts funded by “claims,” whether structured settlements or not, can be reached by creditors and transferees. VA. CODE ANN. § 55-19(c) (Michie Supp. 1994). For recent cases, see *In re Morris*, 144 B.R. 401 (Bankr. C.D. Ill. 1992); *Forsyth v. Rowe*, 629 A.2d 379 (Conn. 1993); *Mills v. Durst*, 594 N.Y.S.2d 537 (Sup. Ct. 1993).

Similarly, a Keogh pension plan created by a self-employed individual may or may not constitute a self-settled trust. Jeffrey G. Sherman, *Spendthrift Trusts and Employee Pensions: The Problem of Creditors' Rights*, 55 IND. L.J. 247, 261-71 (1980); Daniel Wise, *Keogh Plans Denied Shield from Creditors*, N.Y. L.J., Jan. 29, 1993, at 1. *See generally* Noel C. Ice, *What Are Creditors' Rights in Retirement Plan Benefits?*, 21 EST. PLAN. 30 (1994); Daniel L. Skoler, *The Status and Protection of Social Security Benefits in Bankruptcy Cases*, 67 AM. BANKR. L.J. 585 (1993). State law also varies on the question of whether the beneficiary of a life insurance policy can self-select a spendthrift settlement option. STUART SCHWARZSCHILD, RIGHTS OF CREDITORS IN LIFE INSURANCE POLICIES 250-52 (1963); William A. Brackney, *Creditors' Rights in Life Insurance*, PROB. & PROP., Mar.-Apr. 1993, at 52, 53. In a recent Louisiana case, an agreement to *extend* a spendthrift trust past the time when it was due to expire under the terms of the instrument of trust was held void as contrary to the settlor's intent. *Albritton v. Albritton*, 600 So. 2d 1328 (La. 1992). And in two recent cases, spendthrift trusts self-settled with property held in tenancies by the entirety were held *effective* on the ground that tenancies by the entirety are already exempt from creditors' claims. *Bolton Roofing Co. v. Hedrick*, 701 S.W.2d 183 (Mo. Ct. App. 1985); *Sec. Pac. Bank Wash. v. Chang*, 818 F. Supp. 1343 (D. Haw. 1993).

15. Modern empirical data are lacking. For an estimate, see RONALD CHESTER, INHERITANCE, WEALTH, AND SOCIETY 125 (1982). *See also* Bushman, *supra* note 7, at 304; Anne S. Emanuel, *Spendthrift Trusts: It's Time to Codify the Compromise*, 72 NEB. L. REV. 179, 182 n.16 (1993).

nineteenth century,<sup>16</sup> shortly after the United States Supreme Court first endorsed their validity.<sup>17</sup> Gray's arguments engaged scholars for a time, but these academic echoes died away by the 1970s, and the public policy of spendthrift trusts has not been assayed since.<sup>18</sup> For a generation the

16. JOHN C. GRAY, *RESTRAINTS ON THE ALIENATION OF PROPERTY* at iii-xi (2d ed. 1895).

17. *Nichols v. Eaton*, 91 U.S. 716 (1875) (Miller, J.) (dictum). Considered historically, the spendthrift trust seems to have been born largely of chance and confusion, both with respect to its statutory and common law roots. As a matter of common law, Justice Miller in *Nichols* cited to six earlier Pennsylvania cases, yet Pennsylvania at the time was atypical in denying creditors' rights to reach equitable trust interests, because it lacked a court of equitable jurisdiction. Miller apparently failed to appreciate the peculiar procedural circumstances that surrounded his authorities (and because in *Nichols* the point was dictum, it had not gone through the rigors of debate by counsel).

Prior to *Nichols*, English and American cases had held almost uniformly that disabling restraints were ineffective, and commentators immediately criticized Miller's opinion for contradicting established doctrine. It happened, however, that a number of influential treatises appeared or went through new editions shortly after *Nichols* came down, and striving to keep current they picked the case up. These treatises were frequently cited by subsequent courts. For a discussion of these coincidences and confusions along with other ones related to the rise of the spendthrift trust, see GRISWOLD, *supra* note 1, §§ 25-31. On the state of the law prior to *Nichols*, see GRAY, *supra* note 16, *passim*, summarized at § 213. For criticism of *Nichols* by the Court's contemporaries, see *id.* §§ 251-55 (describing the doctrine as a "startling novelty"); *Summary of Events*, 10 AM. L. REV. 586, 594-96 (1876) (calling the doctrine "novel and startling," "hav[ing] the effect of unsettling the law").

As a matter of statutory law, spendthrift trusts first arose under New York's revision of its property code in 1828 (close to a half century before *Nichols*), and variations on this provision subsequently spread to many other states. This statute appears to have been the offspring of mistake as well. The Revisers' Notes indicate that their original intent was to increase the security of *creditors* and to permit only very limited disabling restraints. That the statute proved to have the opposite effect was the result of subsequent (mis)construction and careless amendment. "[I]t [is] unbelievable that the Revisers or the Legislature foresaw the introduction into the law of a vast system of indestructible trusts . . ." 4 POWELL, *supra* note 8, § 42.25[5][c][i] (quotation at 42-409); see also GRISWOLD, *supra* note 1, § 62-70 (stating that the construction was the result of "pure oversight or accident"). On the influence of the New York statute in other states, see *id.* § 61. But for these various coincidences, Griswold speculates, spendthrift trusts might never have gained widespread acceptance in the United States. *Id.* § 26, at 23. (And, by way of comparison, they never did so in Great Britain, where disabling restraints remain void to this day. *Brandon v. Robinson*, 34 Eng. Rep. 379 (Ch. 1811).) As is often said, "'tis the little things in life"—and in the life of the law, too. *Cf.* Friedman, *supra* note 7, at 572-86 (positing a social explanation for the rise of American spendthrift trust doctrine).

18. For recent discussions rehearsing the traditional lines of argument, see BOGERT & BOGERT, *supra* note 2, § 222, at 381-89; Emanuel, *supra* note 15, at 186-94. A number of early courts eschewed policy analysis altogether, some asserting that the right to alienate property was an *inherent* incident of ownership that a benefactor could not strip away; to attach a disabling restraint to a gift was logically paradoxical, "to give and not to give, in the same breath." *Steib v. Whitehead*, 111 Ill. 247, 251 (1884). See also *Brandon*, 34 Eng. Rep. at 379; *In re Smyth*, 49 R.I. 27, 31 (1927); and others asserting that the right to *restrict* the alienation of property was logically an inherent incident of ownership. "Whoever has the right to give, has the right to dispose of the same as he pleases. *Cujus est dare ejus est disponere*, is the maxim which governs in such case." *Ashhurst v. Given*, 5 Watts & Serg. 323, 330 (Pa. 1843); see also GRISWOLD, *supra* note 1, § 552.

But still other early courts and commentators rejected both conceptual approaches, insisting that the

issue has lain dormant, even as the methodology of legal policy analysis has undergone a generational shift. Thus far, spendthrift trusts have entirely escaped notice by the law-and-economics movement. Economists have pondered certain structurally related entities, such as the limited liability corporate form and security interests in property (a sort of mirror image of the spendthrift trust).<sup>19</sup> These legal contrivances suggest useful parallels, and occasionally perpendiculars, to the problem. But spendthrift trusts themselves nowhere appear in Richard Posner's sweeping *Economic Analysis of Law*,<sup>20</sup> nor in the texts of Posner's many peers and disciples. Even as they have striven to cover every branch of the law with their embroidery, here the economists seem to have dropped a stitch. My purpose in this Article is to bring to bear on spendthrift trusts some modern analytic tools and insights, drawn especially from the disciplines of economics and cognitive psychology. Those insights may help to open up new vistas on the problem—and possibly will enable us to teach a few old dogmas new tricks.

The analysis that follows will also endeavor to delve more deeply into the spendthrift trust than hitherto, by breaking it down into its fundamental components. In Part I, I shall explore restraints against *voluntary* alienation: that is, restrictions on a beneficiary's right to terminate the arrangement—to take the money and run. In Part II, I shall proceed to restraints against *involuntary* alienation: that is, restrictions on creditors' rights to reach the trust corpus in order to satisfy their claims. These two elements typically form a legal compound, which most of the existing commentary treats as irreducible.<sup>21</sup> But they are in fact both conceptually—and doctrinal—

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issue was one of policy and not of logic, a view that has grown to become the dominant wisdom: "There is no syllogistic basis for the spendthrift trust." *Id.* § 554; GRAY, *supra* note 16, §§ 3, 257, 259; 2A SCOTT, *supra* note 2, § 152, at 89-90; *Summary of Events*, *supra* note 17, at 595; George P. Costigan, Jr., *Those Protective Trusts Which Are Miscalled "Spendthrift Trusts" Reexamined*, 22 CAL. L. REV. 471, 480-81 (1934); Richard E. Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373, 404 (1935); *Nichols*, 91 U.S. at 725; *Sheridan v. Krause*, 172 S.E. 508, 514-15 (Va. 1934). Alas, in their modern analytic foundations, not all property doctrines have been so fortunate: compare the "rule of repugnancy," criticized right and left by scholars but recently reaffirmed in the same old formalistic terms in *Langille v. Norton*, 628 A.2d 669, 671 (Me. 1993); *see also, e.g., Sterner v. Nelson*, 314 N.W.2d 263 (Neb. 1982). *But see Fox v. Snow*, 76 A.2d 877, 878-85 (N.J. 1950) (Vanderbilt, C.J., dissenting).

19. Whereas a spendthrift trust protects the debtor from a levy by her creditors, a security interest in property protects a *creditor* from levies by other creditors. Other relevant analogies include the problem of exempt property and the discharge of creditors' claims in bankruptcy.

20. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (4th ed. 1992).

21. *But see* 2A SCOTT, *supra* note 2, § 152.3, at 111-12 (recognizing the policy distinction between the two elements).

ly—distinct.<sup>22</sup> A benefactor could seek to create a trust subject to voluntary but *not* to involuntary alienation—allowing the beneficiary to terminate it at will, while disabling creditors from wresting it out of her hands. (Some, but not all, courts have given effect to such “quasi-spendthrift” trusts.<sup>23</sup>) Alternatively, albeit weirdly, a trust could be made impervious to voluntary termination but left susceptible to creditors’ claims. Though few if any benefactors have sought to create trusts of this sort,<sup>24</sup> some state lottery prizes pay off in the form of income streams that disable only the recipient from accelerating her interest.<sup>25</sup> As a practical matter, however, the latter construct seems pointless, given that the beneficiary determined to consolidate her interest into a lump sum could do so by borrowing against the income stream and then letting the creditor alienate it for her.<sup>26</sup> At any rate, these two aspects of alienability do raise different policy concerns and so ought to be addressed independently. Finally, in Part III, I take up the refinement of spendthrift trust doctrine: assuming the expediency of a general warrant to create spendthrift trusts, should lawmakers nonetheless carve out exceptions to their effectiveness? As

22. Mapping out the full range of alternative states of inalienability, see Margaret J. Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1852-59 (1987).

23. For modern doctrine, compare BOGERT & BOGERT, *supra* note 2, § 222, at 397-98 with JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 640 (5th ed. 1995); see also Marvin D. Homer, *Limited or Quasi-Spendthrift Trusts*, 105 TR. & EST. 951 (1966); William G. Williams, *Partial Spendthrift Trusts*, 50 DICK. L. REV. 79 (1946); *Bank of New England v. Strandlund*, 529 N.E.2d 394 (Mass. 1988); *DeMille v. Ramsey*, 254 Cal. Rptr. 573, 578-79 (Ct. App. 1989); *In re Wax*, 147 B.R. 205 (Bankr. D.S.D. 1992). By statute in two jurisdictions, all trusts are construed to be quasi-spendthrift, see *supra* note 9. In a still more limited variation, the benefactor could restrict a disabling restraint to certain types of creditors. In the few cases raising the issue, courts have upheld such limitations. BOGERT & BOGERT, *supra* note 2, § 222, at 398 & n.33.

24. Instruments of trust restraining voluntary alienation but failing to include restraints on involuntary alienation have been construed to intend them by implication (and, often, *vice versa*). BOGERT & BOGERT, *supra* note 2, § 222, at 397-98 & n.32; RESTATEMENT (SECOND) OF TRUSTS, *supra* note 2, § 152 cmts. d & e.

25. Lottery income streams have been held not to be voluntarily alienable. *Lottery Winnings Probably Not Assignable*, 73 J. TAX’N 115 (1990); *Zapata v. Quinn*, 707 F.2d 691 (2d Cir. 1983); MICH. COMP. LAWS ANN. § 432.25 (West Supp. 1994); see also *infra* note 137. Whether lottery winnings are nonetheless subject to involuntary alienation by creditors has varied under state law. Compare *In re Brown*, 86 B.R. 944 (N.D. Ind. 1988) and *In re Miller*, 16 B.R. 790 (Bankr. D. Md. 1982) and *In re Cook*, 148 B.R. 273 (Bankr. W.D. Mich. 1992) with *Meyers v. State Lottery Comm’n*, 517 N.E.2d 1029 (Ohio Ct. App. 1986). But see *In re Meyers*, 139 B.R. 858 (Bankr. N.D. Ohio 1992) (concerning a bankruptcy proceeding involving the same party).

26. Professor Bogert argues that even a restraint against involuntary alienation without a concomitant restraint against voluntary alienation will be functionally toothless, because creditors can bring pressure to bear upon the beneficiary to invade the trust in order to satisfy their claims. BOGERT & BOGERT, *supra* note 2, § 222, at 398.



noted, several exceptions exist under current law, and these need examination.

## I. VOLUNTARY ALIENATION

Putting aside for the time being the matter of creditors' claims, let us begin with the problem of voluntary alienation. Should benefactors have the right to transfer property to a beneficiary encumbered with a restriction against its acceleration and immediate consumption?

### A. *Economic Perspectives*

We may notice preliminarily that, all other things being equal, giving benefactors the broadest possible license to craft their estate plans serves the public interest. Such license encourages benefactors both to produce more wealth and to save more of the wealth they produce.<sup>27</sup> This logic has crystallized into a core principle of inheritance law. As probate judges never tire of repeating, "the intention of the testator is . . . the pole star by which the court must steer."<sup>28</sup> Like every legal tenet, however, this principle has limits.<sup>29</sup> Giving free rein to the dead hand will, on occasion, contradict other precepts of public policy, and lawmakers have not hesitated to navigate around these social obstacles, wherever the pole star happens to lie—whence, for example, the Rule Against Perpetuities, limiting the longevity of benefactor-decreed future interests, no matter how fervently intended. Lawmakers suffer the creation of future interests, but only when they do not hurt too much.<sup>30</sup> To cabin in testamentary intent to this marginal extent is unlikely to affect significantly a benefactor's propensity to accumulate wealth. By the same token, a ban on spendthrift trusts, if found to be in the public interest, could surely be implemented without

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27. RICHARD E. WAGNER, *INHERITANCE AND THE STATE* 5-22, 81-85 (1977); Hirsch & Wang, *supra* note 3, at 7-9.

28. The phrase originated with Chancellor Kent. 4 JAMES KENT, *COMMENTARIES ON AMERICAN LAW* \*537. *E.g.*, *Biles v. Martin*, 259 So. 2d, 258, 262 (Ala. 1972); *see* UNIF. PROB. CODE § 1-102(b)(2) & prefatory note to art. 2 (1990). *But see* *Reed v. Roberts*, 26 Ga. 294, 300-01 (1858).

29. As Justice Oliver Wendell Holmes discerned:

All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached.

*Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

30. On the public policy of future interests, *see* LEWIS M. SIMES, *PUBLIC POLICY AND THE DEAD HAND* 32-82 (1955); Hirsch & Wang, *supra* note 3.

compromising benefactor productivity.<sup>31</sup> Still, effectuation of intent is our default position, and it remains to be seen whether restrictions on a beneficiary's right to alienate her interest in a trust conform or conflict with public policy.

Of course there does exist a long-standing policy, cited as early as the thirteenth century, against making property inalienable. The medieval judges recognized intuitively that property had to be kept "in commerce."<sup>32</sup> As a modern economist would elaborate, efficiency is achieved when property flows into the hands of its most productive users, those who are willing (and able) to pay the most for it, and clogs on alienability hamper this efficient reallocation.<sup>33</sup> The point (at least among exponents of economic analysis) is elementary and suffices to justify the general ban on restraints against alienation.<sup>34</sup> But, as was also recognized early, this policy has no bearing on a trust, which encumbers only the *beneficial* interest in property.<sup>35</sup> The *corpus* of the trust—including that of a spendthrift trust—remains freely alienable by the trustee; it is a revolving

31. Costigan, *supra* note 18, at 472-73; see Rob Atkinson, *Reforming Cy Pres Reform*, 44 HASTINGS L.J. 1111, 1121-23 (1993) (suggesting that limitations on the benefactor's right to restrict the use of charitable gifts would likewise have a de minimus effect on productivity). In states where spendthrift trusts are ineffective, no one has noticed any dampening of the acquisitive instinct. *But see* Mary Bartelme, *Spendthrift Trusts*, 50 ALB. L.J. 6, 10 (1894) (justifying spendthrift trusts as a spur to property acquisition by benefactors); THOMAS L. SHAFFER & CAROL A. MOONEY, *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* 111 (3d ed. 1991) (same).

32. 4 POWELL, *supra* note 8, § 42.25[3]; MCGOVERN ET AL., *supra* note 8, § 13.2, at 505; 6 AMERICAN LAW OF PROPERTY §§ 26.1, 26.3 (A. James Casner ed., 1952). This phraseology was repeated in America. *E.g.*, *Hutchinson v. Maxwell*, 40 S.E. 655, 657 (Va. 1902).

33. See POSNER, *supra* note 20, § 18.6, at 512-13 (discussing the problem in connection with bequests).

34. See, e.g., *Loehr v. Kincannon*, 834 S.W.2d 445 (Tex. Ct. App. 1992); RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §§ 3.1, 4.1 (1983); 2A SCOTT, *supra* note 2, § 152, at 85 & n.1, § 153, at 130-32 & n.1; 6 AMERICAN LAW OF PROPERTY, *supra* note 32, §§ 26.16-18.

35. "But the reasons of the rule [barring restraints against alienation], which apply with such force to fee-simple or other legal titles, do not apply in the case of the transfer of property in trust." *Jourolman v. Massengill*, 5 S.W. 719, 725, 727-28 (Tenn. 1887); *Broadway Nat'l Bank v. Adams*, 133 Mass. 170, 171-72 (1882); Note, *Spendthrift Trusts and Sound Policy*, 11 COLUM. L. REV. 765, 766 (1911); 6 AMERICAN LAW OF PROPERTY, *supra* note 32, § 26.5. Other commentators have associated the policy against clogs on alienability with trusts as well as legal estates, however. GRAY, *supra* note 16, § 257; 5 GEORGE W. THOMPSON, *COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY* § 2350, at 179 (John S. Grimes ed., 1979 & Supp. 1981); Bertel M. Sparks, *Policy Considerations: Alienability of the Beneficial Interest in a Trust in New York*, 9 BUFF. L. REV. 30, 34-35 (1959-60); *In re Smyth*, 49 R.I. 27, 31 (1927); *Hutchinson*, 40 S.E. at 657. Professor Scott hedges: "The policy against taking property out of commerce . . . is not so clearly applicable to an equitable interest under a trust." 2A SCOTT, *supra* note 2, § 152.3, at 112; Austin W. Scott, *Control of Property by the Dead* (pt. 2), 65 U. PA. L. REV. 632, 643-44 (1917).

investment fund that she can trade to whoever will pay top dollar.<sup>36</sup> Only the fungible income that the corpus yields is subject to alienability restrictions. Thus, in creating an inalienable trust, the benefactor's dead hand will not obstruct the invisible hand.

Indeed, in requiring beneficiaries to ration their consumption over time, spendthrift trusts may hold out public benefits. Injunctions against accelerated spending help to ensure that the individuals they constrain, if unable to support themselves, will always be sustained privately. Several early courts upholding spendthrift trusts invoked this rationale: without a disabling restraint, the beneficiary might dissipate her inheritance and become a "public charge."<sup>37</sup> By keeping beneficiaries off the welfare rolls, spendthrift trusts serve to hold down the cost of government.

This argument is undeniable but also of limited significance. Considered from the standpoint of economic efficiency, the problem that here confronts us is twofold. One aspect is the social cost externality created by rights to public support. Like an insurance company, the welfare state cushions its citizens against risk—in this instance the risk of poverty—but in the process offers them a perverse incentive to *expose* themselves to inefficient levels of risk, because they reap its benefits without bearing its full costs.<sup>38</sup> Just as insured motorists can drive with greater abandon, so too

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36 Some commentators have argued that trusts hinder the market for resources by withholding their assets from speculative ventures. The trustee, bound by a fiduciary duty to invest the corpus prudently, will eschew venture capital. This argument was always tenuous, but it is even more so today given changes in the modern prudent investor rule. See the discussion in Hirsch & Wang, *supra* note 3, at 30 & n.116, 52 & n.208. At any rate, whatever market distortions arise in this connection are associated equally with ordinary private trusts and spendthrift trusts. Disabling restraints in no wise *aggravate* the distortion of the market for trust assets.

37. *Canfield v. Security-First Nat'l Bank of L.A.*, 87 P.2d 830, 835 (Cal. 1939); *Matthews v. Van Cleve*, 221 S.W. 34, 37 (Mo. 1920). For commentary making the same point, see Thomas W. Christopher, *A Comment on Spendthrift Trusts*, 39 U. COLO. L. REV. 297, 298 (1967); Costigan, *supra* note 18, at 483, 487, 489, 493; Manning, *supra* note 18, at 406. One commentator compared spendthrift trusts to *charitable* trusts with respect to their public benefits and argued that spendthrift trusts be accorded the same *favored* status on that account. Calvert C. Little, Note, *Alternatives to Spendthrift Trusts in Kentucky*, 37 KY. L.J. 426, 433 (1949). See also MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 188-89 (1962) (discussing, by analogy, the same argument as a justification for compulsory purchase of inalienable annuities).

38. Such observations are centuries old, originating in the political theory of poor relief. For a further discussion of the social consequences of welfare protection, see Hirsch & Wang, *supra* note 3, at 45 & nn.174-76. To some extent, of course, the cost of the welfare state *is* internalized in the form of *ex ante* taxation of its citizens; but because that taxation is imposed on unwilling as well as willing participants in the welfare-insurance scheme (including future generations who participate by virtue of deficit spending), an externality does arise. Cf. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 13 (1987) (discussing the efficiency of liability insurance).

can insured citizens spend (or speculate) in the confident assurance that when in need, the state will provide. By obliging citizens to conserve enough private resources to provide for themselves, disabling restraints inhibit them from yielding to this "moral hazard."<sup>39</sup> Barring that inhibition, society also faces a second inefficiency: namely, the need to construct a costly state bureaucracy to minister to the impoverished. When disabling restraints constrain citizens to save enough to put food onto their own tables, that bureaucracy has less to do, and the social machinery of material endowment can potentially become more cost-effective.

Yet, there are ways to avoid or at least to control these several costs without the aid of spendthrift trusts. One way insurance companies counteract perverse incentives is by placing limits on coverage, such as the deductibility feature of automobile collision insurance. Complete (or "perfect") insurance is not available in the marketplace. Similarly, in the welfare state, coverage is limited to *minimal support*, not necessarily at the level to which the recipient is accustomed or wishes to become accustomed.

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39. Calabresi and Melamed make a related observation: external costs arise simply from the displeasure persons experience when they *see* paupers, and inalienability rules that preclude individuals from falling into pauperism can function to control those costs. Calabresi and Melamed label external costs of this sort "moralisms." Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-12 (1972). To the extent that moralisms exist, they provide a justification for spendthrift trusts whether or not created within a welfare state. Once the welfare state materializes, however, its benefits make erstwhile paupers less poor and hence relieve offenses to the moral eye. Thus, the welfare state may be said to reflect moralisms and its costs tend to substitute for theirs. See also JOHN S. MILL, ON LIBERTY 146-49 (Gertrude Himmelfarb ed., Penguin Classics 1985) (1859) (asserting that behavior causing merely subjective injury to the public is too imperceptible to be significant). For commentary justifying mandatory saving within the Social Security system on the basis of the externality created by the remainder of the welfare state, see Laurence J. Kotlikoff, *On the Contribution of Economics to the Evaluation and Formation of Social Insurance Policy*, AM. ECON. REV. 184, 184-86 (May 1989) (separately paginated *Papers and Proceedings* issue); Laurence J. Kotlikoff et al., *The Adequacy of Savings*, 72 AM. ECON. REV. 1056, 1057 (1982), reprinted in LAURENCE J. KOTLIKOFF, WHAT DETERMINES SAVINGS? 429 (1989); Walter Dolde & James Tobin, *Mandatory Retirement Saving and Capital Formation*, in THE DETERMINANTS OF NATIONAL SAVING AND WEALTH 56, 62 (Franco Modigliani & Richard Hemming eds., 1983). Suggesting generally that externalities can provide an efficiency rationale for restraints on alienability, see Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 970-88 (1985); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 938-39 (1985) (noting also that restraints on alienability in this connection are second-best solutions to external costs that could, but for market failures, be avoided via bargaining or taxation). On the theory of moral hazard, see Mark V. Pauly, *The Economics of Moral Hazard: Comment*, 58 AM. ECON. REV. 531 (1968); Kenneth J. Arrow, *The Economics of Moral Hazard: Further Comment*, 58 AM. ECON. REV. 537 (1968); see also James M. Buchanan, *The Samaritan's Dilemma*, in ALTRUISM, MORALITY, AND ECONOMIC THEORY 71 (Edmund S. Phelps ed., 1975) (extending the concept to human interaction generally).

For heirs to substantial fortunes, and for prosperous beneficiaries generally, the opening of access to welfare benefits that follows reckless investment or riotous living is plainly a Pyrrhic victory. The moral hazard posed by the prospect of state support in these instances will be slight.<sup>40</sup>

Of course, this assumes (as economists are wont to do) that beneficiaries will act rationally; in reality, some may have an irrational tendency to overspend (a point to which we shall return shortly<sup>41</sup>), and consumption rationing for these individuals would again preserve the state from the expense of supporting them. When the state does bear the cost, however, the net expense of its bureaucracy can be reduced if it takes advantage of economies of scale. When disabling restraints operate through the agency of trusts, by comparison, administrative processes may be unnecessarily duplicated. Either way, administrative expenses must be borne, and a single, streamlined support bureaucracy could even prove *more* cost-effective, per capita, than a host of miniscule trusts.<sup>42</sup> But the larger limitation that applies to the instant rationale for disabling restraints, whether or not imposed on rational persons, and whether or not operating in the shadow of relatively cost-effective bureaucracies, is that it suffices only to justify inalienability of income *up to the basic level of welfare support*.<sup>43</sup> To the extent trusts provide income *above* that level, the welfare state remains indifferent to beneficiaries' consumption decisions, because those decisions will not render them public charges.<sup>44</sup>

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40. Because the social safety net is set so low, it is likely to affect risk-taking only at the furthest margin. See DOUGLAS G. BAIRD, *THE ELEMENTS OF BANKRUPTCY* 33-34 (rev. ed. 1993) (arguing that the right to a discharge in bankruptcy presents only a minimal moral hazard because "individuals have so much to lose when they go broke"). But see RICHARD E. WAGNER, *TO PROMOTE THE GENERAL WELFARE* 170-76, 196-98 (1989) (arguing that the welfare state is poorly equipped to combat moral hazard because it cannot, like a private organization, act "strategically" to cancel or threaten to cancel the benefits of those who act in financially reckless ways).

41. See *infra* notes 58-111 and accompanying text.

42. The matter has yet to be studied empirically. Discussing generally economies of scale in the welfare state, see ROBERT E. GOODIN, *REASONS FOR WELFARE* 239-41 (1988). One *diseconomy* of the scale of the welfare state is that it is more susceptible to "agency costs" (i.e., shirking or stealing by the third-party agent) than a smaller entity, such as a trust. In the case of a trust, beneficiaries have an incentive to monitor the trustee, thereby reducing agency costs. In the case of a government, no one citizen has a sufficient incentive to undertake the cost of monitoring, and so the citizenry may succumb collectively to "rational apathy." Hirsch & Wang, *supra* note 3, at 29 & n.110; Jonathan R. Macey, *Private Trusts for the Provision of Private Goods*, 37 *EMORY L.J.* 295, 315-21 (1988).

43. Some state statutes in fact limit the effectiveness of spendthrift trusts to approximately this level. See *supra* note 10.

44. See Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 *HARV. L. REV.* 1393, 1401-04 (1985), reprinted with minor modifications in THOMAS H. JACKSON, *THE LOGIC AND LIMITS OF BANKRUPTCY LAW* ch. 10 (1986) (discussing by analogy the utility of the discharge in bankruptcy

A less conspicuous (but equally equivocal) public benefit of a restraint against voluntary alienation, covering any amount of property, is simply that it provides a means of forced saving for the economy. Just as future interests in property prescribe long-term, intergenerational conservation of wealth,<sup>45</sup> a spendthrift trust enforces a regimen of saving over the short term, for the lifetime of the beneficiary (or whatever period of years the benefactor selects). An economic by-product of this restriction is that it frees up more investment capital and hence tends to promote economic growth. Whether that will serve the interests of the economy, however, remains unclear. In the related context of government policies to stimulate investment, economists have debated the virtues of managed growth. While some favor incentives to promote economic expansion, others respond that such policies can lead to overinvestment and that individual decisions to conserve or spend, made in a neutral tax environment, will lead to optimal levels of capital formation.<sup>46</sup> The same competing analyses would presumably apply a fortiori to disabling restraints which compel, rather than merely cultivate, private saving.

Critics of the spendthrift trust have not questioned the social utility of external prods to economic investment. On the contrary, they have accused spendthrift trusts of *depressing* investment. Because each beneficiary must settle for dollops of income instead of a lump sum, critics have argued, each has less opportunity to invest her inheritance in a productive

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to reduce reliance on the welfare state); William T. Vukowich, *Debtors' Exemption Rights Under the Bankruptcy Reform Act*, 58 N.C. L. REV. 769, 770-71 (1980) [hereinafter Vukowich, *Exemption Rights in Bankruptcy*] (discussing by analogy the utility of exemption law to reduce reliance on the welfare state); William T. Vukowich, *Debtors' Exemption Rights*, 62 GEO. L.J. 779, 786, 876-78 (1974) [hereinafter Vukowich, *Debtors' Exemption Rights*] (same).

45. Hirsch & Wang, *supra* note 3, at 37-38.

46. The literature on this subject is vast. Taking the first view, see, for example, IRA C. MAGAZINER & ROBERT B. REICH, *MINDING AMERICA'S BUSINESS* 319-42 (1982); Martin S. Feldstein, *National Saving in the United States*, in *CAPITAL FOR PRODUCTIVITY AND JOBS* 124 (American Assembly ed., 1977). Taking the second view, see, for example, W. ALLEN WALLIS, *AN OVERGOVERNED SOCIETY* 175-96, 218-30 (1976); POSNER, *supra* note 20, §§ 17.6, 18.1. Questioning more fundamentally the social utility of economic growth, see E.J. MISHAN, *THE ECONOMIC GROWTH DEBATE: AN ASSESSMENT* (1977). Some of the principal threads in the debate are surveyed briefly in DAVID COLANDER, *MACROECONOMICS: THEORY AND POLICY* 512-20 (1986). See generally *SAVINGS AND CAPITAL FORMATION: THE POLICY OPTIONS* (F. Gerard Adams & Susan M. Wachter eds., 1986); *THE ECONOMICS OF SAVING* (James H. Gapinski ed., 1993). For an early discussion of the impact of private saving on economic growth, see 1 ADAM SMITH, *AN ENQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 358-76 (Edwin Cannon ed., Univ. of Chicago Press 1976) (1776).

enterprise.<sup>47</sup> Professor Frederick Stimson went so far as to blame spendthrift trusts for the commercial decline of Massachusetts!<sup>48</sup> Mere common sense suggests the whimsy of such assertions: the spendthrift trust, sheltering a tiny fraction of the nation's capital, must stand as one of history's unlikeliest scapegoats for economic recession. But even in its more modest form, the argument fails to withstand analysis. Of course, it is true that the beneficiaries of spendthrift trusts will have less capital at their disposal to consume or invest as they see fit. But the point is that the trustees of those trusts will have that much more capital at *their* disposal, and under fiduciary law *all of it* will be invested. Like everyone else, would-be entrepreneurs who are trust beneficiaries can still seek to borrow venture capital. In the aggregate, more capital should exist, available at lower interest rates.

Still, these macroeconomic consequences of spendthrift provisions, widely diffused, are probably of small practical consequence. More salient may be the microeconomic (or piceoeconomic) consequences for the beneficiaries themselves. Let us turn, then, to the matter of whether spendthrift trusts help or harm individual beneficiaries.

For a neoclassical economist, the answer seems clear: beneficiaries enjoy the greatest welfare when they decide for themselves how much to consume and how much to save. John Stuart Mill's utilitarian theory of autonomy<sup>49</sup>—which in the modern economic literature goes by the name of consumer sovereignty<sup>50</sup>—holds that the individual knows better than others what will make her happy and always acts rationally to advance her own self-interest.<sup>51</sup> In the context of spending, saving, and borrowing

47. E.g., Edward C. Lukens, *Trust Estates and Character*, 18 A.B.A. J. 137, 138-39 (1932); Peter J. Wiedenbeck, *Missouri's Repeal of the Claflin Doctrine—New View of the Policy Against Perpetuities?*, 50 Mo. L. REV. 805, 829 (1985).

48. On Stimson's assertion (which was chronologically faulty), see Costigan, *supra* note 18, at 489-91; Friedman, *supra* note 7, at 575-76. Others have parroted Stimson's charge, blaming spendthrift trusts for ruining the economies of various other states in and around New England. GRISWOLD, *supra* note 1, § 555, at 635-37 & n.20; 2A SCOTT, *supra* note 2, § 152, at 91.

49. MILL, *supra* note 39, at 68-69, 141-43 *passim*. Utilitarianism is not, of course, the only perspective from which to view the ideal of autonomy, but it is the one taken by economists. For other perspectives, see *infra* note 169.

50. The principle was explored at some length in the essay that coined the phrase. W.H. HUTT, *ECONOMISTS AND THE PUBLIC 257-72* (1936). One skeptical economist calls it "[t]he classical theory of omniscient rationality." Herbert A. Simon, *Rational Decision Making in Business Organizations*, 69 AM. ECON. REV. 493, 496 (1979), *reprinted in* 2 HERBERT A. SIMON, *MODELS OF BOUNDED RATIONALITY* 474 (1982).

51. This behavioral assumption has also insinuated itself into law and economics. E.g., POSNER, *supra* note 20, § 1.1, at 3-4.

decisions, human persons (or “consumer units,” in the warm and friendly language of economics) follow what has come to be called a “consumption function,” whereby they weigh the benefits of present against future spending at any given level of income.<sup>52</sup> Those who favor future consumption will save more; those who prefer present consumption will save less or even borrow against future earnings.<sup>53</sup> A spendthrift trust ties the beneficiary to a suboptimal consumption function. It may be that she is able to compensate for the restriction by adjusting the use of her other, unencumbered assets: she could, for example, spend a larger fraction of her earned income or liquid capital to make up for the saving compelled by a spendthrift trust. But if the trust is sufficiently large relative to her other resources, she will not be able fully to offset its misplaced discipline.<sup>54</sup> The benefactor’s effort *paternalistically* to do the beneficiary good (assuming that is her intention)<sup>55</sup> only does her harm, by distorting her

52. The concept (though not the term) was introduced to the field of economics by Lord Keynes. JOHN M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* 96-97 (Harbinger 1964) (c. 1936). Keynes discussed the psychology of saving in *id.* at 107-08.

53. In the neoclassical model, debt functions to adjust and smooth expenditures over time in anticipation of uneven flows of resources. IRVING FISHER, *THE THEORY OF INTEREST AS DETERMINED BY IMPATIENCE TO SPEND INCOME AND OPPORTUNITY TO INVEST IT* 104-12 (n.d.) (c. 1930); William C. Dunkelberg & Frank P. Stafford, *Debt in the Consumer Portfolio: Evidence from a Panel Study*, 61 *AM. ECON. REV.* 598, 599 (1971).

54. Given a perfect capital market, persons with unencumbered present assets insufficient to compensate for a disabling restraint could still do so by *borrowing* funds and then paying off those loans out of the future income provided by a spendthrift trust. In practice, however, market imperfections will often hinder borrowing against future income streams. See Kotlikoff et al., *supra* note 39, at 1057-58 (discussing citizens’ abilities to circumvent mandatory saving under the Social Security system); Dolde & Tobin, *supra* note 39, at 62-63 (same).

55. Conceivably, a benefactor might impose a disabling restraint on beneficiaries simply because she *herself* attaches an abstract moral value to thrift, or because she would be personally gratified by the thrifty conduct of beneficiaries with whom she identifies or by the thrifty use of property with which she identifies. Her utility, in other words, might derive from egoistic rather than altruistic considerations. See GARY S. BECKER, *A TREATISE ON THE FAMILY* 298 (rev. ed. 1991) (discussing gifts used to control conduct and consumption generally); Hirsch & Wang, *supra* note 3, at 19 (same); Robert A. Pollak, *Tied Transfers and Paternalistic Preferences*, *AM. ECON. REV.* 240, 242 (May 1988) (separately paginated *Papers and Proceedings* issue) (same); David R. Unruh, *Death and Personal History: Strategies of Identity Preservation*, 30 *SOC. PROBS.* 340, 344-45 (1983) (discussing the incidental use of estate plans to highlight and preserve the benefactor’s own identity). Psychology suggests still another possible egoistic motive for a disabling restraint—it represents an exercise of *control* by the benefactor, and some benefactors may find satisfaction in exercising control over beneficiaries or properties *for its own sake*. MYLES I. FRIEDMAN & GEORGE H. LACKEY, JR., *THE PSYCHOLOGY OF HUMAN CONTROL* 3-19 (1991). For an early discussion in connection with dead hand control, see ARTHUR HOBHOUSE, *THE DEAD HAND* 183 (London, Chatto & Windus 1880) (noting that dead hand control “is very commonly exercised to its fullest extent, merely because it exists, and without the slightest reason beyond the pleasure of exercising power”).



rational economic decisions.<sup>56</sup> At that point, we find ourselves in the unenviable position of having to measure the utility gained by the benefactor from imposing a disabling restraint against the utility lost by the beneficiary from bearing the same restraint—optimality being achieved at the (very, very) hypothetical point at which the marginal utility to the benefactor of extending the restraint equals the marginal utility to the beneficiary of terminating it.<sup>57</sup>

### B. *The Psychology of Saving*

That would seem to be the neoclassical perspective on all of this. It is not, of course, the end of the story. Economists aside,<sup>58</sup> human persons are not necessarily rational beings—for many folk, economic nonsense

56. Thus, by analogy, Mill opposed the imposition of usury laws upon an individual borrower who "must be presumed to be a sufficient guardian of his pecuniary interests." 2 JOHN S. MILL, *PRINCIPLES OF POLITICAL ECONOMY* bk. 5, ch. 10, § 2, at 542 (5th ed. Appleton 1897) (1848). For a similar discussion, see *Jeremy Bentham, Defence of Usury*, in 3 *THE WORKS OF JEREMY BENTHAM* 1, 5, 8 (John Bowring ed., 1962) (1787). Similarly, Adam Smith, who (contrary to popular mythology) harbored no belief in the perfect rationality of mankind, nonetheless preferred to leave saving and spending decisions to individuals and opposed state sumptuary laws: "It is the highest impertinence and presumption, therefore, in kings and ministers, to pretend to watch over the œconomy of private people, and to restrain their expence, either by sumptuary laws, or by prohibiting the importation of foreign luxuries. They are themselves always, and without any exception, the greatest spendthrifts in the society. Let them look well after their own expence, and they may safely trust private people with theirs. If their own extravagance does not ruin the state, that of their subjects never will." 1 SMITH, *supra* note 46, at 367 (*plus ça change!*). Smith developed his theory of human psychology in an earlier essay, *The Theory of Moral Sentiments*, discussed in Ronald H. Coase, *Adam Smith's View of Man*, 19 *J.L. & ECON.* 529 (1976).

Across the Atlantic, Thoreau put the matter with his usual aplomb: "If I knew for a certainty that a man was coming to my house with the conscious design of doing me good, I should run for my life." HENRY D. THOREAU, *WALDEN OR, LIFE IN THE WOODS* 118 (Houghton Mifflin 1906) (1854).

57. A collaborator and I have discussed this problem elsewhere in greater detail, in connection with restrictions on the use of bequeathed property generally. Hirsch & Wang, *supra* note 3, at 20-27. For an early discussion, urging broad legal limits on dead hand control on the ground "that people are the best judges of their own concerns," see HOBHOUSE, *supra* note 55, at 184-85.

58. "The problem seems to be that while economists have gotten increasingly sophisticated and clever, consumers have remained decidedly human. . . . [A] couple years ago I explained the difference between my models and Robert Barro's by saying that he assumes the agents in his model are as smart as he is, while I portray people as being as dumb as I am. Barro agreed with this assessment." Richard H. Thaler, *Anomalies: Saving, Fungibility, and Mental Accounts*, *J. ECON. PERSP.*, Winter 1990, at 193, 203, reprinted in RICHARD H. THALER, *THE WINNER'S CURSE* 107 (1992); see also Ralph Lattimore, *Correspondence: Are Economists Different?*, *J. ECON. PERSP.*, Spring 1992, at 199 (who, unlike Professor Thaler, insists that he is serious). *But see* George Stigler: "Economists possess their full share of the common ability to invent and commit error . . . . Perhaps their most common error is to believe other economists." Quoted in Steven N.S. Cheung, *The Fable of the Bees: An Economic Investigation*, 16 *J.L. & ECON.* 11, 11 (1973).

often makes psychological sense. In this century, H.L.A. Hart criticized Mill's vision of human rationality as "fantastic," and he remarked "a general decline in the belief that individuals know their own interests best,"<sup>59</sup> but this suggestion is ahistorical. While the modern cognitive psychologists have demonstrated and elaborated human irrationality more rigorously than their predecessors, the fallibility of human reason is an ancient theme, tracing back to the early Christian texts,<sup>60</sup> and still earlier to the Greeks.<sup>61</sup> John Calvin was hardly more optimistic than Amos

59. H.L.A. HART, *LAW, LIBERTY AND MORALITY* 32-33 (1963). Even some economists have begun to see the light. *E.g.*, TIBOR SCITOVSKY, *THE JOYLESS ECONOMY* (rev. ed. 1992); HERBERT SIMON, *REASON IN HUMAN AFFAIRS* (1983); 2 SIMON, *supra* note 50, at 203-494; RICHARD H. THALER, *QUASI RATIONAL ECONOMICS* (1991); Kenneth J. Arrow, *Risk Perception in Psychology and Economics*, 20 *ECON. INQUIRY* 1 (1982); Amartya Sen, *Behavior and the Concept of Preference*, 40 *ECONOMICA* 241 (1973), reprinted in *RATIONAL CHOICE* 60 (Jon Elster ed., 1986) [hereinafter *RATIONAL CHOICE*]; Herbert A. Simon, *Rationality in Psychology and Economics*, 59 *J. BUS. S.209* (1986). But others remain unrepentant, e.g., Gary S. Becker, *Nobel Lecture: The Economic Way of Looking at Behavior*, 101 *J. POL. ECON.* 385, 402 (1993) ("[N]o approach of comparable generality has yet been developed that offers serious competition to rational choice theory. . . . My work may have sometimes assumed too much rationality, but I believe it has been an antidote to the extensive research that does not credit people with enough rationality."), and the overall climate of opinion within the discipline is clear: as one astute critic has observed, "the economist has a moment of triumph each time he succeeds in showing up the rational logic of some behavior previously believed to be irrational." JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 142 (rev. ed. 1984); *see also id.* at 153-56; DAVID D. FRIEDMAN, *PRICE THEORY* 495 (1986) ("As an economist, I would like to find an economic explanation even for 'anti-economic' behavior."). *See generally* *RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY* (Robin M. Hogarth & Melvin W. Reder, eds., 1986). Yet, recognition of psychological tendencies to irrationality should not undermine economics as a methodology. Rather, economists need to vary their assumptions (an exercise Kenneth E. Boulding called "non-Euclidian economics"). KENNETH E. BOULDING, *ECONOMIC ANALYSIS* 13-14 (rev. ed. 1948). Criticizing the assumption of rationality in the allied field of law and economics, see Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 *CHI.-KENT L. REV.* 23 (1989); Jeffrey L. Harrison, *Egoism, Altruism, and Market Illusions: The Limits of Law and Economics*, 33 *UCLA L. REV.* 1309 (1986); Paul J. Heald & James E. Heald, *Mindlessness and Law*, 77 *VA. L. REV.* 1127 (1991); Bailey Kuklin, *The Gaps Between the Fingers of the Invisible Hand*, 58 *BROOK. L. REV.* 835 (1992); Arthur A. Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 *VA. L. REV.* 451 (1974); Thomas S. Ulen, *Cognitive Imperfections and the Economic Analysis of Law*, 12 *HAMLIN L. REV.* 385 (1989).

60. The Christian vision of human reason corrupted by original sin appeared in scripture: "For that which I am doing, I do not understand; for I am not practicing what I would like to do, but I am doing the very thing I hate. . . . For the good that I wish, I do not do; but I practice the very evil that I do not wish." *Romans* 7:14-25. Among the early Christian theologians, see especially ST. AUGUSTINE, *THE CITY OF GOD* 443-45 (Marcus Dods, trans., The Modern Library 1950) (426 A.D.); ST. AUGUSTINE, *FAITH, HOPE, AND CHARITY* 33-36, 81-82, 109-11 (Louis A. Arand trans., Newman Press 1947) (420-23 A.D.)

61. ARISTOTLE, *NICOMACHEAN ETHICS* bk. 1, ch. 13, at 30-32, bk. 3, chs. 10-12, bk. 6, ch. 5 (Martin Ostwald trans., The Bobbs-Merrill Co., Inc. 1962) (c. 334-23 B.C.); ARISTOTLE, *ON THE SOUL* bk. 3, ch. 3, at 161-62, bk. 3, ch. 9, at 183 (W.S. Hert trans., Harvard Univ. Press 1936) (c. 334-23

Tversky about the mental powers of Adam's corrupt seed.<sup>62</sup> And no sooner had Mill posited his utilitarian theory of autonomy than other Utilitarians rushed forward to attack it.<sup>63</sup> If, in fact, persons do *not* invariably make rational judgments, then they may fail to maximize their overall welfare.<sup>64</sup> When they decide wrongly<sup>65</sup> (or even when they decide rightly, given their preferences of the moment, but fail to take *evolving* preferences into account<sup>66</sup>), they experience subsequent regret. By

B.C.).

62. "[M]an was stripped and deprived of all wisdom . . . . As a consequence, nothing was left to him save ignorance . . . . For what could men's mind produce but all carnal and fatuous things which truly resemble their authors?" JOHN CALVIN, *INSTITUTES OF THE CHRISTIAN RELIGION* 16, 203 (Ford L. Battles trans., William B. Eerdmans' Pub. Co. rev. ed., 1986) (1536); cf. THOMAS HOBBS, *LEVIATHAN* 110-18 (C.B. Macpherson ed., Penguin Books 1981) (1651) (asserting the fallibility of human reason from a secular perspective). Calvin's Puritan disciples acknowledged the power of human reason (especially when sanctified by saving grace), but they nonetheless distrusted it, no less than Augustine and Calvin, as tarnished by original sin. "'Sin,' as Increase Mather put it, 'makes the Rational Soul to become a slave to the Sensual Soul in men.'" PERRY MILLER, *THE NEW ENGLAND MIND: FROM COLONY TO PROVINCE* 428 (1953). On reason in Puritan theology, see *id.* at 417-36. Lift away the cosmological embellishments, and early Christian visions of human irrationality bear a resemblance to modern cognitive theories of *myopia*, discussed *infra* notes 76-77 and accompanying text.

63. *E.g.*, JAMES F. STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 67-81 (R.J. White ed., Cambridge Univ. Press 1967) (1873). Some utilitarians distinguished between "sensible" and "insensible" beings: whereas ordinary persons were able to calculate accurately their self-interest, adverse environmental stimuli could impair that ability, leading "disordered" persons into senseless behavior. Jeremy Bentham distinguished criminals from honest citizens on this basis. ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY* 21-22 (1992). Mill himself acknowledged the potential for human irrationality, and he limited his theory of autonomy to "human beings in the maturity of their faculties," thereby excluding, in Mill's view, children, demented persons, and the entire populations of "backward states." MILL, *supra* note 39, at 69, 147-49, 166; see also *infra* note 77.

64. How this could have come to pass in an evolutionary sense has engaged the attention of behavioralists. Some suggest that irrational thought processes such as heuristics, see text accompanying note 88 *infra*, assist the organism overall, though not in every circumstance. *E.g.*, Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 129, 135 (Daniel Kahneman et al. eds., 1982) [hereinafter *JUDGMENT UNDER UNCERTAINTY*]; J. RICHARD EISER, *SOCIAL PSYCHOLOGY* 226-27 (1986). Others question the sufficiency of natural selection to weed out cognitive biases that do not in general threaten the organism's survival. *E.g.*, Thomas Russell & Richard Thaler, *The Relevance of Quasi Rationality in Competitive Markets*, 75 *AM. ECON. REV.* 1071, 1074 (1985), reprinted in THALER, *supra* note 59, at 239.

65. Here one should distinguish wrong decisions produced by the irrational calculus of the decisionmaker from losing gambles that reflected a rational assessment of the risk and potential return to the decisionmaker. The latter sort of speculation can lead to disappointment at the outcome as opposed to the process whereby the decision was taken. So long as that process was rational, there is no reason for a paternalist to preempt it. For a discussion of this distinction, see Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 *YALE L.J.* 763, 780-82 (1983).

66. For an early recognition, see HOBBS, *supra* note 62, at 216. The classic modern example, with which many of us can relate personally, is teenage orthodontic braces.

overthrowing consumer sovereignty, the paternalist spares the individual subsequent regret and ensures her happiness over time, leaving *both* parties with greater utility.<sup>67</sup> Thus can paternalism and utilitarianism prove conceptually complementary<sup>68</sup> (even if the argument is a bit too pat).<sup>69</sup>

In the present context, the question becomes whether individuals are

67. For a related discussion, see Hirsch & Wang, *supra* note 3, at 23-24.

68. For discussions of this proposition, see, for example, ROBERT E. GOODIN, *POLITICAL THEORY AND PUBLIC POLICY* 39-56 (1982); JOHN KLEINIG, *PATERNALISM* 45-48 (1983); DONALD VANDEVEER, *PATERNALISTIC INTERVENTION* 66-70, 95-163 (1986); ELSTER, *supra* note 59, at 65-85; Jackson, *supra* note 44, at 1405-07; Derek Parfit, *Later Selves and Moral Principles*, in *PHILOSOPHY AND PERSONAL RELATIONS* 137 (Alan Montefiore ed., 1973). Notions of imperfect rationality have been applied to subvert more than just consumer sovereignty; many political theorists over the centuries have condemned *popular* sovereignty on the same basis. Thus did the Puritans, whose views of human irrationality were remarked *supra* note 62, justify a political system under which the principal leaders (known as "magistrates") did not represent, and were not responsible to, the people (although they were elected by them). EDMUND S. MORGAN, *THE PURITAN DILEMMA* 156-57 (1958). Other political theorists have pointed to human irrationality on occasion to justify monarchy, dictatorship of the proletariat—and chattel slavery. V.I. LENIN, *STATE AND REVOLUTION* 12-24 (2d ed. International Publishers 1932) (1918); MILL, *supra* note 39, at 69; BENEDICTUS DE SPINOZA, *ON FREEDOM OF THOUGHT: SELECTIONS FROM TRACTATUS THEOLOGICO-POLITICUS AND TRACTATUS POLITICUS* 39-55 (T.E. Jessop ed. & trans., Mario Casalini Ltd. 1962) (1670 & 1677); LARRY E. TISE, *PROSLAVERY: A HISTORY OF THE DEFENSE OF SLAVERY IN AMERICA 1701-1840*, at 29, 32, 61 (1987). The same theme can be found even today within the writings of civic republican theorists to justify the dismissal of private political preferences. Steven G. Gey, *The Unfortunate Revival of Civic Republicanism*, 141 U. PA. L. REV. 801, 822-33 (1993); Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3 (1991).

69. Too pat, I say, for two reasons: (1) a priori, the paternalist can only guess at her object's subsequent sentiments; and (2) the very act of paternalizing may *produce* those subsequent sentiments. Raising these difficulties, see JOHN ELSTER, *SOUL GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 22-23, 109-40 (1983); KLEINIG, *supra* note 68, at 47, 204; VANDEVEER, *supra* note 68, at 69-70; Pollak, *supra* note 55, at 242; Danny Scoccia, *Paternalism and Respect for Autonomy*, 100 ETHICS 318 (1990); see also Donald H. Regan, *Justifications for Paternalism*, in *THE LIMITS OF LAW: NOMOS XV* 189, 189-92 (J. Roland Pennock & John W. Chapman eds., 1974) (arguing that freedom of choice is in itself a value that competes with utility). Whereas conventional analysis assumes that personal preferences are exogenous, the paternalist may in fact *inculcate* values and preferences (which is, indeed, an ordinary and obvious aspect of being a parent). To the extent, then, that preferences are malleable and endogenous within a decisionmaking system, the paternalist's anticipation of her object's subsequent gratitude may become a self-fulfilling prophecy. From a utilitarian standpoint, that may not matter: gratitude is gratitude (although the object might have been equally happy otherwise). Philosophically, however, it raises a question as to the moral legitimacy of coercive value-indoctrination. While this is not the place to resolve this issue, an obvious distinction might be drawn between the indoctrination of a *child* (upon whose *tabula rasa* something must be written) and an *adult* (whose *tabula scripta* must be erased before it can be revised), although there still remains the troublesome gray area of adolescence (where coercive paternalism bridges the "generation gap"). All of these issues may be placed in sharp relief by the problem of religious indoctrination and the case of cult members, who are often happy and grateful following coercive "deprogramming" but who would also have been happy and grateful to have been left alone. For discussions, see KLEINIG, *supra* note 68, at 213-17; JOHN RAWLS, *A THEORY OF JUSTICE* 249-50 (1971).

prone to irrationality when they come to make saving, borrowing, and consumption decisions.<sup>70</sup> If so, we have a ready justification for the spendthrift trust. And, as common experience would indicate, the answer appears to be: some are, and others are not. In an influential article on the bankruptcy discharge, then-Professor, later-Dean, now-University President Thomas H. Jackson sifted through the literature of cognitive psychology in an effort to demonstrate that persons tend *systematically* to overspend and overborrow. On that basis, he justified a universal, nonwaivable (hence paternalistic) right to a discharge.<sup>71</sup> Were Jackson correct, an argument could be made for attaching a disabling restraint to *all* trusts as a rule of construction, or even as a rule of law.<sup>72</sup> But a second look at the cognitive literature, which has multiplied in the decade since Jackson wrote,<sup>73</sup>

70. Also potentially relevant is the beneficiary's propensity to diminish her resources by making *donative* transfers to others. Some recent scholars have argued that financial generosity, and altruism generally, may be "rational" (and, by the same token, pure selfishness or "egoism" irrational), in the sense that it will lead others to respond in cooperative ways that in toto increase the altruist's own, narrowly defined welfare. Gary S. Becker, *Altruism, Egoism, and Genetic Fitness: Economics and Sociobiology*, 14 J. ECON. LITERATURE 817 (1976), reprinted in GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 282 (1976); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977), reprinted in BEYOND SELF-INTEREST 25 (Jane J. Mansbridge ed., 1990). But see ELSTER, *supra* note 59, at 141-46. See generally *The Economics of Altruism*, AM. ECON. REV. 143 (May 1993) (collection of three papers within separately paginated *Papers and Proceedings* issue). At the same time, it would seem possible for one to be *too* generous—to love others *too* much—for one's "own" good. Is "overgenerosity," as we might call altruistic behavior that leaves the individual with a net loss in her welfare, narrowly defined, despite the cooperation that it fosters, a fit object for paternalistic restraint? Not necessarily: overgenerosity may still increase the altruist's welfare, broadly defined. Because she takes pleasure in assisting the objects of her concern (the phenomenon of "interdependent utilities," as the economists say), or simply in giving per se, or because she feels bound by a moral duty to give, the altruist may never regret her acts of self-sacrifice. Arguendo, there is no paternalistic justification for restraining overgenerosity where it causes no pain. The Mother Teresas of the world, who give until it hurts (including large sums derived from the production of explosives in Scandinavia), in truth endure a sweet agony. (On Mother Teresa herself, see *The Nobel Prizes: "I Accept in the Name of the Poor,"* TIME, Oct. 29, 1979, at 87.) Nevertheless, as discussed in the pages following, persons may come to regret consumption decisions generally, and to the extent that gift-giving is simply an alternative form of pleasure-generating consumption, the two problems are symmetrical.

71. Jackson, *supra* note 44, at 1404-18.

72. In some jurisdictions, such rules have prevailed: all trusts have been construed to include, or have been deemed to include as a matter of law, a disabling restraint. See *supra* note 9.

73. For surveys of the historical evolution and modern literature of psychological theories of saving and consumption, see Gery M. van Veldhoven & A.G. Groenland, *Exploring Saving Behaviour: A Framework and a Research Agenda*, 14 J. ECON. PSYCHOL. 507 (1993); Karl-Erik Wärneryd, *On the Psychology of Saving: An Essay on Economic Behavior*, 10 J. ECON. PSYCHOL. 515 (1989). For recent surveys of the psychology of decisionmaking generally, see PAUL ANAND, *FOUNDATIONS OF RATIONAL CHOICE UNDER RISK* (1993); JONATHAN BARON, *THINKING AND DECIDING* (2d ed. 1994); EISER, *supra* note 64; ROBIN M. HOGARTH, *JUDGEMENT AND CHOICE* (2d ed. 1987); STEPHEN E.G. LEA ET AL., *THE*

suggests that he overstated his case. There are, in fact, psychological crosscurrents at work.<sup>74</sup>

Without plumbing all of the literature's complexities, let us touch on a few points. Consider the problem of time preference. Perfectly rational persons will in general save for the future. They thereby furnish resources to their later selves at a time when those later selves are unable fully to satisfy their own financial needs.<sup>75</sup> Psychological evidence suggests, however, that many persons are "myopic" in outlook: left to their own devices, they attend insufficiently to their long-term welfare, either because they selfishly (if that is the right word<sup>76</sup>) focus on present gratification, or

INDIVIDUAL IN THE ECONOMY (1987); SCOTT PLOUS, *THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING* (1993). For a recent philosophical discussion, see ROBERT NOZICK, *THE NATURE OF RATIONALITY* (1993).

74. Which is not, of course, to say that the economists were right all along. Psychological biases may or may not operate systematically; when they do not, they still may fail to neutralize each other, resulting in less pronounced tendencies to a particular behavior or in a statistical variance of observed behaviors. Debating other arguments for the behavioral insignificance of cognitive biases, compare Vernon L. Smith, *Rational Choice: The Contrast Between Economics and Psychology*, 99 J. POL. ECON. 877 (1991) (asserting a dichotomy between irrational behavior in the laboratory and rational behavior in society stemming from learning and market forces) with Richard H. Thaler, *The Psychology and Economics Conference Handbook: Comments on Simon, on Einhorn and Hogarth, and on Tversky and Kahneman*, 59 J. BUS. S279 (1986) (challenging this assertion), reprinted in THALER, *supra* note 59, at 189; Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S275 (1986), reprinted in *THE LIMITS OF RATIONALITY* 60 (Karen S. Cook & Margaret Levi eds., 1990) (same).

75. The classical theory of saving as an aspect of the life cycle of the household is developed in Franco Modigliani & Richard Brumberg, *Utility Analysis and the Consumption Function: An Interpretation of Cross-Section Data*, in *POST-KEYNESIAN ECONOMICS* 388 (Kenneth K. Kurihara ed., 1955). The extent to which bequest motives also stimulate saving remains controversial. For references to the principal discussions, see Hirsch & Wang, *supra* note 3, at 9 n.28, and George Loewenstein, *The Fall and Rise of Psychological Explanations in the Economics of Intertemporal Choice*, in *CHOICE OVER TIME* 3, 23 (George Loewenstein & Jon Elster eds., 1992). For further discussions, see KOTLIKOFF, *supra* note 39, at 37-162; Andrew B. Abel, *Precautionary Saving and Accidental Bequests*, 75 AM. ECON. REV. 777 (1985); Joseph J. Cordes, *Socio-Economic Perspectives on Household Saving Behavior*, 19 J. BEHAV. ECON. 273 (1990); Benjamin M. Friedman & Mark J. Warshawsky, *The Cost of Annuities: Implications for Saving Behavior and Bequests*, 105 Q.J. ECON. 135 (1990); Benjamin M. Friedman & Mark Warshawsky, *Annuity Prices and Saving Behavior in the United States*, in *PENSIONS IN THE U.S. ECONOMY* 53 (Zvi Bodie et al. eds., 1988) [hereinafter *PENSIONS*]; Paul L. Menchik & Martin David, *Income Distribution, Lifetime Savings, and Bequests*, 73 AM. ECON. REV. 672 (1983); Gian S. Sahota, *Saving and Distribution*, in *THE ECONOMICS OF SAVING*, *supra* note 46, at 193.

76. One pair of theorists has felicitously dubbed the phenomenon of preference of the present self over the later self an "internality." *CHOICE OVER TIME*, *supra* note 75, at xx. Addressing the larger philosophical question of whether it is meaningful to speak of a person at different times as having different identities, see DEREK PARFIT, *REASONS AND PERSONS* 197-347 (1984); Jackson, *supra* note 44, at 1406-07, and the sources cited therein.

because they “deny” the inevitability of their old age.<sup>77</sup> Some theorists have defended mandatory saving within the Social Security system on this basis,<sup>78</sup> and Jackson also points to it to justify the discharge.<sup>79</sup> Nevertheless, the prevalence of myopia remains unclear. Scholars who assert that it reflects the natural state of mind also acknowledge that individuals can, and

77. Discussing myopia (also known as “impulsiveness,” “impatience,” or “*akrasia*”) generally, see CHOICE OVER TIME, *supra* note 75; GEORGE AINSLIE, *PICOECONOMICS* 56-95 (1992); A.C. PIGOU, *THE ECONOMICS OF WELFARE* pt. 1, ch. 2, § 3 (4th ed. 1932); George Ainslie, *Specious Reward: A Behavioral Theory of Impulsiveness and Impulse Control*, 82 *PSYCHOL. BULL.* 463, 463-73 (1975); T. Michael Kashner, *Present-Future Gratification Tradeoffs: Does Economics Validate Psychometric Studies?*, 11 *J. ECON. PSYCHOL.* 247 (1990); Stephen J. Hoch & George F. Loewenstein, *Time-Inconsistent Preferences and Consumer Self-Control*, 17 *J. CONSUMER RES.* 492 (1991); George Loewenstein & Richard H. Thaler, *Anomalies: Intertemporal Choice*, *J. ECON. PERSP.*, Fall 1989, at 181, *reprinted in* THALER, *supra* note 58, at 92; Richard H. Thaler, *Some Empirical Evidence on Dynamic Inconsistency*, 8 *ECON. LETTERS* 201 (1981), *reprinted in* THALER, *supra* note 59, at 127. (For some early discussions in the writings of John Stuart Mill, see MILL, *supra* note 39, at 150; JOHN S. MILL, *UTILITARIANISM* 14-15 (Oskar Piest ed., Macmillan 1957) (1863).) Specifically in connection with financial planning, see FISHER, *supra* note 53, at 61-98; Kotlikoff et al., *supra* note 39, at 1057. For an evolutionary perspective, see Alan R. Rogers, *Evolution of Time Preference by Natural Selection*, 84 *AM. ECON. REV.* 460 (1994). In some behavioral models, myopia follows not from serial changes of perspective, but rather from a simultaneous internal tension between a short-term and long-term perspective (the phenomenon of “ambivalence”). AINSLIE, *supra*, at 24-55; Gregory S. Kavka, *Is Individual Choice Less Problematic Than Collective Choice?*, 7 *ECON. & PHIL.* 143 (1991); Richard H. Thaler & H.M. Shefrin, *An Economic Theory of Self-Control*, 89 *J. POL. ECON.* 392 (1981), *reprinted in* THALER, *supra* note 59, at 77. As economists point out, discounting future benefits is rational in those cases where the consumer expects to have greater resources in the future, given diminishing marginal utilities. Robert E. Goodin, *Discounting Discounting*, 2 *J. PUB. POL’Y* 53, 57-58 (1982); Mancur Olson & Martin J. Bailey, *Positive Time Preference*, 89 *J. POL. ECON.* 1 (1981). *See also* Amos Tversky & Dale Griffin, *Endowment and Contrast in Judgments of Well-Being*, in *STRATEGY AND CHOICE* 297 (Richard J. Zeckhauser ed., 1991) (suggesting that one’s subsequent sense of well-being is affected by one’s memories of prior gratification). For a further philosophical discussion of decisionmaking over time, see PARFIT, *supra* note 76, at 149-94.

78. George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 *AM. ECON. REV.* 307, 317 (1982); P.A. Diamond, *A Framework for Social Security Analysis*, 8 *J. PUB. ECON.* 275, 281-82 (1977); Kotlikoff et al., *supra* note 39, at 1056-57; Deborah M. Weiss, *Paternalistic Pension Policy: Psychological Evidence and Economic Theory*, 58 *U. CHI. L. REV.* 1275, 1299, 1317-18 (1991). *Cf.* Robert H. Frank, *Positional Externalities*, in *STRATEGY AND CHOICE*, *supra* note 77, at 25, 38-39 (suggesting utilities in mandatory Social Security stemming from its universality); *supra* note 39 and *infra* note 141 (referring to economic justifications premised on perfect rationality). *But see infra* note 169. The legislative history of the Employee Retirement Income Security Act of 1974 (ERISA) justifies private pension inalienability only briefly, as necessary to “ensure that the employee’s accrued benefits are actually available for retirement purposes.” H.R. REP. NO. 807, 93d Cong., 2d Sess. 68 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4734.

79. Jackson, *supra* note 44, at 1408-10.

often do, learn to overcome it.<sup>80</sup>

Even among those persons who do focus relentlessly on their temporary welfare, some may be expected to defer consumption and to avoid or retire debt. Persons can derive *present* satisfaction out of knowing that greater consumption awaits them in the future. Psychologists call this phenomenon *savoring*. (Thus, some persons prefer to be the last ones to open their Christmas presents, or they leave their rarest bottles of wine in the cellar, reserved for later occasions.) By the same token, persons can suffer present dissatisfaction out of knowing that something unpleasant (such as debt payments) awaits them in the future—the phenomenon of *dread*. (To minimize dread, some individuals try to move up surgery or a dental appointment.) These psychological impulses, which incidentally are common enough to find expression not only in the professional literature but also in lay colloquialisms,<sup>81</sup> could incline persons either to accelerate *or to delay* consumption, to borrow *or to pay off* debts.<sup>82</sup>

In the same vein, while persons may derive pleasure from spending, they may also derive certain present satisfactions out of saving. As Lester Thurow has argued, the conservation of wealth does facilitate present consumption of a sort (though not acknowledged in conventional consumption economics)—namely, the consumption of *power*, which wealth disparities within interpersonal relationships permit the wealth holder to

80. AINSLIE, *supra* note 77, at 57-60, 79; FISHER, *supra* note 53, at 66, 89-91; Ainslie, *supra* note 77, at 467-69 (reviewing studies on animal behavior); Modigliani & Brumberg, *supra* note 75, at 430; *see also* George F. Loewenstein, *Frames of Mind in Intertemporal Choice*, 34 MGMT. SCI. 200 (1988) (suggesting that the individual discount rate can be influenced by framing an intertemporal choice alternatively as an acceleration or a delay). Individuals conscious of their myopia can overcome it by various self-imposed cognitive devices. Ainslie, *supra* note 77, at 473-89; George Ainslie & Nick Haslam, *Self-Control*, in CHOICE OVER TIME, *supra* note 75, at 177; Hoch & Loewenstein, *supra* note 77, at 498-503; Walter Mischel, *Processes in Delay of Gratification*, 7 ADVANCES EXPERIMENTAL SOC. PSYCHOL. 249 (1974); T.C. Schelling, *Self-Command: A New Discipline*, in CHOICE OVER TIME, *supra* note 75, at 167; Thaler & Shefrin, *supra* note 77, at 396-98; *see also infra* notes 323-32 and accompanying text. Indeed, such devices can lead to *overcompensation* and turn a natural squanderer into a miser. AINSLIE, *supra* note 77, at 236-37. That lay persons recognize intuitively the phenomenon of myopia is indicated by certain colloquial expressions that have crept into the language; *viz.*, when "I can't wait" to do something. Yet, as often in semantics, the phrase "I can't wait" has a deeper, contradictory meaning, for what I really mean when I say "I can't wait," is that while I do not *want* to wait, I have developed sufficient willpower to control myself, and so I actually *can* wait.

81. Savoring: "saving the best for last." Dread: "getting it over with."

82. On savoring and dread, *see* PARFIT, *supra* note 76, at 160-61; Jon Elster & George Loewenstein, *Utility from Memory and Anticipation*, in CHOICE OVER TIME, *supra* note 75, at 213; George Loewenstein, *Anticipation and the Valuation of Delayed Consumption*, 97 ECON. J. 666 (1987). For an early discussion, *see* KEYNES, *supra* note 52, at 108. Compare the converse phenomenon of retrospection discussed in Tversky & Griffin, *supra* note 77; Elster & Loewenstein, *supra*.



project.<sup>83</sup> (The argument actually originated with Marx.<sup>84</sup>) And apart from these dynamics, wealth conservation can also provide present benefits in the form of personal ego gratification, as investigators have observed.<sup>85</sup> For some lost souls, *net* worth contributes to a sense of *self-worth*.<sup>86</sup> Like Silas Marner, they may be driven to amass and conserve wealth for its own

83. LESTER C. THURLOW, *GENERATING INEQUALITY* 131-42 (1975). For related discussions, see OTTO FENICHEL, *The Drive to Amass Wealth*, in *THE COLLECTED PAPERS OF OTTO FENICHEL: SECOND SERIES* 89, 91, 94-96 (1938); JOHN K. GALBRAITH, *THE ANATOMY OF POWER* 47-53 (1983); HENRY C. LINDGREN, *GREAT EXPECTATIONS: THE PSYCHOLOGY OF MONEY* 58-82 (1980).

84. KARL MARX, *Money*, in *MARX'S CONCEPT OF MAN* 163 (Erich Fromm ed., rev. ed. 1966) (ms. 1844). Antecedents of the idea expressed in connection with the social value of the right to bequeath trace back at least to Bracton, writing in the thirteenth century. Hirsch & Wang, *supra* note 3, at 9-11.

85. Thaler & Shefrin, *supra* note 77, at 396 ("In this case doer myopia does not inhibit saving.")

86. FENICHEL, *supra* note 83, at 94-102; LEWIS H. LAPHAM, *MONEY AND CLASS IN AMERICA* 84 (1988); LINDGREN, *supra* note 83, at 83-99; PHILIP SLATER, *WEALTH ADDICTION* 34-36 (1980); THORSTEIN VEBLEN, *THE THEORY OF THE LEISURE CLASS* 37-39 (Houghton Mifflin 1973) (1899); David W. Krueger, *Money, Success, and Success Phobia*, in *THE LAST TABOO: MONEY AS SYMBOL AND REALITY IN PSYCHOTHERAPY AND PSYCHOANALYSIS* 3 (David W. Krueger ed., 1986); Russell W. Belk, *Possessions and the Extended Self*, 15 *J. CONSUMER RES.* 139, 155 (1988); David W. Krueger, *A Self-Psychological View of Money* [hereinafter Krueger, *View of Money*] in *THE LAST TABOO, supra*, at 24; Melvin Prince, *Self-Concept, Money Beliefs and Values*, 14 *J. ECON. PSYCHOL.* 161 (1993); Carin Rubenstein, *Money and Self-Esteem, Relationships, Secrecy, Envy, Satisfaction*, *PSYCHOL. TODAY*, May, 1981, at 29; see also Frances L. Feldman, *Money: An Index to Personal Problems in Adolescents*, 25 *MARRIAGE & FAM. LIVING* 364, 365-66 (1963) (discussing the development of this attitude during childhood); ADRIAN FURNHAM & ALAN LEWIS, *THE ECONOMIC MIND* 46-67 (1986) (discussing variations in attitudes toward money); Russell W. Belk & Melanie Wallendorf, *The Sacred Meanings of Money*, 11 *J. ECON. PSYCHOL.* 35 (1990) (same); Adrian Furnham, *Many Sides of the Coin: The Psychology of Money Usage*, 5 *PERSONALITY & INDIVIDUAL DIFFERENCES* 501 (1984) (same); Paul F. Wernimont & Susan Fitzpatrick, *The Meaning of Money*, 56 *J. APPLIED PSYCHOL.* 218 (1972) (same). Likewise, wealth may win the esteem of others, which is itself an aspect of its value to the wealthholder. Adam Smith emphasized the point early on. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 212-13 (D.D. Raphael & A.L. Macfie eds., Clarendon Press 1976) (1759). Then again, of course, individuals may also derive present ego gratification from *spending*, especially on "prestige" items that conspicuously signal the benefactor's success. A Porsche can lift esteem, both self- and other- (a point constantly reinforced by product advertising). MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS* 29-32 (1981); HELGA DITTMAR, *THE SOCIAL PSYCHOLOGY OF MATERIAL POSSESSION* 9-17, 41-64, 95-121, 155-84 (1992); JAMES S. DUESENBERY, *INCOME, SAVING, AND THE THEORY OF CONSUMER BEHAVIOR* 28-37, 50-52 (1967); ARTHUR A. LEFF, *SWINDLING AND SELLING* 167-69, 172-75 (1976); Ottmar L. Braun & Robert A. Wicklund, *Psychological Antecedents of Conspicuous Consumption*, 10 *J. ECON. PSYCHOL.* 161 (1989); Grant McCracken, *Culture and Consumption: A Theoretical Account of the Structure and Movement of the Cultural Meaning of Consumer Goods*, 13 *J. CONSUMER RES.* 71 (1986); Marsha L. Richins & Floyd W. Rudmin, *Materialism and Economic Psychology*, 15 *J. ECON. PSYCHOL.* 217 (1994). Adam Smith recognized this point as well. I SMITH, *supra* note 46, at 192. The impulse to raise self-esteem has also been associated with *compulsive* spending (and so presumably could also lead to compulsive saving among those individuals for whom wealth and self-esteem are linked). Alice Hanley & Mari S. Wilhelm, *Compulsive Buying: An Exploration into Self-Esteem and Money Attitudes*, 13 *J. ECON. PSYCHOL.* 5 (1992); see also *infra* notes 107-10.

sake, without any regard to future consumption.<sup>87</sup> In short, myopia can lead to different behavioral sequelae, to spending *or* to saving.

Consider another psychological process upon which Jackson laid great emphasis: heuristic devices to simplify strenuous cognitive tasks, in particular "anchoring," whereby decisionmakers tend to focus on an initial value or probability and insufficiently adjust their calculus to take account of other ones. In the context of risk perceptions, this tendency leads persons consistently to underestimate disjunctive probabilities, that is, probabilities that any one of a number of independent chance events will occur (say, to cause financial default), because the probability that *at least one* of several events will occur exceeds the probability that *any particular one*, upon which an individual has anchored, will occur. By the same token, persons tend to overestimate the corresponding conjunctive probability that *none* of the chance events that could cause something to occur (such as a default) will materialize, because the probability that each one of the events that could go wrong will in fact go right is less than the probability that any one of those events that has been anchored upon will go right.<sup>88</sup> On this basis, Jackson suggests that persons tend systematically to underestimate the risk of borrowing money and to overestimate the corresponding chance of success in that endeavor.<sup>89</sup> Yet, it would seem that credit risk could just as easily be (and be anticipated to be) conjunctive as disjunctive—that is, several independent events could have to occur in unison, say, loss of a job

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87. "But at night came his revelry: at night he closed his shutters, and made fast his doors, and drew forth his gold . . . He spread them out in heaps and bathed his hands in them . . ." GEORGE ELIOT, *SILAS MARNER* 70 (Q.D. Leavis ed., Penguin Books 1967) (1861). For some real examples of legendary misers, see KENNETH LAMOTT, *THE MONEYMAKERS* 185-203 (1969). Jon Elster also posits "mixed cases" where misers pinch their pennies "in order to become a spendthrift." ELSTER, *supra* note 59, at 67. Though Elster fails to develop the idea, this seemingly paradoxical scenario could arise where an individual's utility vision extends into the *near* future ("mild myopia," we might say), and so she resolves to save for a Porsche, or it could arise where an individual suffers from a syndrome literally the opposite of myopia ("hyperopia," we could call it) and focuses overly or exclusively on her *subsequent* welfare. (Postulating this last possibility, see PARFIT, *supra* note 76, at 161.)

88. Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 *SCI.* 1124, 1128-30 (1974), *reprinted in* *JUDGMENT UNDER UNCERTAINTY*, *supra* note 64, at 3. Tversky and Kahneman reached the same conclusion in subsequent and more focused studies. Indeed, postulating the involvement of another cognitive process known as the representativeness heuristic, whereby persons tend to stereotype other individuals and situations, they found that persons may anticipate a conjunctive probability to be even *higher* than that of its least likely constituent probability, a phenomenon they call the "conjunction fallacy." Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, *in* *JUDGMENT UNDER UNCERTAINTY*, *supra* note 64, at 84, 90-98; Amos Tversky & Daniel Kahneman, *Extensional Versus Intuitive Reasoning: The Conjunction Fallacy in Probability Judgment*, 90 *PSYCHOL. REV.* 293 (1983).

89. Jackson, *supra* note 44, at 1410-12 & n.60 (citing, inter alia, to several of the studies by Kahneman and Tversky).

and inability to find another one, for a default to follow.<sup>90</sup> In that case, anchoring would lead persons to *overestimate* credit risk, when they focused on one of those probabilities, whereas they would *underestimate* the corresponding disjunctive probability of success, which would require only that one of the several alternative hazards be overborne. In short, the effect of anchoring on financial decisions is ambiguous: it may lead persons toward evaluations of risk that are long or short of the mark.<sup>91</sup>

Take still another thought process, one not heretofore considered in connection with saving and spending but which is certainly germane to the problem. That is the proclivity to irrational optimism. Persons tend to believe that "it won't happen to them." They may leave seat belts unfastened, they may lie out in the sun, with serene confidence in their own invulnerability.<sup>92</sup> In the context of individual consumption functions, irrational optimism could lead in the direction of greater present consumption and borrowing, in the (false) assurance that the future will take care of itself.<sup>93</sup> But again, this current of thought does not flow only in one direction. For one thing, evidence suggests that irrational optimism can

90. See DAVID CAPLOVITZ, *CONSUMERS IN TROUBLE: A STUDY OF DEBTORS IN DEFAULT* 50 (1974) ("[C]areful probing by the interviewers often elicited more than one reason for the default. In fact, almost half the debtors [surveyed] mentioned more than one reason [for default] and quite a number offered three reasons.").

91. Similarly, evaluations of the amount an individual needs presently to save in order to sustain future consumption, by virtue of the very *complexity* of the calculation, may be inaccurately high or low; heuristic processes do not clearly bias the calculation. For discussions, see Richard H. Thaler, *Psychology and Savings Policies*, AM. ECON. REV. 186 (May 1994) (separately paginated *Papers and Proceedings* issue); STEPHEN JOHNSON ET AL., *CAN PEOPLE COMPUTE? AN EXPERIMENTAL TEST OF THE LIFE CYCLE CONSUMPTION MODEL* (National Bureau of Economic Research Working Paper No. 2183, 1987) (finding a general tendency of persons to *overestimate* the need for saving by underestimating the power of compound interest).

92. For a general discussion, see Neil D. Weinstein, *Unrealistic Optimism About Future Life Events*, 39 J. PERSONALITY & SOC. PSYCHOL. 806 (1980). Adam Smith noticed the phenomenon long ago. I SMITH, *supra* note 46, at 120-23. Discussing the phenomenon in connection with business, as opposed to saving, decisions, see Jakob B. Madsen, *Tests of Rationality Versus an "Over Optimist" Bias*, 15 J. ECON. PSYCHOL. 587 (1994) (speculating also that the bias may help to explain market "bubbles" and "manias"). Psychologists have argued over the origins of this phenomenon, debating whether it stems, once again, from denial or from an illusion of control. Frank P. McKenna, *It Won't Happen to Me: Unrealistic Optimism or Illusion of Control?*, 84 BRIT. J. PSYCHOL. 39 (1993); Weinstein, *supra*, at 807, 818-19. On psychological illusions of control, see Ellen J. Langer, *The Illusion of Control*, 32 J. PERSONALITY & SOC. PSYCHOL. 311 (1975), *excerpted in* JUDGMENT UNDER UNCERTAINTY, *supra* note 64, at 231.

93. It is not, in fact, certain that irrational optimism is maladaptive, for it could conceivably lead to greater effort and persistence: the power of positive thinking, if you will. For discussions, see McKenna, *supra* note 92, at 41-42, 44, 47; Linda S. Perloff, *Perceptions of Vulnerability to Victimization*, J. SOC. ISSUES, at 41, 47-50 (1983).

reverse itself following adverse experience.<sup>94</sup> Automotive accident victims rarely forget to buckle up; melanoma victims hug the shadows. And, at least in connection with financial decisions, there is a contrary bias with which any economist is familiar—namely, the tendency toward risk aversion.<sup>95</sup> As the market confirms, investors demand a risk premium for common stocks as compared to bonds. (While this phenomenon is usually associated with the decreasing marginal utility of wealth,<sup>96</sup> innate predispositions may also be involved—clinical studies show that *rats* are also risk averse!<sup>97</sup>) Again, aversion to risk could forestall undue present consumption and borrowing.<sup>98</sup>

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94. Neil D. Weinstein, *Effects of Personal Experience on Self-Protective Behavior*, 105 PSYCHOL. BULL. 31 (1989). Professor Weinstein has argued that the representativeness heuristic, by which persons tend to engage in stereotyping, could lead to irrational optimism if they fail to fit the vulnerable stereotype; but as Professor Perloff points out, the representativeness heuristic in this respect is double-edged, for it could also lead to unrealistic pessimism (quite apart from adverse experience) if an individual perceived herself to fall *within* the vulnerable stereotype. Compare Weinstein, *supra* note 92, at 808 with Perloff, *supra* note 93, at 46-47. See also Dariusz Dolinski et al., *Unrealistic Pessimism*, 127 J. SOC. PSYCHOL. 511 (1987) (arguing that under other special conditions, not present in connection with debt, persons may have an initial tendency toward unrealistic pessimism).

95. Aversion to financial risk is not universal, but the empirical evidence for general risk aversion is conclusive. (It does not necessarily follow, however, that a risk averse investor will also be averse to other sorts of risks.) For discussions and further references, see RISK-TAKING BEHAVIOR (J. Frank Yates ed., 1992); Hirsch & Wang, *supra* note 3, at 31 n.117; Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1, 8-26 (1993); for an early analysis, see SMITH, *supra* note 86, at 212-17 (referring to risk aversion as "prudence"). Jackson, however, downplays the significance of risk aversion. Jackson, *supra* note 44, at 1413.

96. E.g., ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 58-65 (1988). Adam Smith drew this conclusion. SMITH, *supra* note 86, at 213.

97. *Ratonomics*, THE ECONOMIST, Sept. 14, 1991, at 76. Of men as of mice? See Paul H. Rubin & Chris W. Paul II, *An Evolutionary Model of Taste for Risk*, 17 ECON. INQUIRY 585 (1979) (discussing homo sapiens). In an earlier essay, a collaborator and I also speculated that risk aversion was tied to the "endowment effect," discussed *infra* note 118 and accompanying text, whereby persons tend psychologically to value losses of personal property (with which they personally identify) above gains (with which they do not yet identify). Hirsch & Wang, *supra* note 3, at 31 n.117. A pair of economists has recently offered precisely such an argument to explain the magnitude of the risk premium existing within the securities market. SHLOMO BENARTZI & RICHARD H. THALER, MYOPIC LOSS AVERSION AND THE EQUITY PREMIUM PUZZLE (National Bureau of Economic Research Working Paper No. 4369, 1993). For a discussion of other possible psychological components of risk aversion, see David E. Bell, *Disappointment in Decision Making Under Uncertainty*, 33 OPERATIONS RES. 1 (1985).

98. See Olof Dahlbäck, *Saving and Risk Taking*, 12 J. ECON. PSYCHOL. 479 (1991) (finding that risk aversion strongly affects borrowing decisions and investment decisions but not saving decisions); Karen E. Dynan, *How Prudent Are Consumers?*, 101 J. POL. ECON. 1104 (1993) (finding less precautionary saving than expected, given accepted beliefs about risk aversion). Adam Smith tied frugality to risk aversion, and he surmised that as an empirical matter "the principle of frugality seems not only to predominate but to predominate very greatly." SMITH, *supra* note 86, at 213-15; 1 SMITH, *supra* note 46, at 362-64 (quotation at 363). On the other hand, risk aversion may be more pronounced

Finally, to point to the most glaring lacuna in Jackson's analysis (I dare say, one that the cognitive psychologists should also bear in mind), *social* forces play an important role here. As Max Weber taught us, some cultures and subcultures attach normative significance to thrift—it is exalted for its own sake.<sup>99</sup> More recent sociological studies confirm that tendencies toward thrift and caution vary among families and among different national, cultural, attitudinal, and socioeconomic groups.<sup>100</sup> The point is sufficiently manifest to have bred social stereotyping—one can, for example, find a commentator playfully contrasting the Scots with unmarried sailors to illustrate two behavioral extremes.<sup>101</sup> Modern American culture has been

*later* in life, which could again provide a paternalistic justification for enforced caution during youth. Discussing risk aversion as a function of age, see Baruch Fischhoff, *Risk Taking: A Developmental Perspective*, in RISK-TAKING BEHAVIOR, *supra* note 95, at 133.

99. MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Talcott Parsons trans., Charles Scribners Sons 1958) (1904-05).

100. For varied discussions, see FURNHAM & LEWIS, *supra* note 86, at 154-77; GEORGE KATONA, *PSYCHOLOGICAL ECONOMICS* 233-39, 247-51, 271-83 (1975); GEORGE KATONA ET AL., *ASPIRATIONS AND AFFLUENCE* 88-105 (1971); LEA ET AL., *supra* note 73, at 214-16; CONSTANTINO LLUCH ET AL., *PATTERNS OF HOUSEHOLD DEMAND AND SAVING* 240-42 (1977); JAMES N. MORGAN ET AL., *INCOME AND WELFARE IN THE UNITED STATES* 427-44 (1962); JAMES N. MORGAN ET AL., *PRODUCTIVE AMERICANS* 234-49, 299-317 (1966); DUESENBERY, *supra* note 86 (formulating the general theory that persons' wants are dependent on the wants of their neighbors); Ainslie, *supra* note 77, at 465-67; B. Douglas Bernheim & John K. Scholz, *Do Americans Save Too Little?*, *BUS. REV.*, Sept.-Oct. 1993, at 3; Evelio Freire et al., *Temporal Span, Delay of Gratification, and Children's Socioeconomic Status*, 137 *J. GENETIC PSYCHOL.* 247 (1980); Adrian Furnham, *Why Do People Save? Attitudes to, and Habits of Saving Money in Britain*, 15 *J. APPLIED SOC. PSYCHOL.* 354 (1985); Philip Kotler, *Mathematical Models of Individual Buyer Behavior*, 13 *BEHAVIORAL SCI.* 274 (1968); Stephen E.G. Lea et al., *The Economic Psychology of Consumer Debt*, 14 *J. ECON. PSYCHOL.* 85, 116-18 (1993); Sonia M. Livingstone & Peter K. Lunt, *Predicting Personal Debt and Debt Repayment: Psychological, Social and Economic Determinants*, 13 *J. ECON. PSYCHOL.* 111 (1992); Pierre Martineau, *Social Classes and Spending Behavior*, 23 *J. MARKETING*, 121 (1958); H. Lee Mathews & John W. Slocum, Jr., *Social Class and Commercial Bank Credit Card Usage*, *J. MARKETING*, Jan. 1969, at 71; Walter Mischel, *Preference for Delayed Reinforcement: An Experimental Study of a Cultural Observation*, 56 *J. ABNORMAL & SOC. PSYCH.* 57 (1958); Dennis W. Rook, *The Buying Impulse*, 14 *J. CONSUMER RES.* 189, 190, 196 (1987); Louis Schneider & Sverre Lysgaard, *The Deferred Gratification Pattern: A Preliminary Study*, 18 *AM. SOC. REV.* 142 (1953); John W. Slocum, Jr. & H. Lee Mathews, *Social Class and Income as Indicators of Consumer Credit Behavior*, *J. MARKETING*, Apr. 1970, at 69; Chester R. Wasson, *Is It Time to Quit Thinking of Income Classes?*, *J. MARKETING*, Apr. 1969, at 54; see also Elizabeth S. Moore-Shay & Richard J. Lutz, *Intergenerational Influences in the Formation of Consumer Attitudes and Beliefs About the Marketplace: Mothers and Daughters*, 15 *ADVANCES CONSUMER RES.* 461 (1988) (suggesting that children tend to mimic the observable consumer habits of their parents); Susan E. Heckler et al., *Intergenerational Influences in Adult Buying Behaviors: An Examination of Moderating Factors*, 16 *ADVANCES CONSUMER RES.* 276 (1989) (suggesting factors that can inhibit intergenerational mimicking).

101. FISHER, *supra* note 53, at 84, 87; see also DITTMAR, *supra* note 86, at 136-54 (discussing social stereotyping in connection with material possessions).

much maligned for fostering a “buy now, pay later” philosophy,<sup>102</sup> but recent investigations suggest that cultural changes may be afoot—more Americans are expressing negative attitudes toward conspicuous consumption and credit.<sup>103</sup> Be this as it may, the clearest implication of the sociological studies is that propensities to save and to avoid risk tend to rise with levels of education and with socioeconomic status<sup>104</sup>—an observation that may, however, be more economic than social, given the greater ease with which the wealthy can save.<sup>105</sup>

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102. DANIEL HOROWITZ, *THE MORALITY OF SPENDING* (1985); MARTHA L. OLNEY, *BUY NOW PAY LATER* 118-84 (1991); ROBERT B. SETTLE & PAMELA L. ALRECK, *WHY THEY BUY* 221-43 (1986); DAVID M. TUCKER, *THE DECLINE OF THRIFT IN AMERICA* (1991); Rook, *supra* note 100, at 189. *See also* B. DOUGLAS BERNHEIM, *THE VANISHING NEST EGG: REFLECTIONS ON SAVING IN AMERICA* 2, 72-75 (1991) (suggesting that the baby boom generation’s attitude toward saving has been marked by post-war prosperity and ignorance of the Great Depression).

103. Richard A. Feinberg, *The Social Nature of the Classical Conditioning Phenomena in People: A Comment on Hunt, Florsheim, Chatterjee, and Kernan*, 67 *PSYCHOL. REP.* 331 (1990); Anne B. Fisher, *It’s A Great Time to Trade Up (If You Have the Cash)*, *FORTUNE*, Apr. 6, 1992, at 112; Hoch & Loewenstein, *supra* note 77, at 503; Bill Kelley, *The New Consumer Revealed*, *SALES & MARKETING MGMT.*, May 1993, at 46; *cf.* Hoch & Loewenstein, *supra* note 77, at 502. For a recent popular diatribe against credit and the American credit industry, see TERRY GALANOY, *CHARGE IT* (1980). Suspicion of credit and a taste for the simple life and frugality are, needless to say, enduring themes in American cultural history, threading through seventeenth-century Puritanism, eighteenth-century republicanism, and nineteenth-century transcendentalism. *E.g.*, MILLER, *supra* note 62, at 40-52; EDMUND S. MORGAN, *The Puritan Ethic and the American Revolution, in THE CHALLENGE OF THE AMERICAN REVOLUTION* 88 (1976); THOREAU, *supra* note 56, at 15-18, 35-36, 3-88; GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787*, at 52, 65, 416-18 (1969). These themes are also reflected in the credos of certain current philosophical and religious movements such as the Amish sect. *E.g.*, ELMER SCHWIEDER & DOROTHY SCHWIEDER, *A PECULIAR PEOPLE: IOWA’S OLD ORDER AMISH* 51-53 (1975). Suggesting modern cultural ambivalence toward materialism, see DITTMAR, *supra* note 86, at 185-201.

104. *See supra* note 100.

105. Noting the relative ease of saving by the wealthy, see, for example, Sahota, *supra* note 75, at 203. Put another way, saving has the attributes of a luxury good. Nevertheless, economists have disagreed over whether the marginal propensity to consume diminishes with wealth. Adam Smith thought not: though “[t]he desire of food is limited in every man by the narrow capacity of the human stomach,” still

the desire of the conveniencies and ornaments of building, dress, equipage, and household [sic] furniture, seems to have no limit or certain boundary. . . . What is over and above satisfying the limited desire, is given for the amusement of those desires which cannot be satisfied, but seem to be altogether endless.

1 SMITH, *supra* note 46, at 183. Lord Keynes, by contrast, inferred as a “fundamental psychological law, upon which we are entitled to depend with great confidence . . . that men are disposed, as a rule and on the average, to increase their consumption as their income increases, but not by as much as the increase in their income.” KEYNES, *supra* note 52, at 96; FISHER, *supra* note 53, at 72-73. For modern discussions, see 2 JAMES TOBIN, *ESSAYS IN ECONOMICS* 61-318 (1975); Hersh M. Shefrin & Richard H. Thaler, *The Behavioral Life-Cycle Hypothesis*, 26 *ECON. INQUIRY* 609, 621-22, 628-29 (1988), *reprinted in* THALER, *supra* note 59, at 91; *see also* THUROW, *supra* note 83, at 136 (asserting that possessors of large fortunes literally lack sufficient time to consume all their wealth).

At any rate, if nothing else, empirical evidence on saving and borrowing in America demonstrates the heterogeneity of individual behavior.<sup>106</sup> At one edge of the spectrum lies a fringe of compulsive (or "addictive") spenders and borrowers,<sup>107</sup> persons who suffer from a recognized psychological disorder.<sup>108</sup> And at the other edge lies a scattering of "money

106. James N. Morgan, *The Structure of Aggregate Personal Saving*, 59 J. POL. ECON. 528 (1951).

107. AINSLIE, *supra* note 77, at 13, 1-23; Karl Abraham, *The Spending of Money in Anxiety States*, in ERNEST BORNEMANN, *THE PSYCHOANALYSIS OF MONEY* 99 (1976); Caroline Arthur, *Fifteen Million Americans Are Shopping Addicts*, AM. DEMOGRAPHICS, Mar. 1992, at 14 (1992) (presenting statistics); Ronald J. Faber et al., *Compulsive Consumption*, 14 ADVANCES CONSUMER RES. 132 (1986); Ronald J. Faber & Thomas O'Guinn, *Compulsive Consumption and Credit Abuse*, 11 J. CONSUMER POL'Y 97 (1988) (noting, inter alia, that compulsive shoppers share character traits with persons displaying other compulsive behaviors); Max M. Glatt & Christopher C.H. Cook, *Pathological Spending as a Form of Psychological Dependence*, 82 BRIT. J. ADDICTION 1257 (1987); Hanley & Wilhelm, *supra* note 86; Elizabeth C. Hirschman, *The Consciousness of Addiction: Toward a General Theory of Compulsive Consumption*, 19 J. CONSUMER RES. 155 (1992); William Kaufman, *Some Emotional Uses of Money*, in BORNEMANN, *supra*, 227, 237-42, 247-50; David W. Krueger, *On Compulsive Shopping and Spending: A Psychodynamic Inquiry*, 42 AM. J. PSYCHOTHERAPY 574 (1988) (noting, inter alia, that compulsive shopping often accompanies other forms of compulsive or frenzied behavior); Lauren Lawrence, *The Psychodynamics of the Compulsive Female Shopper*, 50 AM. J. PSYCHOANALYSIS 67 (1990); Thomas C. O'Guinn & Ronald J. Faber, *Compulsive Buying: A Phenomenological Exploration*, 16 J. CONSUMER RES. 147 (1989); Dennis W. Rook & Stephen J. Hoch, *Consuming Impulses*, 12 ADVANCES CONSUMER RES. 23 (1984); Howard Tokunaga, *The Use and Abuse of Consumer Credit: Application of Psychological Theory and Research*, 14 J. ECON. PSYCHOL. 285 (1993); Gilles Valence et al., *Compulsive Buying: Concept and Measurement*, 11 J. CONSUMER POL'Y 419 (1988). See generally JIM ORFORD, *EXCESSIVE APPETITES: A PSYCHOLOGICAL VIEW OF ADDICTIONS* (1985).

Credit cards may aggravate the problem, by facilitating (or even serving as a cue that triggers) impulse buying, and by serving psychologically to divorce the benefits of purchase from the costs of payment. TERESA A. SULLIVAN ET AL., *AS WE FORGIVE OUR DEBTORS: BANKRUPTCY AND CONSUMER CREDIT IN AMERICA* 178 (1989); Richard A. Feinberg, *Credit Cards as Spending Facilitating Stimuli: A Conditioning Interpretation*, 13 J. CONSUMER RES. 348 (1986); Hoch & Loewenstein, *supra* note 77, at 501-02; Rook, *supra* note 100, at 189, 196; see also Ainslie, *supra* note 77, at 479 (discussing impulse facilitation generally). But see James M. Hunt et al., *Credit Cards as Spending-Facilitating Stimuli: A Test and Extension of Feinberg's Conditioning Hypothesis*, 67 PSYCHOL. REP. 323 (finding no evidence that credit cards trigger spending); Feinberg, *supra* note 103 (questioning Hunt's methodology, but admitting Feinberg's own inability to replicate his prior results); David J. Burman, *Do People Overspend with Credit Cards?*, 5 J. CONSUMER CREDIT MGMT. 98 (1974) (finding that consumers do not in general overspend with credit cards). See generally Elizabeth C. Hirschman, *Differences in Consumer Purchase Behavior by Credit Card Payment System*, 6 J. CONSUMER RES. 58 (1979) (discussing the place of credit cards in traditional economic models); Gillian Garcia, *Credit Cards: An Interdisciplinary Survey*, 6 J. CONSUMER RES. 327 (1980) (reviewing the literature on credit cards generally).

Evidence on the empirical prevalence of compulsive shopping is conflicting. Cf. CAPLOVITZ, *supra* note 90, at 53, 64-67; SULLIVAN ET AL., *supra*, at 188-89; Roger D. Blackwell et al., *Americans' Use of Credit Cards: A Nationwide Study of Female and Male Attitudes*, BULL. BUS. RES., Feb. 1975, at 5, 7-8; Rook, *supra* note 100, at 196.

108. Appreciation of the fact that persons may suffer from a wide variety of money psychoses has spawned a new branch of psychiatry: money therapy. Rachel Englehart, *Debt Anxiety? Credit Crisis?*

addicts” and “debt averse” persons, the first saving compulsively,<sup>109</sup> the second eschewing or retiring even *subsidized* loans, below the market rate of interest, in defiance of the classical laws of economic gravity.<sup>110</sup> Spared of these pathologies, the bulk of the population of consumer units also varies, though in less pronounced ways. In matters of the pocketbook, just about everyone (to quote an old curmudgeon) is “either a little liberal or else a little conservative.”<sup>111</sup> The point is perhaps too obvious even to merit the ink we have devoted to it, for it is the lesson of everyday life.

*Tell It to a Money Shrink*, WALL ST. J., Feb. 7, 1994, at B1.

One possibility that has not been addressed in the psychological literature is addictive *gift-giving*, as opposed to spending, although the notion that “altruism may . . . have some of the properties of an addictive taste” has been suggested in passing by a pair of economists. Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1, 4 (1988), reprinted with modifications in BECKER, *supra* note 55, at 362. At the same time, another mental debility, often ending in self-destitution via gift-giving, is well documented: that is, the exaggerated psychological dependency and conformism associated with membership in a cult. On the psychology of cult membership, see ARTHUR J. DEIKMAN, *THE WRONG WAY HOME: UNCOVERING THE PATTERNS OF CULT BEHAVIOR IN AMERICAN SOCIETY* (1990); MARC GALANTER, *CULTS: FAITH, HEALING, AND COERCION* (1989). On the financial repercussions, see Richard Delgado, *Religious Totalism: Gentle and Ungentle Persuasion Under the First Amendment*, 51 S. CAL. L. REV. 1, 24-25, 94 (1977). See generally MONEY AND POWER IN THE NEW RELIGIONS (James T. Richardson ed., 1988). This danger has been noted by estate planners. JOHN R. PRICE, *PRICE ON CONTEMPORARY ESTATE PLANNING* § 10.21, at 896 (1992). For still another gift-giving neurosis noted in some adolescents, see Feldman, *supra* note 86, at 365 (discussing overgenerosity to gain friendships).

Conceivably, a benefactor faced with a compulsive spender or donor could seek to establish a trust disabling the beneficiary only narrowly from the compulsive activity—the trust could be made inalienable by sale *but not by donation* if the beneficiary were (merely) a compulsive spender, or *vice versa*. Such would probably be held valid. See *supra* note 23. In practice, however, such a limited disabling restraint would likely prove ineffective: a trust alienable only by gift could be donated to a reliable donee who promises informally to return the funds for spending by the original beneficiary; whereas a trust alienable only by sale could be sold by the beneficiary for cash and the proceeds then donated at will.

109. The phenomenon was discussed by Freud. Sigmund Freud, *Character and Anal Erotism*, in BORNEMANN, *supra* note 107, at 73. For more recent discussions, see AINSLIE, *supra* note 77, at 237 (associating the phenomenon with psychological forces other than addiction); EDMUND BERGLER, *MONEY AND EMOTIONAL CONFLICTS* 3-19, 129-49 (1959); HERB GOLDBERG & ROBERT T. LEWIS, *MONEY MADNESS: THE PSYCHOLOGY OF SAVING, SPENDING, LOVING, AND HATING MONEY* 104-08 (1978); ROBERT E. LANE, *THE MARKET EXPERIENCE* 102-04 (1991); Krueger, *View of Money*, *supra* note 86, at 26-28; see also *supra* notes 86-87. The possibility has even been raised that there exists in human persons a biological saving drive related to the hoarding instinct found in some other mammals, though the idea has been rejected as implausible. LEA ET AL., *supra* note 73, at 227-29.

110. “Many people pay off mortgages and student loans quicker than they have to, even when the rate they are paying is less than they earn on safe investments.” Loewenstein & Thaler, *supra* note 77, at 187. No clinical studies of debt aversion appear to have been undertaken as yet, however.

111. J.H. HEXTER, *REAPPRAISALS IN HISTORY* 75 (1961) (quoting in turn, though out of context, Gilbert and Sullivan’s *Private Willis*).



### C. *The Psychology of Inheritance*

We are not quite done spilling ink, however, for there remains an additional element yet to consider—an element impertinent to the general problem of spending and borrowing that Jackson studied, but one that figures directly into the problem of spendthrift trusts. For the corpus of property that we deal with in this instance—the corpus that the beneficiary may too-readily deplete or borrow against—comprises not general assets, but rather a *gratuity*. The resources involved are the product not of the beneficiary's own sweat and toil, accumulated in gradual accretions, but rather of a spontaneous gift or bequest bestowed by someone *else*. Should we expect this circumstance to change the psychodynamics of the beneficiary's conduct in a systematic way?

An interesting question, this. Yet it has prompted only a trickle of analytic and empirical studies, leaving far too much to the imagination. The standard economic model that applies to the problem was developed nearly forty years ago by Professor (and Nobel laureate) Milton Friedman. Under his “permanent income hypothesis,” a consumer unit's consumption function varies with its permanent income, *not* its transitory income. Consumption is supposed to follow from “long-term considerations,” and saving is assumed to be a “residual” category. Under this model, transitory income will not prompt transitory spending; rather, consumption is smoothed over time, and saving soaks up the extra revenue. Consumption thereafter will rise only to the extent that the infusion of saving raises permanent income, by generating a stream of passive earnings.<sup>112</sup> Thus, Friedman's model predicts, consumer units will be *more* disposed to conserve inherited wealth than earned wealth, and its arrival should *not* trigger a “spending spree.”<sup>113</sup>

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112. MILTON FRIEDMAN, A THEORY OF THE CONSUMPTION FUNCTION 20-31 *passim* (1957). Friedman's work is one of many offering refinements to Lord Keynes's original concept of the consumption function (discussed *supra* note 52 and accompanying text). Professor Modigliani, for example, posits that the consumption function is temporally dynamic, evolving over the life cycle of the individual. In Modigliani's model, it is *aged persons* who tend systematically to dissave—but as a rational response to impending death, not irrational tropisms meriting paternalistic intervention. Modigliani & Brumberg, *supra* note 75; Franco Modigliani, *Life Cycle, Individual Thrift, and the Wealth of Nations*, 76 AM. ECON. REV. 297 (1986) (and the sources cited therein). For a recent criticism of the permanent income hypothesis as it relates to consumer units' consumption patterns in response to changes in *permanent*, expected future income, see Alan D. Viard, *The Productivity Slowdown and the Savings Shortfall: A Challenge to the Permanent Income Hypothesis*, 31 ECON. INQUIRY 549 (1993).

113. FRIEDMAN, *supra* note 112, at 28-29. Friedman argues that consumption is smoothed, irrespective of whether an inheritance is anticipated or not; if anticipated, however, the inheritance will

Psychologically, as usual, the problem appears far more complex, and ultimately more enigmatic, than this economic model allows; but the collected works on cognitive responses to gratuitous transfers take up disappointingly little shelf space,<sup>114</sup> and so one must scavenge the adjoining shelves in search of enlightenment. One potentially relevant consideration, well documented in the literature, is the phenomenon of *framing*. Evidence suggests that persons conceptually pigeonhole different assets into different “mental accounts” and assign different consumption functions to each—hence violating psychologically the economically inviolate principle of wealth fungibility. Persons tend, for example, to exhibit a relatively high marginal propensity to consume current income, but are loath to “dip into capital.”<sup>115</sup>

The question then becomes how persons frame gratuitous transfers. Do they associate them in general with income, with capital, or with something else again? Here, unfortunately, the experimental and empirical evidence is wafer thin but suggests that the mental classification of an inheritance may depend upon its characteristics. *Smaller* inheritances are likely to be framed as income and spent relatively easily or even “splurged” within a separate category of minor windfalls (manna from heaven or, as the Irish say, “money from America”). By contrast, *larger*, lump-sum inheritances are more commonly conceptualized as capital and set aside for a rainy day.<sup>116</sup> In addition, the *form* of an inheritance may affect its treatment.

be reflected in the consumer unit's consumption function *ex ante*. For evidence on anticipation, confirming Friedman's hypothesis in some cases but noting the risk that the expectancy will fail to materialize as a deterrent to *ex ante* consumption, see MARVIN B. SUSSMAN ET AL., *THE FAMILY AND INHERITANCE* 159, 170-71 (1970); see also Shefrin & Thaler, *supra* note 105, at 619-20 (reporting that in an experimental test, beneficiaries of a hypothetical expectancy of inheritance indicated that they would not adjust their spending *ex ante*).

114. The sociological and anthropological literature of gratuities is far more ample, emphasizing their function within a social fabric of implicit reciprocity. *E.g.*, DAVID CHEAL, *THE GIFT ECONOMY* (1988); DITTMAR, *supra* note 86, at 24-30, 87, 97-98, 109-12; and the references cited in Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 630 nn.203-05 (1989); Hirsch, *supra* note 8, at 211-14 nn.111-21; Hirsch & Wang, *supra* note 3, at 9-10 nn.30-32.

115. AINSLIE, *supra* note 77, at 234; Shefrin & Thaler, *supra* note 105, at 610-11, 614-15; Thaler, *supra* note 58, *passim*.

116. ROBIN BARLOW ET AL., *ECONOMIC BEHAVIOR OF THE AFFLUENT* 95-96 (1966); SUSSMAN ET AL., *supra* note 113, at 160-61; see AINSLIE, *supra* note 77, at 234-35 (suggesting that small windfalls are spent more easily than larger, lump-sum transfers, though not dealing specifically with inheritances); Shefrin & Thaler, *supra* note 105, at 633-35 (same); Thaler, *supra* note 58, at 193, 197-98 (same); Michael Landsberger, *Windfall Income and Consumption: Comment*, 56 AM. ECON. REV. 534 (1966) (drawing this conclusion on the basis of statistical data, though not involving inheritances); R. Conrad Doenges, *Transitory Income Size and Savings*, 33 S. ECON. J. 258 (1966) (same, data based on transitory income generally). *But see* Ronald G. Bodkin, *Windfall Income and Consumption: Reply*, 56

Specific bequests of securities or real estate resemble capital and hence are liable to be framed accordingly, whereas general bequests of money have the look and feel of income and are more apt to be treated as such.<sup>117</sup> In short, framing theory suggests that spendthrift clauses are more likely to make a difference in the case of less sizeable bequests (where, ironically, the added administrative expense of a trust may outweigh the benefits) or in the case of larger, liquid ones.

Another related and possibly significant cognitive process is the observed tendency of persons to give greater weight to losses than to gains. Out-of-pocket (or sunk) costs matter more to people than opportunity costs, and they are significantly more averse to losing their existing endowment than to forgoing a chance to obtain more. The cognitive roots of this disparity may trace to a psychological identification with property that a person conceives to be "hers." The loss of "her" property induces a stronger feeling of loss and regret than forgoing an equivalent gain of property with which she does not personally identify, a phenomenon psychologists call the "endowment effect."<sup>118</sup>

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AM ECON. REV. 540 (1966) (responding to Landsberger, seeing no such correlation in the American data alone); Mordechai E. Kreinin, *Windfall Income and Consumption—Additional Evidence*, 51 AM. ECON. REV. 388, 389-90 (1961) (finding no evidence, in a study of restitution payments to Israelis from Germany in 1957-58, that the propensity to save varied with the size of the transfer).

117. See Shefrin & Thaler, *supra* note 105, at 637 (hypothesizing this result); Thaler, *supra* note 58, at 197-98 (looking by analogy to studies of other windfalls). The psychological theory of framing may have implications not only for legal policy but also for practical estate planning. Some estate planners advise against making specific bequests of capital assets because they fluctuate in value before the will matures and often raise construction problems. *E.g.*, MCGOVERN ET AL., *supra* note 8, § 10.1, at 405. But instructions to liquidate and dispose of capital assets in the form of general bequests could raise other sorts of problems: they may tend to encourage more rapid consumption by beneficiaries!

118. Much of the large literature on the endowment effect (also referred to as "status-quo bias," "loss aversion," or the "offer-ask disparity") is surveyed in Elizabeth Hoffman & Matthew L. Spitzer, *Willingness to Pay vs. Willingness to Accept: Legal and Economic Implications*, 71 WASH. U. L.Q. 59 (1993). See also DITTMAR, *supra* note 86, *passim* (discussing persons' psychological attachment to and identification with their property); Belk, *supra* note 86, at 155 *passim* (same, including money); Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982) (same, but distinguishing "personal property" from "fungible property," a distinction called into doubt by empirical evidence of the endowment effect).

Interestingly, Justice Holmes noticed the endowment effect long ago and pointed to it to justify the doctrine of adverse possession. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476-77 (1897). Judge Posner in his treatise on law and economics remarks Holmes' analysis but traces the phenomenon to the diminishing marginal utility of wealth! POSNER, *supra* note 20, § 3.11, at 79 & n.5. Well, yes, diminishing marginal utilities distinguish opportunity costs from sunk costs—the marginal utility of additional accretions of wealth will be less than that of existing wealth—but that is an unlikely explanation for the catastrophic discontinuity between the value persons assign to existing assets and potential assets. An economist at heart, Posner cannot bring himself to admit that irrational

How might the endowment effect affect the treatment of inherited wealth? Well, that depends. If the beneficiary fails to conceptualize an inheritance as really being “her” property, she might be less averse to risking or dissipating it—rather like the spectator in a casino who approaches the gaming tables only after running across a loose chip on the floor. This phenomenon, I suspect, may help to explain the high frequency of *disclaimers* of inheritances. These can produce tax efficiencies, of course, but still it is easier psychologically to forgo an inheritance for this purpose than to make annual gift-tax free transfers out of one’s “own” pocket.<sup>119</sup> A spendthrift clause assures that the corpus of a gift will not be treated as if it lies apart from the beneficiary’s endowment.<sup>120</sup> Nevertheless, the beneficiary’s conceptualization of an inheritance—whether she frames it immediately as “hers” or not, and how long it takes her to reconceptualize it as “hers”—is unclear and probably will vary from case to case.<sup>121</sup> Here, the origin of the property could well be significant,

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psychological forces may be at work! Discussing possible explanations for the endowment effect, both psychological and economic, see Hoffman & Spitzer, *supra*, 85-98.

119. Assignments and gifts of just-inherited property, to which no tax benefits attach, are also common enough. The psychology at work here is, I think, understood intuitively by legislators, who sense that they can likewise *withhold* taxes from income with less pain (or political unrest) than if the tax is demanded *after* income has been received. Tax withholding would seem a classic political exploitation of the endowment effect. (Withholding has not traditionally been justified on this basis, however, but rather has been premised on inexperienced taxpayers’ inability to *plan* for annual taxation, see Richard L. Doernberg, *The Case Against Withholding*, 61 TEX. L. REV. 595, 601-02 (1982).)

120. While a spendthrift clause prevents the dissipation of a trust corpus, in most jurisdictions it does not prevent disclaimer of the corpus to an alternative beneficiary. Hirsch, *supra* note 114, at 608 n.111.

121. No focused research has yet addressed the psychological processes whereby persons develop a sense of endowment—a necessary step to fleshing out the full significance of the endowment effect. The existing empirical evidence is ambiguous. One study, postulating “an instant endowment effect . . . as soon as [an] individual is given the object,” suggests that “[t]he impression gained from informal pilot experiments is that the act of giving the participant physical possession of the good results in a more consistent endowment effect. Assigning subjects a chance to receive a good, or a property right to a good to be received at a later time, seemed to produce weaker effects.” Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325, 1342 & n.7 (1990). (Compare the reflection of one of my colleagues that when he receives an honorarium he can readily endorse the check over to charity, but when it is deposited into his bank account, even for a single day, that is it—he keeps it!) Yet, another study (sharing a co-author with the first, but failing to remark the contradiction!) found evidence that persons who won an initial gamble preferred more risk in a second gamble with the proceeds than they did with only a single gamble, because they are able to edit their frame to make the second gamble appear not to risk a loss, but rather to risk diminution of a gain—“as if losing some of ‘[the house’s] money’ doesn’t hurt as much as losing one’s own cash.”—a phenomenon the authors call the “house money effect.” While they failed to explore how long it takes for the effect to wear off, the authors speculate that it may lead managers of profitable enterprises toward greater risk seeking, a suggestion assuming a protracted psychological process.

slowing the process of reconceptualization: think of the proverbial child who spends promiscuously so long as her parents *give* her money but grows frugal the moment she begins to *earn* it.<sup>122</sup> But it may also happen that this reconceptualization occurs rapidly or even takes root *before* the will matures, if the beneficiary is familiar with the bequeathed property, anticipates its receipt, and already identifies with it as a marital right or a "birthright."<sup>123</sup> Such concepts (or conceits) could lead a beneficiary to

Richard H. Thaler & Eric J. Johnson, *Gambling with the House Money and Trying to Break Even: The Effects of Prior Outcomes on Risky Choice*, 36 MGMT. SCI. 643, 644, 657 (1990), reprinted in THALER, *supra* note 59, at 48; see also Jack L. Knetch, *The Endowment Effect and Evidence of Nonreversible Indifference Curves*, 79 AM. ECON. REV. 1277, 1282 (1989) (suggesting that experimental evidence on the endowment effect may underestimate its extent because the subjects may view the property given to them for the experiment as a "windfall"). (Also suggesting that a sense of endowment builds over time, see the early discussion in Holmes, *supra* note 118, at 477.)

For a general discussion of the relativity of characterizations of changes in one's property, which can be framed alternatively as losses or forgone gains with significant consequences for individual choice, see Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, 211 SCI. 453 (1981) [hereinafter Tversky & Kahneman, *Framing*], reprinted in RATIONAL CHOICE, *supra* note 59, at 123; Amos Tversky & Daniel Kahneman, *Loss Aversion in Riskless Choice: A Reference-Dependent Model*, 106 Q.J. ECON. 1039 (1991) (including an interesting discussion of the rationality of the endowment effect); Tversky & Kahneman, *supra* note 74, at S260-62 (dubbing this alternative framing phenomenon "the money illusion"). According to Tversky and Kahneman, lay persons are ordinarily unaware of alternative frames and will accept passively the frame offered by an experimenter, whereas "in everyday life . . . [t]he reference outcome is . . . sometimes set by social norms and expectations." Tversky & Kahneman, *Framing*, *supra*, at 456, 456-58; see also Baruch Fischhoff, *Predicting Frames*, 9 J. EXPERIMENTAL PSYCHOL.: LEARNING, MEMORY, & COGNITION 103 (1983).

122. Russell W. Belk, *Adolescents' Reported Saving, Giving, and Spending as a Function of Sources of Income*, 12 ADVANCES CONSUMER RES. 42 (1984). See also the brief psychological speculation in LAWRENCE C. BECKER, PROPERTY RIGHTS 48-49 (1977). For evidence that some beneficiaries take a careless attitude toward inheritances that they did not anticipate or sense that they did not work for, see the anecdotes reported in SUSSMAN ET AL., *supra* note 113, at 167. Again, the psychological literature is curiously scant, but historians have appreciated the heightened possessiveness of early American settlers toward the property they laboriously carved out of the wilderness. E.g., ALAN TAYLOR, LIBERTY MEN AND GREAT PROPRIETORS: THE REVOLUTIONARY SETTLEMENT ON THE MAINE FRONTIER, 1760-1820, at 24-29 (1990); EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1753-89, at 73-74 (rev. ed. 1977); EDMUND S. MORGAN, *Revisions in Need of Revising*, in THE CHALLENGE OF THE AMERICAN REVOLUTION 43, 54-56 (1976). For my own prior thoughts, see Adam J. Hirsch, *From Pillory to Penitentiary: The Rise of Criminal Incarceration in the New Republic 273-74* (1987) (unpublished Ph.D. dissertation, Yale University). For a recent philosophical examination of the labor-desert theory of property, see STEPHEN R. MUNZER, A THEORY OF PROPERTY 254-91 (1990). See also Hirsch & Wang, *supra* note 3, at 44 n.170 (noting the recognition by "self-made" persons that inheritances can be demoralizing).

123. Surely it cannot be doubted that some persons feel a strong attachment to the property they inherit, possibly because it holds sentimental value to them, or possibly because they *do* conceive they have "earned" it, by virtue of spousal or filial devotion if not by dint of their wage labor. On the sentimental value of inherited wealth, see SUSSMAN ET AL., *supra* note 113, at 156-58. *But see* John

treat inherited property as the equivalent of self-made assets.

Still another psychological factor to consider involves not the nature or source of the property received, but rather the circumstances under which it is acquired. Unlike inter vivos gifts, inheritances typically are accompanied by intense (and often prolonged<sup>124</sup>) grief at the loss of the benefactor.<sup>125</sup> Just how this mental condition can affect financial decisions is yet another issue overdue for inquiry, but one can again find entwined in the existing literature a few suggestive threads. Students have recognized that the physical shock of grief can leave beneficiaries vulnerable to outside influence—and, presumably, to financial exploitation.<sup>126</sup> Studies also indicate that grief (and negative mood states generally) can trigger impulsive and compulsive behavior—such as excessive shopping—possibly

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H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722, 737-38 (1988) (arguing that most inherited property today lacks sentimental value). On the frequency with which beneficiaries anticipate their inheritances, see SUSSMAN ET AL., *supra* note 113, at 159, 170-71; on beneficiaries' sense of entitlement, see *id.* at 121-53. For a general discussion of the notion that inheritances operate to reciprocate the beneficiary for social services performed during the benefactor's life, see *id.* at 83-120; Hirsch, *supra* note 8, at 211-14; Hirsch, *supra* note 114, at 630-31; Hirsch & Wang, *supra* note 3, at 9-11. I would add that such senses of entitlement appear more defensible from a moral point of view in the spouse than in the child, given the former's more manifest contribution to the commonweal of the family (a conclusion with which American lawmakers apparently concur, having established a forced share for the spouse but not for descendants), but this fact fails to alter the reality that some children, rightly or wrongly, do develop attachments to their parents' property that could affect the psychology of inheritance. (On the moral claims of children, see also Succession of Lauga, 624 So. 2d 1156 (La. 1993); Deborah A. Batts, *I Didn't Ask to Be Born: The American Law of Disinheritance and a Proposal for Change to a System of Protected Inheritance*, 41 HASTINGS L.J. 1197 (1990).)

124. On the persistence of grief, see ROBIN A. HAIG, *THE ANATOMY OF GRIEF* 10 (1990); *REHABILITATION PSYCHOLOGY* 133-35 (David W. Krueger ed., 1984).

125. Typically, though not invariably: some inheritances are received by distant relatives in lieu of closer survivors—the so-called “laughing heirs.” But laughing heirs almost always take by right of intestacy, to which spendthrift trust policy is inapplicable. (For a rare example of a “laughing legatee,” see Hirsch, *supra* note 8, at 211 n.110.) For a discussion of inheritance by laughing heirs, suggesting that the term is in fact a misnomer, see SUSSMAN ET AL., *supra* note 113, at 138-42. Of course, some beneficiaries under wills may have feigned their affection for the deceased benefactors and so too will be unaffected by their deaths.

126. HAIG, *supra* note 124, at 7-12, 26-28; CATHERINE M. SANDERS, *GRIEF: THE MOURNING AFTER* 46-56, 76-79, 118-20, 182-86 (1989); Cym H. Lowell & Terry R. Abel, *Estate Planning for the Instantly Wealthy Including Resident and Non-Resident Aliens*, 23 INST. ON EST. PLAN. ¶ 1603, at 16-16. Shock may also follow simply from a sudden dramatic change in wealth, again leaving the recipient vulnerable to exploitation or indiscipline. Mark Abrahamson, *Sudden Wealth, Gratification and Attainment: Durkheim's Anomie of Affluence Reconsidered*, 45 AM. SOC. REV. 49, 49-51 (1980); Lowell & Abel, *supra*, ¶ 1601.1, at 16-4; William Simon & John H. Gagnon, *The Anomie of Affluence: A Post-Mertonian Conception*, 82 AM. J. SOC. 356 (1976); *infra* notes 136-37.

as a relief to emotional distress.<sup>127</sup> But at the same time, evidence suggests that negative mood states heighten risk aversion. Grievors thus could be less inclined to take financial risks than those in a happier frame of mind.<sup>128</sup> Finally, it is possible that inheritances received under mournful circumstances will induce in beneficiaries a sense of guilt.<sup>129</sup> But the behavioral consequences of such feelings are unclear: possibly they could prompt in the beneficiary a wish to be rid of property received as a consequence of personal tragedy,<sup>130</sup> or possibly they could awaken in her a desire to bequeath to her own children in turn, since it is too late to offer due gratitude to the benefactor herself.<sup>131</sup> Guilt at the receipt of an inheritance thus appears double-edged, conceivably leading the beneficiary either to dissipate the property or to salt it away in order to facilitate

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127. "Shopping therapy," as the lay colloquialism has it. For professional discussions, see DAVID W. KRUEGER, *BODY SELF AND PSYCHOLOGICAL SELF* 104-06 (1989); P.S. Fry, *Affect and Resistance to Temptation*, 11 *DEVELOPMENTAL PSYCHOL.* 466 (1975) (child study); Hoch & Loewenstein, *supra* note 77, at 502; Bert S. Moore et al., *The Role of Affect in Delay of Gratification*, 47 *CHILD DEV.* 273 (1976) (child study); O'Guinn & Faber, *supra* note 107, at 148. See generally Meryl P. Gardner, *Mood States and Consumer Behavior: A Critical Review*, 12 *J. CONSUMER RES.* 281 (1985); Haim Mano, *Emotional States and Decision Making*, 17 *ADVANCES CONSUMER RES.* 577 (1990); William R. Swinyard, *The Effects of Mood, Involvement, and Quality of Store Experience on Shopping Intentions*, 20 *J. CONSUMER RES.* 271 (1993); Masanao Toda, *Emotions and Decision Making*, 45 *ACTA PSYCHOLOGICA* 133 (1980).

128. Christopher Dewberry et al., *Anxiety and Unrealistic Optimism*, 130 *J. SOC. PSYCHOL.* 151 (1990); Eric J. Johnson & Amos Tversky, *Affect, Generalization, and the Perception of Risk*, 45 *J. PERSONALITY & SOC. PSYCHOL.* 20 (1983); William F. Wright & Gordon H. Bower, *Mood Effects on Subjective Probability Assessment*, 52 *ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES* 276 (1992) (see also the earlier studies reviewed therein); Leon Mann, *Stress, Affect, and Risk Taking, in RISK-TAKING BEHAVIOR*, *supra* note 95, at 201 & especially 223-25 (discussing risk-taking in depression).

129. EDWARD MYERS, *WHEN PARENTS DIE* 113-14 (1986); Kenneth J. Doka, *The Monkey's Paw: The Role of Inheritance in the Resolution of Grief*, 16 *DEATH STUD.* 45, 54-57 (1992) (speculating that guilt is most likely when the inheritance is unexpected); see SANDERS, *supra* note 126, at 64-67, 183-84 (suggesting that the mourning process itself can engender guilt).

130. See MYERS, *supra* note 129, at 113 (anecdote of beneficiary who allowed that she "did not handle . . . well" an inheritance about which she felt guilty); SUSSMAN ET AL., *supra* note 113, at 167 (anecdote of beneficiary who gave away his inheritance because he wanted nothing from the deceased). But see Roy F. Baumeister, *The Self Against Itself: Escape or Defeat?*, in *THE RELATIONAL SELF* 238, 240 (Rebecca C. Curtis ed., 1991) (questioning in general the assumption that guilt is connected to self-destructive behavior).

131. Discussing this possibility in the abstract, see KENNETH E. BOULDING, *THE ECONOMY OF LOVE AND FEAR* 26-27 (1973). For some concrete data, see SUSSMAN ET AL., *supra* note 113, at 160-62, 167-68, 171. Economists have debated the extent to which persons save in order to provide bequests, see *supra* note 75, but they (or somebody!) ought to explore more precisely the extent to which inheritances *themselves* induce in beneficiaries bequest motives for saving.

subsequent acts of "serial reciprocity."<sup>132</sup>

I can speculate about these matters—and so can you. Ultimately, it is up to the cognitive psychologists to address them rigorously.

Leaving all of this behind in the black (or at least very dark) box where it must remain for the time being, we may simply take note of the behavioral fact that rapid dissipation of inheritances is a distinct possibility and a legitimate concern. Though the empirical evidence is slim, it confirms at least that much.<sup>133</sup> Apart from the psychological considerations already remarked, beneficiaries of sudden infusions of wealth may simply be unpracticed money managers, easily victimized, and they may know no better than to terminate a terminable trust. The latter possibility presents an additional concern, in that the beneficiary of a stream of income

132. Professor Boulding coined the phrase. BOULDING, *supra* note 131, at 26-27.

133. For a sociological study of responses to windfall gains, suggesting that their treatment is dictated by cultural values, see Ronald Gallimore et al., *Cultural Differences in Delay of Gratification: A Problem of Behavior Classification*, 30 J. PERSONALITY & SOC. PSYCHOL. 72 (1974).

For empirical studies of the use of inheritances, suggesting a diversity of beneficiary behaviors, see BARLOW ET AL., *supra* note 116, at 95-96; STANLEY LEBERGOTT, WEALTH AND WANT 190-92 (1975), reprinted in Stanley Lebergott, *Are the Rich Getting Richer? Trends in U.S. Wealth Concentration*, 36 J. ECON. HIST. 147, 155-57 (1976); SUSSMAN ET AL., *supra* note 113, at 158-70; L.R. Klein et al., *Savings and the Finances of the Upper Income Classes*, 18 BULL. OXFORD UNIV. INST. STAT. 303 (1956); L.R. Klein & N. Liviatan, *The Significance of Income Variability on Savings Behavior*, 19 BULL. OXFORD UNIV. INST. STAT. 151 (1957); Paul L. Menchik, *Is the Family Wealth Squandered? A Test of the Merry-Widow Model*, 44 J. ECON. HIST. 835 (1984). For studies of the propensity to save or consume other sorts of lump-sum gains of wealth, testing Professor Friedman's permanent income hypothesis, see GEORGE KATONA & EVA MUELLER, CONSUMER RESPONSE TO INCOME INCREASES 100-06, 127-29 (1968); Roger C. Bird & Ronald G. Bodkin, *The National Service Life-Insurance Dividend of 1950 and Consumption: A Further Test of the "Strict" Permanent-Income Hypothesis*, 73 J. POL. ECON. 499 (1965) (positing a "loose" variant of the permanent income hypothesis under which the marginal propensity to consume transitory income is above zero, but less than the marginal propensity to consume permanent income); Ronald G. Bodkin, *Windfall Income and Consumption*, 49 AM. ECON. REV. 602 (1959); Ronald G. Bodkin, *Windfall Income and Consumption: Comment*, 53 AM. ECON. REV. 445 (1963); Carson & Tong, *supra* note 14, at 312; Robert C. Jones, *Transitory Income and Expenditures on Consumption Categories*, AM. ECON. REV. 584 (May 1960) (separately paginated *Papers and Proceedings* issue); Kreinin, *supra* note 116, at 388; Mordechai E. Kreinin, *Windfall Income and Consumption: A Further Comment*, 53 AM. ECON. REV. 448 (1963); James S. Marelllo, *Comment, Periodic Payment Plans: Are Annuities Adequately Protecting the Personal Injury Plaintiff from Inflation, Providing Accurate Attorney's Fees and Promoting the Compensatory Goal of Our Tort Law System?*, 12 OHIO N.U. L. REV. 271, 271 & n.6 (1985); Margaret G. Reid, *Consumption, Savings and Windfall Gains*, 52 AM. ECON. REV. 728 (1962) (including in her study inheritances along with other gains); *supra* note 116; see also Roger C. Bird, *Consumption, Savings and Windfall Gains: Comment*, 53 AM. ECON. REV. 443 (1963) (questioning whether inheritance spending data tests the permanent income hypothesis, given the anticipation of expectancies); Margaret G. Reid, *Consumption, Savings and Windfall Gains: Reply*, 53 AM. ECON. REV. 444 (1963) (responding to Bird); H. ROY KAPLAN, LOTTERY WINNERS 154-73 (1978) (discussing the spending behavior of lottery winners); H. Roy Kaplan, *Lottery Winners: The Myth and Reality*, 3 J. GAMBLING BEHAV. 168, 176 (1987) (same).



in trust may misjudge the present value of her interest. Even before she decides what to do with her inheritance, she could be enticed to liquidate it for less than its true actuarial value—a “catching bargain” of the sort that British courts of equity used to set aside as a matter of course.<sup>134</sup> General concern for financial inexperience has led many commentators to recommend the use of spendthrift trusts,<sup>135</sup> just as, by analogy, insurance agents have urged the use of spendthrift installment options for life insurance proceeds,<sup>136</sup> lottery commissions have opted for mandatory periodic payouts of prizes,<sup>137</sup> and tort lawyers have advised structured settlements of accident claims.<sup>138</sup>

And there is one final use to which a restraint against voluntary alienation can be put, though whether the problem here identified is more theoretical than real I am not prepared to say. That is, a spendthrift trust

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134. See GRAY, *supra* note 16, § 124n (recognizing the danger in a different context). On the historical development of the treatment of sales of future interests by the Chancery Courts in Great Britain and America, see John P. Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253, 267-76 (1947); Russell D. Niles, *Matter of Yought's Will: A Tighter Grip By the Dead Hand*, 45 N.Y.U. L. REV. 421, 437-39 (1970); *Provident Life & Trust Co. v. Fletcher*, 237 F. 104, 109-10 (S.D.N.Y. 1916); see also Friedman & Warshawsky, *supra* note 75, at 135 (discussing the premiums charged for transactions with annuity companies); Friedman & Warshawsky, in PENSIONS, *supra* note 75, at 53-60 (same); *infra* note 210 and accompanying text.

135. Costigan, *supra* note 18, at 487 n.36, 489, 493; Richard R. Powell, *The Rule Against Perpetuities and Spendthrift Trusts in New York: Comments and Suggestions*, 71 COLUM. L. REV. 688, 704 (1971); Note, *A Rationale for the Spendthrift Trust*, 64 COLUM. L. REV. 1323, 1326-27 (1964); *Steib v. Whitehead*, 111 Ill. 247, 251-52 (1884); see also Lowell & Abel, *supra* note 126, ¶¶ 1601.1, 1603 (suggesting other expedients when no spendthrift trust has been imposed).

136. HARRY S. REDEKER & CHARLES K. REID, II, LIFE INSURANCE SETTLEMENT OPTIONS 6-7 (1957) (suggesting that “[i]t is unusual for an individual not to be thrown off balance by sudden affluence”).

137. *McCabe v. Director of N.J. Lottery Comm'n*, 363 A.2d 387, 390 (N.J. Super. Ct. Div. 1976) (suggesting the prize winner's need to be “insulated from his own human frailties and the possible excesses to which he would otherwise be subjected by suddenly coming into possession of an enormous amount of cash”); *In re Brown*, 86 B.R. 944, 948 (N.D. Ind. 1988) (noting that periodic payments protect prize winners “from a short-lived misuse of their windfall”). Other ostensible functions of periodic payments are tax savings and the utility of reducing the actual payout cost to the state. *McCabe*, 363 A.2d at 390; *Brown*, 86 B.R. at 948. The former justification has lost much of its force with the compression of tax rates in the 1980s, however, and the latter justification seems a rather precise description of fraud.

138. JAMES R. ECK & JEFFREY L. UNGERER, STRUCTURING SETTLEMENTS §§ 5.04-.06 (1987); Carson & Tong, *supra* note 14, at 309, 312-13; Vasilios B. Choulos, *Structured Settlements: Cure or Curse?*, TRIAL, Nov. 1980, at 73, 74; Gayla R. Harrison, Note, *The Ethics of Structuring Settlements*, 34 DRAKE L. REV. 1045, 1051 (1985-86); Charles F. Krause, *Structured Settlements for Tort Victims*, 66 A.B.A. J. 1527, 1527-28 (1980); Claudia MacLachlan, *IRS Clears Question on Structured Payouts*, NAT'L L.J., Sept. 27, 1993, at 10; Marelllo, *supra* note 133, at 271-72; *Structured Settlements: A Roundtable*, TRIAL, Jan. 1983, at 70, 72.

can operate to mitigate moral hazard within a communal family.<sup>139</sup> If altruistic parents will rescue children who overspend, those children have a *rational incentive* to do so: they can thereby capture further shares of the family wealth that would otherwise go to their more responsible siblings. Parents can combat this incentive by threatening parasitic children with strategic retaliation, but strong benevolence (or “softheartedness”) may dissuade them from this course.<sup>140</sup> An alternative course is to transfer to children assets that they find more difficult to dissipate. A pair of economists predicts on this basis that parents concerned about moral hazard will overinvest in the housing and education of their children, because “children cannot run down human capital [and other illiquid assets] as readily as marketable wealth.”<sup>141</sup> But a disabling restraint serves this end more efficiently, preventing parasitic overspending *without* simultaneously narrowing the use of the transferred wealth to suboptimal purposes.<sup>142</sup> This may be designated the *socializing* (as opposed to the paternal) function of spendthrift trusts.

In sum, for the right individuals—the nearsighted, the reckless, the fragile, the inexperienced, the parasitic—a spendthrift trust provides the ideal financial vehicle, offering safe passage to the future without fully revoking their license to drive.<sup>143</sup> But the overall point I do hope to have

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139. On the problem of moral hazard within the family, see generally Laurence J. Kotlikoff & Avia Spivak, *The Family as an Incomplete Annuities Market*, 89 J. POL. ECON. 372 (1981) (equating family economy with a mutual insurance pool), reprinted in KOTLIKOFF, *supra* note 39, at 88; Neil Bruce & Michael Waldman, *The Rotten-Kid Theorem Meets the Samaritan's Dilemma*, 105 Q.J. ECON. 155 (1990) (specifically addressing moral hazard); Assar Lindbeck & Jörgen W. Weibull, *Altruism and Time Consistency: The Economics of Fair Accompli*, 96 J. POL. ECON. 1165 (1988) (same).

140. On strategic retaliation, see LAURENCE J. KOTLIKOFF & ASSAF RAZIN, MAKING BEQUESTS WITHOUT SPOILING CHILDREN: BEQUESTS AS AN IMPLICIT OPTIMAL TAX STRUCTURE AND THE POSSIBILITY THAT ALTRUISTIC BEQUESTS ARE NOT EQUALIZING (National Bureau of Economic Research Working Paper No. 2737, 1988). On soft-heartedness, see Buchanan, *supra* note 39, at 74-75, 83-84.

141. Becker & Murphy, *supra* note 108, at 7. In a similar vein, other economists justify mandatory saving within the Social Security system as a means of mitigating parasitic overconsumption within the family, Lindbeck & Weibull, *supra* note 139, at 1180-81, and within the larger altruistic social community, see *supra* note 39.

142. Of course, with respect to inter vivos transfers, a parent fearful of parasitical dissipation of a corpus of property could retain the corpus herself and simply make periodic transfers of income to her children. But in the testamentary setting, a spendthrift trust could have greater strategic use, granting a child her inheritance while ensuring that it is not dissipated in order to gain a larger bequest later from the *surviving* parent.

143. Other inalienable variants of the spendthrift trust, such as the discretionary trust, can also play this role—and indeed are often superior to the simple spendthrift provision as estate planning devices. For a discussion, see Jon J. Gallo & Eileen F. Gallo, *Estate Planning for the Postponed Generation*, PROB. & PROP., Sept.-Oct. 1989, at 6. Whereas some commentators have taken the position that

substantiated is that when it comes to the treatment of wealth (however acquired), there is nothing, absolutely nothing “systematic” about human behavior. Lump-sum inheritances can facilitate both spending and saving—and are apt in practice to produce either one.

This conclusion, incidentally, need not spell the end of Thomas Jackson’s theory of the discharge.<sup>144</sup> He could posit that, as an empirical matter, applying the discharge to every contract for credit serves the “greatest good for the greatest number”—a Kaldor-Hicks move, as opposed to a Paretean “good with harm to none” move. It seems unlikely, though, that lawmakers could justify a legal rule mandating that all trusts be spendthrift even on that basis.<sup>145</sup> Trusts are generally created by and for persons accustomed to affluence,<sup>146</sup> and if one gives credence to the sociological evidence, affluent persons are the ones least inclined to financial irresponsibility or a “live for the present” mentality.<sup>147</sup> But of course in the context of spendthrift trusts (unlike the discharge), we need not establish rules that

beneficiaries unable to attend rationally to their financial affairs can be judged incompetent and made subject to guardianship, this would entail an unnecessary intrusion into the personal concerns of those who are not fully incapable of managing their own affairs. In this respect, a spendthrift trust functions as a *via media* between a full-fledged guardianship and untrammelled autonomy. Compare BOGERT & BOGERT, *supra* note 2, § 222, at 385 n.6 and Bushman, *supra* note 7, at 317-18 with Note, *supra* note 135, at 1326-27. See also Note, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676, 691 (1964) (arguing that court-ordered trusts or annuities would in many instances be preferable to involuntary guardianship, “[assuring] financial security . . . while allowing the individual a maximum of integrity and freedom.”).

144. See *supra* note 71 and accompanying text.

145. Nor, by the same token, does a rule of construction seem warranted. Nonetheless, a few jurisdictions have adopted rules of these sorts. See *supra* note 9. For a defense of the presumption that benefactors would not create trusts unless they intended to include disabling restraints, see 4 POWELL, *supra* note 8, § 42.25[5][c][iii], at 42-431. But see Sparks, *supra* note 35, at 35.

146. See *infra* note 249 and accompanying text.

147. See *supra* notes 100-05 and accompanying text. In a similar vein, Professor Scott argued against the desirability of legally mandating disabling restraints: whereas these could benefit “the person of weak intellect . . . [who] is not actually mentally incompetent,” they were of no use to “a man of ability,” and “as a matter of law it is hardly possible to make one rule for the one type of beneficiary and another for the other.” 2A SCOTT, *supra* note 2, § 152, at 91-92. Compare the rule-based mandatory inalienability of Social Security and ERISA pension benefits defended by some theorists on paternal grounds, see *supra* note 78 and accompanying text. As with the bankruptcy discharge, such universal protection may be more defensible when it covers wage earners in general (despite its costs to persons “of ability”), for the interests of those who do benefit from protection could be deemed to outweigh the costs to those who do not. See B. DOUGLAS BERNHEIM, IS THE BABY BOOM GENERATION PREPARING ADEQUATELY FOR RETIREMENT? (1993) (presenting empirical evidence of widespread inadequacy of saving among the baby boom generation); BERNHEIM, *supra* note 102 (same); Bernheim & Scholz, *supra* note 100 (same). But see FRIEDMAN, *supra* note 37, at 188-89 (asserting that the cost to responsible savers of mandatory purchase of inalienable pensions far exceeds the benefits). Trust beneficiaries, by contrast, do not comprise a cross-section of American society.

operate across the board. Under current law in most jurisdictions, individual benefactors can discriminate, choosing whether or not to attach disabling restraints to each bequest. (To borrow a distinction from utilitarian theory, we might call this "act paternalism," as opposed to "rule paternalism."<sup>148</sup>) But this element of discretion raises another concern, does it not? For if beneficiaries vary in their need for disabling restraints, the question remains whether the typical benefactor can be counted on to impose them judiciously, so that they turn up mainly in the estate plans where they belong.

#### D. *The Problem of Paternalism*

Put otherwise, the question is whether benefactors know what they are doing when they create spendthrift trusts. If so, they serve to compensate for the poor judgment of beneficiaries, earning their eventual gratitude; if not, the benefactors simply interpose their own poor judgment, and we are back to square one.<sup>149</sup>

Now, we may notice that as a general proposition, theorists have held to the conviction that freedom of testation promotes intelligent estate planning.<sup>150</sup> Certainly, benefactors can be expected to possess the information and insight into their families' affairs necessary to distribute their wealth in a rational manner. Parents know their children pretty well, and because of natural ties of affection and consanguinity, parents can also be expected to plan their estates with their children's interests at heart.

Still, when benefactors decree not only a testamentary division of their wealth but also attach *long-term restrictions on its use*, there is cause for some concern. Putting aside for just a moment the core problem of prognostication, a benefactor's detailed judgments about her family could be clouded by certain failings, predicted by cognitive psychologists and often observed by down-to-earth estate planners.<sup>151</sup> Here, the pertinent subdiscipline is "attribution theory," the study of cognitive processes by

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148. Noting the distinction without applying this terminology, see Regan, *supra* note 69, at 207 n.2. Compare act- and rule-utilitarianism, as outlined in WILLIAM K. FRANKENA, *ETHICS* 30-35 (1963).

149. Or, more precisely, we are back to *supra* note 57 and accompanying text.

150. This proposition, which a collaborator and I have dubbed the "father knows best" hypothesis, is one of the traditional justifications for freedom of testation. For a recent statement of the hypothesis, see MCGOVERN ET AL., *supra* note 8, § 3.1, at 88-89. For additional references and a critical discussion of the hypothesis, see Hirsch & Wang, *supra* note 3, at 12-13, 15.

151. In some cases though, it is the estate planners themselves who are at fault, by recommending disabling restraints reflexively, without inquiring into the particular needs of beneficiaries. See *supra* note 7.

which people infer the state of the world around them. Research in this area suggests that human inference is often irrational, falling prey to a variety of "attribution errors."<sup>152</sup>

As we would expect, researchers have discovered that emotion and kinship sometimes color our assessment of others: parents may cling to an unduly rosy image of their children.<sup>153</sup> On the other hand, individuals who recognize shortcomings in themselves (such as financial irresponsibility) may be disposed to tar others with the same brush, in order to maintain their *relative* self-esteem;<sup>154</sup> more generally, studies suggest that individuals tend to perceive the rest of the world through a glass darkly, assessing others as less capable than themselves.<sup>155</sup> Other attribution errors could

152. For general discussions, see EISER, *supra* note 64, at 171-213; RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980); KELLY G. SHAVER, *AN INTRODUCTION TO ATTRIBUTION PROCESSES* (1975).

153. Discussing the impact of emotions and closeness on assessment, see Abraham Tesser, *Some Effects of Self-Evaluation Maintenance on Cognition and Action*, in 1 *HANDBOOK OF MOTIVATION AND COGNITION* 435, 437-43 (Richard M. Sorrentino & E. Troy Higgins eds., 1986); Carol R. Glass & Thomas V. Merluzzi, *Cognitive Assessment of Social-Evaluation Anxiety*, in *COGNITIVE ASSESSMENT* 388, 427-28 (Thomas V. Merluzzi et al. eds., 1981) (noting as well that the causal sequence is unclear, and that persons may maintain illusory appraisals in order to *produce* positively toned emotions); see also SHAVER, *supra* note 152, at 23 (suggesting generally the difficulty of remaining objective in perceptual judgments when the perceiver has a stake in the outcome). The phenomenon of ego defenses such as *denial*, whereby persons suppress an external reality in conflict with their emotions in order to reduce anxiety, could also presumably lead parents to overestimate the capabilities of their offspring. See generally ANNA FREUD, *THE EGO AND THE MECHANISMS OF DEFENCE* (Cecil Baines trans., International Universities Press 1946). And parental identification with their children could have the same effect: in a noncompetitive relationship, a positive assessment of one's children enhances one's self-image. For discussions, see Jonathon D. Brown, *Evaluations of Self and Others: Self-Enhancement Biases in Social Judgments*, 4 *SOC. COGNITION* 353, 370-73 (1986); Shelley E. Taylor & Judith H. Koivumaki, *The Perception of Self and Others: Acquaintanceship, Affect, and Actor-Observer Differences*, 33 *J. PERSONALITY & SOC. PSYCHOL.* 403 (1976); see also Abraham Tesser & Jennifer Campbell, *Self-Definition and Self-Evaluation Maintenance*, in 2 *PSYCHOLOGICAL PERSPECTIVES ON THE SELF* 1, 5-12 (Jerry Suls & Anthony G. Greenwald eds., 1983) (discussing the effect of a relation's success on one's self-evaluation). For a general discussion of the irrational persistence of beliefs and the psychological mechanisms involved, see BARON, *supra* note 73, at 256-80.

154. HOWARD B. KAPLAN, *SOCIAL PSYCHOLOGY OF SELF-REFERENT BEHAVIOR* 115-16 (1986). At the same time, recognition of a failing in oneself might lead one to downgrade the significance of that attribute relative to other attributes, in oneself and in others. Thus, an irresponsible spender might come to minimize or even to disdain thrift. *Id.* at 106, 112-15; Tesser, *supra* note 153, at 440, 448-52. These phenomena are both manifestations of what is known in the literature as "self-protective—self-enhancing responses" within the attribution process. For a further discussion, see KAPLAN, *supra*, 101-76 (and the references noted therein). See also ELSTER, *supra* note 69, at 109-24 (discussing the more general phenomenon of "sour grapes").

155. This phenomenon is known technically as the "self-other bias." For a recent discussion referring to prior studies, see Brown, *supra* note 153. For an early discussion, see I SMITH, *supra* note 46, at 120. The self-other bias may well be enhanced in those situations where the trait being assessed

also operate to skew perceptions in either direction.<sup>156</sup> Estate planners have dwelled little on instances of overassessment of beneficiaries, but they have often been impressed with the *vanity* of their clients (particularly those who have achieved personal financial success), both in inflating their own ability to plan for others and in deprecating the qualifications of those around them, including their own offspring.<sup>157</sup> But a still more common failing involves what might be dubbed the "static attribution error": benefactors often appear to forget that they inhabit a changing world. Whether or not they look down on their children, they tend to look backward, ignoring or even resisting the idea that their children grow up as well as grow older and that their children's needs—and their faculties—evolve over time.<sup>158</sup> Once again, the psychological evidence is

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is ambiguous (such as frugality?), and in those situations where the assessment is communicated privately (such as within wills, which remain private documents so long as the benefactor lives—although wills *do* become public after they mature, a prospect that could be troubling to some benefactors contemplating provisions manifesting negative assessments of beneficiaries). Herbert H. Blumberg, *Communication of Interpersonal Evaluations*, 23 J. PERSONALITY & SOC. PSYCHOL. 157 (1972); Brown, *supra* note 153, at 372-73.

156. It has been hypothesized that persons tend to attribute the behavior of others to stable trait dispositions rather than to situational pressures, whereas they judge their *own* conduct as relatively more influenced by environmental circumstances. This phenomenon, known as the "fundamental attribution error," has been attributed in turn to a number of heuristic devices. For discussions, see EISER, *supra* note 64, at 183-89; NISBETT & ROSS, *supra* note 152, at 122-27; David Watson, *The Actor and the Observer: How Are Their Perceptions of Causality Divergent?*, 92 PSYCHOL. BULL. 682 (1982); see also Taylor & Koivumaki, *supra* note 153 (finding that close acquaintanceship does *not* appear to neutralize the error). *But cf.* Langer, *supra* note 92 (discussing the illusion of control); KAPLAN, *supra* note 154, at 109, 155 (discussing self-deceptive attribution of negative consequences to forces beyond the self). Discounting situational pressures seemingly could lead benefactors either to under- or to overestimate the frugality of their beneficiaries, depending upon whether those pressures promoted current spending or saving.

Evidence also suggests that transient mood states (along with more stable emotional attachments) can affect our judgments of others, possibly because "material stored in memory that is congruent with that feeling state will be more accessible." Margaret S. Clark, *A Role for Arousal in the Link Between Feeling States, Judgments, and Behavior*, in AFFECT AND COGNITION 263, 265 (Margaret S. Clark & Susan T. Fiske eds., 1982); Alice Isen et al., *Affect, Accessibility of Material in Memory, and Behavior: A Cognitive Loop?*, 36 J. PERSONALITY & SOC. PSYCHOL. 1 (1978); Russell Veitch & William Griffith, *Good News—Bad News: Affective and Interpersonal Effects*, 6 J. APPLIED SOC. PSYCHOL. 69 (1976). Again, the benefactor's mood during the estate planning process cannot be predicted, for her (negative?) attitude toward *death* and her (positive?) attitude toward *giving* are both likely to be implicated. For a discussion, see THOMAS L. SHAFFER, *DEATH, PROPERTY, AND LAWYERS: A BEHAVIORAL APPROACH* 107-46 (1961).

157. LEACH & LOGAN, *supra* note 7, at 241-42; Lukens, *supra* note 47, at 137-38; see also Brown, *supra* note 153 (finding that the self-other bias is particularly pronounced among persons with high self-esteem).

158. LEACH & LOGAN, *supra* note 7, at 241-42; SHAFFER, *supra* note 156, at 123-24; SHAFFER & MOONEY, *supra* note 31, at 13-14; Paul B. Sargent, *Drafting of Wills and Estate Planning*, 43 B.U. L.

suggestive: just as persons form habits of behavior, so do they develop habits of *perception* (concerning, for example, the dependency of their progeny<sup>159</sup>), and they often engage in the ego defense of *denial* of an unhappy future in which they are old or deceased.<sup>160</sup>

It would be going too far to assert that benefactors misperceive their beneficiaries' aptitudes in a systematic way. Still, the possibility that a benefactor may (in spite of her insight) underrate her beneficiaries' prospects for personal responsibility, and hence may be overeager to proclaim or prolong spendthrift restrictions, seems sufficiently tangible. What is more, not even clear-sighted benefactors can forecast their beneficiaries' future capabilities and exigencies with any degree of assurance. So long as a benefactor lives, she can (and often does) tailor her gratuitous transfers to her beneficiaries' particular needs, subsidizing those activities or purchases which she deems advisable at any given time—but these judgments are made on the spot, with information near at hand. Even an inter vivos spendthrift trust could be terminated or modified with the benefactor's consent.<sup>161</sup> Once the benefactor dies, such impromptu refinements become impossible (death being the ultimate disabling restraint), and beneficiaries must thenceforth make do with testamentary restrictions premised on the benefactor's final evaluation of their interests and financial judgment. The dead have their say, but lives go on. With each passing day, even the best-laid estate plan is bound to grow increasingly obsolescent.<sup>162</sup>

Of course, existing law does limit the grasp of the dead hand. Under the Rule Against Perpetuities, benefactors can (loosely speaking) control their property for no longer than lives in being plus twenty-one years, a temporal boundary imposed with precisely this problem in mind. Still, the solution offered by the Rule lacks sufficient refinement.<sup>163</sup> Some forms of dead hand control are more invasive than others: restrictions on the *use* of property, for instance, directly impair its value to beneficiaries, whereas

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REV. 179, 191-92 (1963); Lukens, *supra* note 47, at 138. For an early observation along these lines, see Duke of Norfolk's Case, 22 Eng. Rep. 931, 949 (Ch. 1682).

159. J. RICHARD EISER & J. VAN DER PLIGT, *ATTITUDES AND DECISIONS* 29-32, 41 (1988).

160. FREUD, *supra* note 153, at 133-34. The classic modern discussion is ERNEST BECKER, *THE DENIAL OF DEATH* (1973).

161. 4 SCOTT, *supra* note 2, § 338.

162. The point has been often made as a criticism of dead hand control in general; still, it becomes less salient as benefactors add elements of discretion to their estate plans. Hirsch & Wang, *supra* note 3, at 15 & n.53, 23-24, 36-37 & n.144, 38-43.

163. For an extended criticism of the Rule Against Perpetuities on this basis, see *id. passim*.

provisions for the *allocation* of property among alternative beneficiaries have no comparable impact upon total wealth.<sup>164</sup> Of such distinctions the Rule takes no account. Though a disabling restraint fails to dictate how money must be spent, it does dictate *when* it can be spent. To the extent that a spendthrift trust cramps the beneficiary's elbow room to modify her consumption behavior in light of events as they happen to unfold, the subjective value of her inheritance is again affirmatively degraded. In this respect, a disabling restraint is only marginally less invasive than other use restrictions,<sup>165</sup> whose costs could set in long before the trust runs up against the Rule Against Perpetuities.<sup>166</sup>

All of this being the case, lawmakers would do well to build into the system a safety valve. If the law enforces restrictions against voluntary alienation, it should give beneficiaries the right to petition for their termination on grounds of manifest unsuitability or unforeseen conditions—a sort of *cy pres* authority for private trusts.<sup>167</sup> Such a legal

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164. See the discussion in *id.* at 18-27, 34-38, 50.

165. Whereas a use restriction requires the beneficiary to use the inheritance for a *specific* (possibly less desired) purpose, a disabling restraint will rather *foreclose* the beneficiary from putting the inheritance to certain (possibly more desired) purposes that cannot be paid for in small increments.

166. For an early criticism of spendthrift trusts along these lines, see Overman's Appeal, 88 Pa. 276, 281 (1879). In connection with use restrictions in general, see Hirsch & Wang, *supra* note 3, at 50-51, 54-55.

167. A number of commentators have proposed giving courts authority to extinguish disabling restraints if and when it finds that the beneficiary possesses full competency. CHESTER, *supra* note 15, at 139-40; Bushman, *supra* note 7, at 313-15; Manning, *supra* note 18, at 405-06 (noting that it would be against public policy "to enforce the capricious whims of an owner of property"); Note, *supra* note 35, at 767; see also 4 POWELL, *supra* note 8, § 42.25[5][c][iii], at 42-438 to 42-447 (discussing deliberations over the creation of *cy pres* powers to modify spendthrift trusts in New York); BOGERT & BOGERT, *supra* note 2, § 222, at 385 (suggesting that the application of spendthrift trusts to the fully capable is overbroad); 6 AMERICAN LAW OF PROPERTY, *supra* note 32, § 26.100, at 545 (same); Brahme v. Rollins, 179 A. 186, 194 (N.H. 1935) (same). But see 2A SCOTT, *supra* note 2, §152, at 91-92 (suggesting that "it is hardly possible" to draw such a legal distinction). (Still, given the socializing, in addition to the paternal, function of spendthrift trusts, discussed *supra* notes 139-42 and accompanying text, courts should also take concerns about overall family welfare into account, waiving disabling restraints upon beneficiaries who prove clever, but not upon those who are too clever by half.)

At one time, several jurisdictions implemented limitations on spendthrift trusts based on judicial determination of suitability, but such provisions no longer exist in any state. BOGERT & BOGERT, *supra* note 2, § 222, 407 n.59, 416 n.59 (citing Arizona and Georgia provisions); 4 POWELL, *supra* note 8, § 42.25[5][c][i], 42-410; 42-447; see also *id.* § 42.25[3][g] (discussing the prior enforceability in England of disabling restraints only for married women on the assumption that they were subject to suasion by their husbands, a special suitability-based distinction); 2A SCOTT, *supra* note 2, § 146.1 (same). Nevertheless, several jurisdictions today grant courts authority to nullify use restrictions on trusts generally, whether or not they take the form of disabling restraints. For statutory references and commentary, see Hirsch & Wang, *supra* note 3, at 51 & n.205.



response can be envisioned as an exercise, so to say, of "meta-paternalism"—a means of protecting beneficiaries against misguided paternalistic impulses of the benefactor.<sup>168</sup>

There remains, however, a more fundamental critique of trust paternalism that cannot go unanswered. The whole exercise can be challenged from a moral point of view.<sup>169</sup> Professor Gray assailed the spendthrift trust from this direction. To insist that beneficiaries live on the income from a trust rather than dispose of the corpus all at once was, said Gray, to abandon the principle of "individual liberty," and to coddle "the weaker . . . portion of the community."<sup>170</sup> Such a moral vision, he concluded in his most colorful of many purple passages, was infused "by that spirit, in short, of paternalism, which is the fundamental essence alike of spendthrift trusts and of socialism."<sup>171</sup>

Penned at the height of legal formalism, Gray's diatribe must, if nothing else, have been refreshing—an effusion of bluntness in an age of bland-

168. For a further discussion, see Hirsch & Wang, *supra* note 3, at 21-27. Of course, this analysis assumes that courts will judge the interests of beneficiaries more acutely than the benefactor. Debating the virtues of judicial determination of suitability, compare Manning, *supra* note 18, at 405 with Note, *supra* note 135, at 1333-34 and Note, *supra* note 35, at 767. At least when judicial judgments are premised on changed circumstances, the court will be rendering its assessment on the spot, with the benefit of hindsight. Still, there does exist here an inescapable "Who guards the bevy of Platonic guardians?" problem.

169. See by analogy FRIEDMAN, *supra* note 37, at 187-88 (criticizing mandatory purchase of inalienable annuities on grounds of individual autonomy); Gregory S. Alexander, *Pensions and Passivity*, LAW & CONTEMP. PROBS., Winter 1993, at 111, 120-22, 130-31 (suggesting that the case for paternalistic pension law is "uneasy" given political ideals of individual responsibility). On moral justifications for autonomy, see generally, for example, GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* (1988); 2 RALPH W. EMERSON, *Self-Reliance*, in *THE COLLECTED WORKS OF RALPH WALDO EMERSON* 25 (Joseph Slater ed., 1979); GOODIN, *supra* note 42, at 332-59; LAWRENCE HAWORTH, *AUTONOMY* (1986); KLEINIG, *supra* note 68, at 27-36; Regan, *supra* note 69, at 189-92; see also MARTIN HEIDEGGER, *BEING AND TIME* 157-59 (John Macquarrie & Edward Robinson trans., Harper & Row 1962) (1927) (setting out the existential view that making hard choices is an essential aspect of the human condition); Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 588-90, 638-49 (1982) (setting out the Critical Legal Studies view that a tension lies between the need for paternalistic intervention and its perverse tendency to reinforce preexisting hierarchies).

170. GRAY, *supra* note 16, at viii-x; see also *id.* § 258, at 243 ("[I]t is not the function of the law to join in the futile effort to save the foolish and the vicious from the consequences of their own vice and folly."). Extending to dead hand control in general the criticism that "it is better for [people], on moral grounds, that they should manage their own concerns for themselves," see HOBHOUSE, *supra* note 55, at 184-85.

171. GRAY, *supra* note 16, at ix (emphasis added); cf. ELSTER, *supra* note 59, at 84-85 (asserting that welfarism often entails, but does not necessarily imply, paternal restriction of citizens' autonomy).

ness.<sup>172</sup> But the reasoning is another matter. To exalt the “individual liberty” of beneficiaries was obviously to consider only half of the equation. To the extent that lawmakers preserve that liberty, they tread upon the freedom of *benefactors* to do with their own property as they please.<sup>173</sup> One way or the other, someone has to lose a portion of her liberty. In connection with spendthrift trusts, this particular moral road leads to the dead end of philosophical antinomy.<sup>174</sup>

As for Gray’s apostrophe to socialism, one can only offer posthumous congratulations on his foresight—for the fact is that, since Gray’s passing, socialism in the guise of the welfare state has won respectability and is widely approved in its fundamental aims, even by neoconservatives.<sup>175</sup> But what appears particularly startling about Gray’s dictum is that he here decried not socialism by the state but rather socialism *within the family*. And whatever one’s moral view of the state as guardian ad litem, it takes a hard heart to condemn a *parent* for bringing her own children under her wing.<sup>176</sup> In this respect, Gray surely was as much out of step with his own time as with ours. By contrast, judicial contemporaries of Gray applauded spendthrift trusts as following from “the best feelings of our nature,”<sup>177</sup> fulfilling “the most sacred instincts of regard and affec-

172. Certainly, Gray was capable of formalizing with the best of them; see his other major work, JOHN C. GRAY, *THE RULE AGAINST PERPETUITIES* (Roland Gray ed., 4th ed. 1942) (1886), 833 tedious pages through which not even the redoubtable W. Barton Leach could persevere. W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638, 638 (1938). But the spendthrift trust brought out another side of Gray. See GRAY, *supra* note 16, §§ 3, 257, 259 (emphasizing the importance of policy analysis).

173. As one early court put the matter, not to enforce a disabling restraint interposed by a benefactor “would be a fraud on his generosity.” *Holdship v. Patterson*, 7 Watts 547, 551 (Pa. 1838). A federal court recently made the point more coldly: “Pennsylvania enforces spendthrift provisions solely to protect the property right of the donor in the execution of the trust and not out of any concern for the beneficiary . . .” *Schreiber v. Kellogg*, 849 F. Supp. 382, 390 (E.D. Pa. 1994).

174. For discussions, see 2A SCOTT, *supra* note 2, § 152, at 90-91; Richard R. Powell, *Freedom of Alienation—For Whom?*, 2 REAL PROP. PROB. & TR. J. 127 (1967). For a historical account of jurisprudential wrestling with this dilemma, see Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189 (1985).

175. “Certainly [Gray’s] ideas are less convincing at a time when social security and unemployment insurance are accepted facts, medicare a more than likely possibility, and a war on poverty a tenet of national policy.” Note, *supra* note 135, at 1335; MCGOVERN, *supra* note 8, § 8.7, at 342; see also 2A SCOTT, *supra* note 2, § 152, at 91 (asserting cryptically that the spendthrift trust upholds “capitalistic paternalism rather than socialistic paternalism.”). On the modern moral consensus for welfarism, see, for example, GOODIN, *supra* note 42, at 16. For further references, see Hirsch & Wang, *supra* note 3, at 44 & n.169.

176. Gray at one point described the spendthrift trust as a reflection of “family pride, and sentimentalism.” GRAY, *supra* note 16, § 168, at 162.

177. *Buckman v. Wolbert*, 9 Phila. Rep. 207, 207 (Dist. Ct. 1874).

tion."<sup>178</sup> Surely, paternalism was and remains a fundamental moral responsibility of parenthood.<sup>179</sup>

But perhaps Gray's point was that this effort at paternalism, once again, is misguided. Granting that parents are morally bound to come to the aid of their children, a spendthrift trust will not in fact inure to their benefit. Gray himself spoke of spendthrift trusts as having an "irritating and demoralizing" effect on their subjects, who were "not likely to become . . . valuable citizen[s],"<sup>180</sup> and other commentators and judges have chimed in with similar assessments. Spendthrift trusts, we are told, encourage weakness of character and idleness (the latter charge carrying economic as well as moral implications).<sup>181</sup> Instead of motivating a free-spending

178. *Jourolman v. Massengill*, 5 S.W. 719, 728-29 (Tenn. 1887). For similar commentary, see *Guemsey v. Lazear*, 41 S.E. 405, 410 (W.V. 1902); *Matthews v. Van Cleve*, 221 S.W. 34, 37 (Mo. 1920) (citing in turn to scripture, 1 *Timothy* 5:8); *Nichols v. Eaton*, 91 U.S. 716, 727 (1875); *Steib v. Whitehead*, 111 Ill. 247, 252 (1884); *Bartelme*, *supra* note 31, at 10.

179. Philosophers have specifically justified parental paternalism (as distinct from paternalism generally) on several grounds: (1) the child's helplessness and resulting need for assistance, (2) the parent's detailed knowledge of her child's situation and needs, and (3) our assurance that when a parent (as opposed to the state) acts "paternalistically," she actually does have her child's interests at heart. For discussions, see KLEINIG, *supra* note 68, at 143-56; MILL, *supra* note 39, at 69; Jack D. Douglas, *Cooperative Paternalism Versus Conflictful Paternalism*, in *PATERNALISM* 171, 172 (Rolf Sartorius ed., 1983); Tziporah Kasachkoff, *Paternalistic Solicitude and Paternalistic Behavior: Appropriate Contexts and Moral Justifications*, in *FREEDOM, EQUALITY, AND SOCIAL CHANGE* 79, 80-82 (Creighton Peden & James Sterba eds., 1989); see also GOODIN, *supra* note 42, at 341-59 (asserting a moral contradiction between opposition to the welfare state and advocacy of family dependency). One early commentator emphasized these points in order to justify disabling restraints: "None can know the incapacity of a child to support or protect himself, better than a parent, and certainly none should have a better right to provide against his weakness." *Bartelme*, *supra* note 31, at 10. In implicit recognition of these arguments, and the negative inferences that follow from them, several state statutes have confined spendthrift trusts to persons related by blood or marriage to the benefactor, a position endorsed (without analysis) by Professor Powell. BOGERT & BOGERT, *supra* note 2, § 222, at 406 n.59, 407 n.59, 435 n.59 (citing law in Alabama, and prior law in Arizona and North Carolina); Powell, *supra* note 135, at 706; see also 6 *AMERICAN LAW OF PROPERTY*, *supra* note 32, § 26.100, at 545 (suggesting that, in light of its justifying theory, the application of spendthrift trusts to beneficiaries who are not close relatives is overbroad). *But see* Note, *supra* note 135, at 1333 (arguing that a restriction to family member beneficiaries is "arbitrary . . . insofar as no correlation exists between kinship and disability.").

180. GRAY, *supra* note 16, §§ 124a, 263.

181. *E.g.*, 6 *AMERICAN LAW OF PROPERTY*, *supra* note 32, § 26.100, at 546; *Lukens*, *supra* note 47, at 139; *Hutchinson v. Maxwell*, 40 S.E. 655, 658 (Va. 1902); *Seidenberg v. Seidenberg*, 126 F. Supp. 19, 21 (D.D.C. 1954); *Smith v. Towers*, 15 A. 92, 96 (Md. 1888) (dissent). This criticism has been made of paternalism generally. Jon Elster, *Selfishness and Altruism*, in *BEYOND SELF-INTEREST*, *supra* note 70, at 44, 47 ("[T]he opportunity to choose—including the right to make the wrong choices—is a valuable, in fact, indispensable, means to self-improvement."); Joel Feinberg, *Legal Paternalism*, in *PATERNALISM*, *supra* note 179, at 3, 3 ("If adults are treated as children they will come in time to be like children. Deprived of the right to choose for themselves, they will soon lose the power of rational judgment and decision.")

beneficiary to take greater personal responsibility, a spendthrift trust will confirm her in her habits—a sort of reverse-Pygmalion effect. Many psychologists (and historians too) have noticed a tendency for individuals and groups to take on the characteristics that others, particularly those in positions of authority, ascribe to them—what is known in the psychological literature as a “self-fulfilling prophecy.”<sup>182</sup> To the extent that parents “pamper” or “overprotect” their children, reinforcing their childishness, they may again deserve moral censure—for surely one of the central responsibilities of parental paternalism is to prepare children for the *eventual* autonomy of adulthood.<sup>183</sup>

Of course, even assuming that spendthrift trusts are properly viewed as concealing beneficiaries from the hard lessons of financial life, parental protectiveness can be justified, at least for a time. Though sentencing a child to a lifelong disabling restraint skates close to the line of willful infantilization, a lesser term of protective custody may well be desirable simply in order to age her sufficiently to survive in the schoolhouse.<sup>184</sup> Just how long a spell is necessary, and whether parents are ethically bound to let go of their children as soon as they reach the age of majority, is less clear. Though the sociologists have proclaimed the end of childhood innocence,<sup>185</sup> we do live in an age of prolonged adolescence.<sup>186</sup> When called for, parental protection can arguably be extended further into a child’s life.<sup>187</sup>

182. For a recent discussion also reviewing prior literature, see Lee Jussim et al., *Teacher Expectations and Student Achievement: Self-Fulfilling Prophecies, Biases, and Accuracy*, in APPLICATIONS OF HEURISTICS AND BIASES TO SOCIAL ISSUES 303 (Linda Heath et al. eds., 1994). For a historian’s observation, see EDMUND S. MORGAN, *AMERICAN SLAVERY, AMERICAN FREEDOM: THE ORDEAL OF COLONIAL VIRGINIA* 326 (1975). For a suggestion that acceptance of a *gift* entails acceptance of the identity imposed by the gift (or trust?), see DITTMAR, *supra* note 86, at 98.

183. KLEINIG, *supra* note 68, at 143, 147-54; MILL, *supra* note 39, at 69, 175-76; Douglas, *supra* note 179, at 173-75; Feinberg, *supra* note 181, at 3. Discussing the matter in psychological terms, see FRIEDMAN & LACKEY, *supra* note 55, at 11-12; Feldman, *supra* note 86, at 366-67.

184. A disabling restraint may serve “to withhold the capital of the trust until [the beneficiary] should reach such years of discretion that he would be likely to safeguard his own interest . . . [and thus] might profit by experience and by the ripening judgment which age usually brings.” *Jones v. Harrison*, 7 F.2d 461, 465 (8th Cir. 1925).

185. MARIE WINN, *CHILDREN WITHOUT CHILDHOOD* (1983); Jerry Adler, *Kids Growing Up Scared*, NEWSWEEK, Jan. 10, 1994, at 43.

186. LARRY V. STOCKMAN & CYNTHIA S. GRAVES, *ADULT CHILDREN WHO WON’T GROW UP* (1989); SUSAN LITWIN, *THE POSTPONED GENERATION: WHY AMERICA’S GROWN-UP KIDS ARE GROWING UP LATER* (1986).

187. For a philosophical discussion, see KLEINIG, *supra* note 68, at 4, 74-75, 156-57. For related discussions of the public policy of the twenty-one year period-in-gross under the Rule Against Perpetuities, concerning the appropriate limits of dead hand control, see JOHN H. MORRIS & W.

Whether such protection will operate, as critics charge, to stunt the moral growth of the beneficiary is difficult to predict. To begin with, a spendthrift trust does not cater unequivocally to the beneficiary's prodigality—it *does* impose restraints, albeit artificial ones, from which habits might take hold.<sup>188</sup> The alternative sink-or-swim approach may fail as often as it succeeds. And as far as self-fulfilling prophecies are concerned, several recent researchers have argued that the targets of negative stereotyping often respond by striving to overcome the stereotype, rather than submitting to it.<sup>189</sup> This rings true: surely, parental pessimism sometimes eggs a child on to disappoint the prediction, to “prove that they were wrong about me.” Conceivably, a spendthrift trust, expressing gloom about a child's prospects of responsibility, could prompt her to rebel against dependency—although, admittedly, the object of her rebellion could also turn out to be the financial restraint itself.<sup>190</sup>

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BARTON LEACH, *THE RULE AGAINST PERPETUITIES* 68-69 (2d ed. 1962); SIMES, *supra* note 30, at 68-70. Compare also mandatory saving under Social Security, whereby state paternalism persists throughout the working years of citizens.

188. By analogy, it has been suggested that a Chapter 13 plan in bankruptcy, whereby a debtor is obliged to follow a strict budget, has a salutary impact: “Administrators of Chapter XIII proceedings observe the beneficial effect upon debtors of learning to live within their means.” James Angell MacLachlan, *Puritanical Therapy for Wage Earners*, 68 *COM. L.J.* 87, 89 (1963). See also *supra* note 69; Thaler & Shefrin, *supra* note 77, at 399 (predicting that a mandatory pension plan will not prompt compensatory spending with unencumbered assets, because nondiscretionary savings entails no “psychic cost”); Shefrin & Thaler, *supra* note 105, at 621-22 (same, because people “allow themselves” mentally to associate mandatory saving with reduced income in order to accomplish its purpose of future support). By analogy, empirical evidence suggests that mandatory pension plans increase total saving and may even increase *discretionary* saving. PHILIP CAGAN, *THE EFFECT OF PENSION PLANS ON AGGREGATE SAVING: EVIDENCE FROM A SAMPLE SURVEY* (1965); GEORGE KATONA, *PRIVATE PENSIONS AND INDIVIDUAL SAVING* (1965); Laurence J. Kotlikoff et al., *Annuity Markets, Savings, and the Capital Stock*, in *ISSUES IN PENSION ECONOMICS* 211 (Zvi Bodie et al. eds., 1987); Alicia H. Munnell & Frederick O. Yohn, *What Is the Impact of Pensions on Saving?*, in *PENSIONS AND THE ECONOMY* 115 (Zvi Bodie & Alicia H. Munnell eds., 1992); Shefrin & Thaler, *supra* note 105, at 622-24; Thaler, *supra* note 58, at 199-200; Thaler & Shefrin, *supra* note 77, at 399-400. One student hypothesizes that discretionary saving rises with forced saving because “[p]ension coverage draws attention to the problems of providing for retirement,” a phenomenon he terms “a ‘recognition’ effect.” But he adds: “I have purposely avoided the term learning effect, as misleading, since pension plans do not appear to teach households much that they did not already know or could not easily find out.” CAGAN, *supra*, at 53.

189. EDWARD E. JONES ET AL., *SOCIAL STIGMA* 179-84 (1984); Dale T. Miller & William Turnbull, *Expectations and Interpersonal Processes*, 37 *ANN. REV. PSYCHOL.* 233, 238 (1986) (citing to studies); Mark Snyder, *When Belief Creates Reality*, 18 *ADVANCES EXPERIMENTAL SOC. PSYCHOL.* 247, 285-92 (1984) (same).

190. On reaction against paternal restraints and dependency, see BECKER, *supra* note 55, at 298; BOULDING, *supra* note 131, at 99-100; ELSTER, *supra* note 69, at 22, 111-12; KLEINIG, *supra* note 68, at 143-44; MILL, *supra* note 39, at 150; Douglas, *supra* note 179, at 175; Feldman, *supra* note 86, at

The criticism that spendthrift trusts will transform beneficiaries into laggards is one that could just as well be made of inheritances generally. By virtue of eventual succession to property, the productivity of one generation can always dampen the industry of the next.<sup>191</sup> Spendthrift trusts, at least, do not create *perverse* incentives to relax efforts. Unlike, say, discretionary trusts and support trusts, which distribute larger sums to those in greater need, and hence which affirmatively encourage indolence, a spendthrift trust simply generates a fixed income stream, irrespective of how much or little the beneficiary earns for herself. For some donees poverty pays, but not for the beneficiary of a spendthrift trust. If anything, impressing an inheritance with a disabling restraint should *increase* the beneficiary's impetus to labor for her present consumption.<sup>192</sup>

At any rate, whether beneficiaries typically alter their productive activities in response to gratuitous transfers is far from clear. Persons choose to labor for many reasons, including the nonmercenary satisfaction that it provides, and mere habit (of which we are all, to a greater or lesser extent, creatures). Studies of welfare recipients offer little evidence that beneficiaries of state aid slacken their efforts to become productive.<sup>193</sup> Needless to say, the typical spendthrift trust beneficiary inhabits a different region of the indifference curve between leisure and income than the usual welfare recipient, and the behavior of trust beneficiaries has never been

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365-67; see also Robert A. Burt, *Commentary on Schelling's "Enforcing Rules on Oneself,"* 1 J.L. ECON. & ORGANIZATION 381 (1985) (suggesting that paternal restraints against one impulse may prompt a different, possibly equally deleterious impulse, a behavioral phenomenon known as "symptom substitution").

191. For some recent anecdotal evidence, see Tom Cunneff, *The Sons Also Rise*, GOLF DIG., May 1994, at 102, 108. This is, in fact, one of the traditional arguments against the institution of inheritance. Hirsch & Wang, *supra* note 3, at 9 & n.29. But is the existence of a leisure class an unmitigated curse? For discussions, see BERTRAND RUSSELL, *In Praise of Idleness*, in IN PRAISE OF IDLENESS AND OTHER ESSAYS 11, 30-33 (1935); and the sources cited in Hirsch & Wang, *supra* note 3, at 41 n.158.

192. To the extent that a spendthrift trust limits a beneficiary's present consumption options, she has an incentive to produce her own wealth to meet her additional present needs. See *supra* note 165 and accompanying text.

193. GOODIN, *supra* note 42, at 233-35, 338-41; THEODORE R. MARMOR ET AL., AMERICA'S MISUNDERSTOOD WELFARE STATE 57-69, 141-44, 219-22 (1990); Gary Burtless & Robert A. Moffitt, *The Effect of Social Security Benefits on the Labor Supply of the Aged*, in RETIREMENT AND ECONOMIC BEHAVIOR 135 (Henry J. Aaron & Gary Burtless eds., 1984); Sheldon Danziger et al., *How Income Transfer Programs Affect Work, Savings, and the Income Distribution: A Critical Review*, 19 J. ECON. LITERATURE 975 (1981) (synthesizing earlier studies). For sociological studies on the general disposition to labor, see THE NATURE OF WORK: SOCIOLOGICAL PERSPECTIVES (Kai Erikson & Steven P. Vallas eds., 1990); LANE, *supra* note 109, at 235-422; F. Thomas Juster, *Preferences for Work and Leisure*, in TIME, GOODS, AND WELL-BEING 333 (F. Thomas Juster & Frank P. Stafford eds., 1985); Curt Tausky, *Work is Desirable/Loathsome: Marx Versus Freud*, 19 WORK & OCCUPATIONS 3 (1992).

tested empirically. But studies of lottery winners, who also receive substantial long-term income streams, are suggestive. Though some winners search for more rewarding employment, few leave the labor force.<sup>194</sup> All told, it seems problematic to infer that spendthrift trusts will impair the moral well-being or productivity of beneficiaries.<sup>195</sup>

There is, I think, another possible escape route from Gray's moral critique: that is to notice that, oftentimes, a spendthrift trust is not paternalistic at all, that in many if not most instances it can be reconciled with the beneficiary's ostensible moral right to autonomy. The point is simply that beneficiaries frequently will not be averse to spendthrift protection. They may welcome it or even entreat the benefactor to provide it. The benefits to them are manifest in connection with restrictions against involuntary alienation, as will shortly be detailed.<sup>196</sup> But beneficiaries may be equally thankful for restrictions against *voluntary* alienation. They may recognize in themselves a tendency to overspend and so may accept the need for externally imposed financial discipline. Though some critics have supposed that spendthrift trusts are "necessarily humiliating" to their beneficiaries,<sup>197</sup> how humiliating to citizens is the mandatory savings component of Social Security?<sup>198</sup> To the extent that beneficiaries *do* approve of disabling restraints, their autonomy remains intact.<sup>199</sup>

194. Itzhak Harpaz, *Non-Financial Employment Commitment: A Cross-National Comparison*, 62 J. OCCUPATIONAL PSYCHOL. 147 (1989); H. Roy Kaplan, *Lottery Winners and Work Commitment*, J. INST. SOCIOECONOMIC STUD., Summer 1985, at 82; Kaplan, *supra* note 133, at 173-76. *But see* KAPLAN, *supra* note 133, at 68-115 (reporting initial finding of little work commitment, based on a relatively small sample of lottery winners).

195. Professor Bogert concludes:

The question whether spendthrift trusts prejudicially affect the character of their beneficiaries cannot, of course, be answered with any certainty. There are no statistics. . . . From a reading of many cases one is impressed with the weak or undesirable character of many of the beneficiaries. Whether these qualities were caused or encouraged by the spendthrift trusts established for them is another matter.

BOGERT & BOGERT, *supra* note 2, § 222, at 387-88; and in a similar vein, see 2A SCOTT, *supra* note 2, § 152, at 91.

196. *See infra* notes 203-14 and accompanying text.

197. *Nunn v. Titcher-Goettinger Co.*, 245 S.W. 421, 423 (Tex. Comm'n App. 1922, opinion adopted).

198. "The Social Security system, perhaps the most popular social policy of this century, is an example of legislated self-control." Thaler, *supra* note 58, at 195. Perhaps this is a false analogy, for Social Security does at least apply to everyone; whereas, it could be the invidious distinction between beneficiaries that causes the object of a disabling restraint to feel humiliated. Still, as will be discussed hereafter, many persons, acting individually, do take steps to protect themselves from their own financial irresponsibility. *See infra* notes 322-32 and accompanying text.

199. "To the extent that bans on cigarette advertisements stem from the actual or potential customers themselves, . . . one should not talk about paternalism." ELSTER, *supra* note 59, at 84; *cf.*

Like moral analysis generally, it is all a bit muddy. So let us press on to the second half of the spendthrift trust problem.

## II. INVOLUNTARY ALIENATION

Along with the public policy of permitting benefactors to limit a *beneficiary's* power to accelerate a stream of income, we have also to consider the merits of allowing them to block her *creditors* from drawing on that stream. At first glance, restraints against involuntary alienation appear problematic, for they enable benefactors to tamper not only with the rights of the beneficiary (who, if unhappy with the terms under which a gift is offered, can always disclaim it), but also with the rights of third parties, strangers to the transaction that resulted in the trust's creation.<sup>200</sup>

Nevertheless, this fact alone is insufficient to condemn involuntary restraints. Though some courts have maintained that *any* attempt by way of testamentary writ to modify the legal rights of creditors, "tak[ing] such property out from under the operation of . . . statutes and *pro tanto* repeal[ing] them," is void *per se*,<sup>201</sup> this assertion—at least from the standpoint of policy analysis—begs the question. The real problem lies in assessing what powers the legislature ought to grant benefactors to qualify creditors' rights in the first place.

That protection of this sort could serve the interests of beneficiaries is readily apparent. Consider the case of a beneficiary who is already indebted when her inheritance arrives. If she intends to pay off her debts, she might well be indifferent as to whether she receives her inheritance subject to restraint. Even were creditors immediately to swallow up her whole resources, including those she inherits, her *future* resources would thereby be liberated for further consumption. On the other hand, if an indebted beneficiary were insolvent and anticipated a workout or a bankruptcy proceeding that would free up her future resources anyway, then she would

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Elster, *supra* note 181, at 47 (suggesting, by contrast, that the decision of the welfare state to provide food stamps instead of money does *not* reflect the will of the recipients).

200. Those commentators alert to the distinction have considered disabling restraints on involuntary alienation more problematic from the standpoint of public policy than those preventing voluntary alienation. *E.g.* BOGERT & BOGERT, *supra* note 2, § 222, at 387. On the disclaimability of spendthrift trusts, see *supra* note 120.

201. *Swan v. Gunderson*, 215 N.W. 884, 885 (S.D. 1927). Another court characterized spendthrift trusts as "almost a scorn of the law": "[T]he right to seize property . . . is not a quality of property, but is wholly external thereto. . . . It is a public regulation of property beyond private control. . . . If [the benefactor] may bar seizure, why may he not as well bar taxability?" *Brahmey v. Rollins*, 179 A. 186, 191, 192, 194 (N.H. 1935).



gain materially from a disabling restraint. She could then have her financial cake and eat it too, receiving a discharge from her debts but keeping her inalienable assets in the bargain.<sup>202</sup> Herein lies the *preservative* function of an involuntary restraint.

Even if a beneficiary were not presently indebted, a restraint against involuntary alienation could benefit her and her family in other ways. Once again, such a restraint could serve both a paternal and a socializing function by inhibiting witless and parasitical borrowing along with spending: an individual with fewer alienable assets will have smaller access to credit. But even beneficiaries of a provident bent might find virtues in involuntary restraints: for these can also serve a *security* function, limiting the debtor's future financial risk.<sup>203</sup> By squirreling away this nest egg, benefactors give beneficiaries a measure of protection against subsequent financial embarrassment, though again at the cost of more expensive and elusive credit. Whether this type of protection would appeal to the individual beneficiary will depend upon her personal preferences, of course, which she can communicate to the benefactor.<sup>204</sup> Given the collective propensity toward financial risk aversion, the balance of probabilities would, at any rate, be in its favor.<sup>205</sup> In light of the security they provide, restraints against involuntary alienation should find favor with a wider audience of

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202. Avoidance of satisfaction of a beneficiary's prior debts has been a common motive for adding disabling restraints to bequests. For some early expressions of this aim, see *Easterly v. Keney*, 36 Conn. 18, 19 (1869); *Holdship v. Patterson*, 7 Watts 547, 548-49 (Pa. 1838); *Ashhurst v. Given*, 5 Watts & Serg. 323, 324 (Pa. 1843). For a recent example, see *In re McCombe*, 93 B.R. 597, 597-98 (Bankr. S.D. Ohio 1988).

203. For an early estate plan setting out this motive, see *Lampert v. Haydel*, 9 S.W. 780, 780 (Mo. 1888) (involving a spendthrift trust created to protect beneficiaries from "the accident of fortune"). For discussions, see Costigan, *supra* note 18, at 487; Friedman, *supra* note 7, at 577-78; Lowell & Abel, *supra* note 126, ¶ 1606; Nancy S. Roush & Robert K. Kirkland, *Spendthrift Trusts Not Limited to Protection of Immature Dependents*, 18 EST. PLAN. 16, 16 (1991).

204. See *supra* text accompanying note 196. Again, a beneficiary found to be in no need of paternal protection from overborrowing arguably should be permitted to undo a restraint against involuntary alienation by court order. Such would enable her to borrow more easily and at lower cost (though with less security), if that is her preference. See *supra* notes 161-68 and accompanying text. If the trust only restrained involuntary alienation, leaving the beneficiary free to alienate her interest herself (a so-called "quasi-spendthrift trust," see *supra* note 23), then she would stand in a position to convert the property and thereby indirectly to avoid the involuntary restraint anyway.

205. See *supra* note 95. By analogy, commentators have justified the discharge in bankruptcy (securing the debtor's subsequent earning capacity), pension inalienability, and corporate limited liability on this basis. POSNER, *supra* note 20, § 14.3, at 394-95; Margaret Howard, *A Theory of Discharge in Consumer Bankruptcy*, 48 OHIO ST. L.J. 1047, 1067 (1987); Richard A. Posner, *The Rights of Creditors of Affiliated Corporations*, 43 U. CHI. L. REV. 499, 503 (1976); Weiss, *supra* note 78, at 1292 (citing, but not subscribing, to the argument).

beneficiaries than restrictions on their *own* right to accelerate interests in a trust. (It is, however, a distinction that needs emphasizing within the applicable estate planning literature.)<sup>206</sup>

In another way, restraints against involuntary alienation of a trust interest might carry broad appeal: irrespective of the beneficiary's concern for risk, they ensure that the property interest in question will not be sold forcibly under circumstances disadvantageous to the owner.<sup>207</sup> When a benefactor creates a life estate, she gives something of enhanced worth to her beneficiary: not merely an *amount* of property, but also an *annuity*, which has additional value as a hedge against actuarial risk.<sup>208</sup> But a potential buyer of the annuity will not compensate her for this value, for it vanishes once it passes out of her hands—a life estate *pur autre vie* is not a hedge.<sup>209</sup> What is worse, life estates and other future interests upon forced sale typically fail to fetch even their full risk-adjusted value, given the absence of an established market in these nonhomogeneous assets.<sup>210</sup> When the smoke clears, creditors may be left with deficiency judgments diminished by far less than the beneficiary's loss. For this reason, contingent future interests have been held exempt from creditors' claims *as*

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206. Estate planners have been insufficiently careful to separate the appeals of voluntary and involuntary restraints. Whereas one pair of students posit that beneficiaries who are "prudent money managers . . . may still be subject to unexpected claims and so may need the protection of a spendthrift trust," Roush & Kirkland, *supra* note 203, at 16, it is more precise to say that prudent beneficiaries could benefit from *involuntary* restraints, not voluntary ones. As a matter of law, the two may not need to go together, *see supra* note 23, and as a matter of estate planning they often might be better left uncoupled, *see infra* notes 265-66 and accompanying text.

207. This attribute of spendthrift trusts has not been discussed in either the theoretical or estate planning literature, though it is a long-standing legal concern, as will appear hereafter. Compare the related paternal interest in ensuring that a beneficiary does not *voluntarily* liquidate a trust interest for less than its full value, discussed *supra* note 134 and accompanying text.

208. Whereas life insurance protects against the risk of dying too soon, an annuity protects the annuitant against the risk of *living too long*. For a further discussion, see Hirsch & Wang, *supra* note 3, at 36.

209. Indeed, a life estate *pur autre vie* is affirmatively risky from a buyer's perspective; for this risk she will demand a premium, unless she can negate the specific risk by purchasing at low transaction cost the remainder interest also and thereby merge the two estates into a risk-free fee simple. For a fuller discussion of the market for future interests in light of portfolio theory, see Hirsch & Wang, *supra* note 3, at 35-36.

210. In Great Britain, formal markets in future interests have developed. See Robert D. Hershey, Jr., *Birthrights Up for Auction As Investments in London*, N.Y. TIMES, Mar. 6, 1978, at D1; *Speculation: Betting on Death*, NEWSWEEK, Jan. 25, 1971, at 66. For a (facetious) proposal to establish such a market in the United States, see Cullen Murphy, *Great Expectations: Acquiring Tomorrow Today*, ATLANTIC, Dec. 1990, at 24.

a matter of law in some jurisdictions;<sup>211</sup> though vested interests (such as life estates) are everywhere fully alienable, the same difficulty in fact applies to them as well. The benefactor can enlist a spendthrift trust to protect the beneficiary in this respect. Thus, along with their other functions, involuntary restraints can serve a *value maintenance* function, ensuring that beneficiaries can enjoy fully property interests that others tend to underappraise and hence avoiding the waste of beneficial utility.<sup>212</sup>

Absent involuntary restraints, beneficiaries could seek to maintain security and value by bargaining to limit creditors' recourse to their trusts. In ordinary consumer credit transactions such bargains are unheard of, however, presumably because of offsetting transaction costs and other considerations.<sup>213</sup> In this respect, a spendthrift trust can function to avoid transaction costs.<sup>214</sup>

Furthermore, disabling restraints against involuntary alienation can benefit society, to the extent that they impede debtor destitution. The

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211. 1 AMERICAN LAW OF PROPERTY, *supra* note 32, §§ 4.64-72; 2A POWELL, *supra* note 8, §§ 274-79; 2A SCOTT, *supra* note 2, § 162; Edward C. Halbach, Jr., *Creditors' Rights in Future Interests*, 43 MINN. L. REV. 217 (1958); and the cases cited in Hirsch & Wang, *supra* note 3, at 35 n.136.

212. See *Jones v. Harrison*, 7 F.2d 461, 465 (8th Cir. 1925) (*construing* an ambiguous trust to be spendthrift on the theory that the benefactor had created the trust to avoid the waste of its beneficial interests on forced sale). Similar structural purposes can be observed in other legal doctrines, such as the discharge in bankruptcy (ensuring that human capital is fully utilized), and exemption rights in personal property and life insurance. For discussions, see Hirsch, *supra* note 8, at 209-10 & n.106, 220 & n.143; Vukowich, *Debtors' Exemption Rights*, *supra* note 44, at 787-88, 811 & n.185; Note, *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1502 (1959); *Woodson v. Fireman's Fund Ins. Co.* (*In re Woodson*), 839 F.2d 610, 618 (9th Cir. 1988).

Given the widespread utility of involuntary (as opposed to voluntary) restraints in terms of preservation, security, and value maintenance, a stronger case can be made for a rule of construction implying that all trusts are intended to be *quasi-spendthrift*, invulnerable to levy but subject to deliberate sale, than can be made for a rule of construction that all trusts are intended to contain both voluntary and involuntary restraints. *Cf. supra* notes 145-47 and accompanying text. Such a modified rule of construction presently exists in two states. See *supra* note 9.

213. See *Jackson*, *supra* note 44, at 1401 n.24 (suggesting by analogy that debtor negotiation for a discharge, were it optional, would signal to a creditor that the debtor anticipated default; thus, signaling theory suggests that no debtor who bargained for a limited recourse loan could obtain credit); *cf. Weiss*, *supra* note 78, at 1292 (failing to acknowledge these difficulties in the context of pension inalienability).

214. By analogy: "by endowing every corporation with limited liability the law obviates the need for a lot of cumbersome express contracting on the scope of liability." POSNER, *supra* note 20, § 14.3, at 396. Another alternative would be for the debtor to purchase (in a single transaction) insurance against financial calamity. Such may be difficult to obtain, however, due to problems of moral hazard and adverse selection. See the related discussions in FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 47-49 (1991); GOODIN, *supra* note 42, at 157-59; POSNER, *supra* note 20, § 14.4, at 402.

opportunity for public relief creates a social cost externality that spendthrift trusts help to avoid.<sup>215</sup> We have already addressed this point from the standpoint of voluntary restraints.<sup>216</sup> Where involuntary restraints are concerned the issue becomes more complex, however, in that a legal regime permitting benefactors to confound creditors *also* entails social costs: creditors shift part of their bad debt losses onto the public by deducting them from their taxable income.<sup>217</sup> Which outcome is worse as a matter of social efficiency is unclear and could vary from case to case.<sup>218</sup>

Given the potential advantages to beneficiaries (and assuming a wash, more or less, from the state's point of view), what of the creditors? Do they sustain any injury when a benefactor restricts the involuntary transfer of a gratuity?

One aspect of this problem that I will dispose of in short order—or perhaps short shrift—is the suggestion that spendthrift trusts encroach upon the *moral* rights of creditors. If one returns to the pages of Gray, one finds that his moral criticism of disabling restraints extended from their effect on beneficiaries as individuals to their impact on beneficiaries' relations with others. "If there is one sentiment," he penned, "which it would seem to be the part of all in authority, and particularly of all judges, to fortify, it is the duty of keeping one's promises and paying one's debts." This principle, Gray continued in the language of his age, is "fit to produce a manly race, based on sound morality and wise philosophy."<sup>219</sup>

215. *But cf.* Note, *supra* note 212, at 1497-98 (asserting, in the context of exemption law, that shifting risk from creditors to society is beneficial in that "[s]tate welfare programs, financed from general tax receipts, would spread the costs of economic misfortune more widely"). Society surely is a superior risk bearer to private creditors, though debtors, who will *also* share in the extra risk if less property is inalienable, in all likelihood are not. *See infra* note 256-58 and accompanying text. Furthermore, society will bear part of the risk in any event, as will appear hereafter.

216. *See supra* notes 37-44 and accompanying text.

217. I.R.C. § 166 (1986).

218. Large spendthrift trusts may provide more protection than is necessary merely to hold the beneficiary off the welfare rolls. On the other hand, the larger the inalienable trust the greater the creditor's risk and hence the greater the cost associated with the tax deductibility of bad debts.

219. GRAY, *supra* note 16, at iii, v-vii, §§ 258, 262, 264. For other moral criticism, see Overman's Appeal, 88 Pa. 276, 281 (1879); Seidenberg v. Seidenberg, 126 F. Supp. 19, 21 (D.D.C. 1954); Smith v. Towers, 15 A. 92, 93 (Md. 1888) (dissent); Tillinghast v. Bradford, 5 R.I. 205, 212 (1858); Utley v. Graves, 258 F. Supp. 959, 960 (D.D.C. 1966), *rev'd sub nom.* American Sec. & Trust Co. v. Utley, 382 F.2d 451 (D.C. Cir. 1967). Some critics have spoken more vaguely of spendthrift trusts as contravening "the values of a commercial society." Myres S. McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077, 1113-14 (1942); *Summary of Events*, *supra* note 17, at 595.

It is submitted that this vision fundamentally distorts the typical debtor-creditor relation. On the one hand, persons may under some circumstances extend credit involuntarily to others, and these transactions do take on a moral tone.<sup>220</sup> But where ordinary commercial lenders are concerned, the matter is quite different. Credit, after all, is a business. Commercial lenders loan money for profit, fully cognizant that some debtors will default. The rate of interest they demand compensates them for their risk, and they will gain in the aggregate, notwithstanding incidental default. The debtor-creditor relation is essentially contractual in nature: it is an arm's length bargain between economic actors whose entitlements and expectations stem from naught other than the text of their agreement and the context provided by the surrounding legal landscape.<sup>221</sup> Once this is acknowledged, creditors can voice no moral outrage when debtors enjoy the protection offered by a spendthrift trust. Aware that the law sanctions these devices, creditors have no authority to rely on them as a source of satisfaction in the first place.<sup>222</sup> If the upshot is that "children of rich men . . . live in debt and in luxury at the same time" (to again quote Gray),<sup>223</sup> so be it; the parties to the bargain creating the debt knew what they were getting into. Indeed, if there is moral blame to apportion in such a case, much of it might well fall upon lenders, who frequently extend credit carelessly and aggressively. This other side of the moral coin was spotted by contemporaries of Gray, who complained in defense of disabling restraints that trade

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220. For a further discussion, see *infra* notes 288-91 and accompanying text. Lending undertaken for reasons of friendship or family obligation (as opposed to profit) also arguably implicates moral considerations. Hirsch, *supra* note 114, at 611. Relational business contracts (not involving spendthrift trusts) could also present a case for special moral pleading, though the literature has yet to address this issue directly. See generally Symposium, *Law, Private Governance and Continuing Relationships*, 1985 Wis. L. REV. 461.

221. A classical exposition of this vision is to be found in Holmes, *supra* note 118, at 460-62. For a brief historical discussion of the moral philosophy of debtor-creditor relations, see Hirsch, *supra* note 8, at 226-30.

222. "Creditors cannot complain because they are bound to know the foundation upon which they extend their credit." *Buckman v. Wolbert*, 9 Phila. Rep. 207, 207 (Dist. Ct. 1874); see *Broadway Nat'l Bank v. Adams*, 133 Mass. 170, 173 (1882) (making the same point); *Nichols v. Eaton*, 91 U.S. 716, 726 (1875) (same). The argument has echoed within the realm of exemption law: "No credit is extended . . . on the faith of [exempt property], for all persons dealing with [the debtor] are bound to know the law." *Fox v. Swartz*, 51 N.W.2d 80, 85 (Minn. 1952); Vukowich, *Exemption Rights in Bankruptcy*, *supra* note 44, at 771. For a further discussion and related references, see Hirsch, *supra* note 8, at 191-92 & nn.47-48.

223. GRAY, *supra* note 16, § 263; see also, e.g., *Tillinghast*, 5 R.I. at 212: "Certainly, no man *should* have an estate to live on, but not an estate to pay his debts with. Certainly, property available for the purposes of pleasure or profit, should be also amenable to the demands of justice."

creditors "are ready to tempt the weak and improvident and to take advantage of extravagance [sic] and folly."<sup>224</sup> It is a criticism that continues to resonate today.<sup>225</sup> But the whole question, still much puzzled, is incapable of resolution at this juncture.<sup>226</sup>

Putting morals to one side, there are also economic points to be made here. Consider first the situation where an already-indebted person receives an inheritance qualified by a disabling restraint. The potential advantage of this restriction to the beneficiary is clear. Are pre-inheritance creditors harmed? Not really: they extended credit without any expectation of satisfaction from this source and set the price of credit accordingly.<sup>227</sup> To

224. Note, *supra* note 35, at 767; and slightly later, Costigan, *supra* note 18, at 492.

225. For modern discussions, offered in connection with other aspects of debtor-creditor law, see John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355, 369 (1986); Vern Countryman, *Improvident Credit Extension: A New Legal Concept Aborning?*, 27 ME. L. REV. 1, 2-7 (1975); Karen Gross, *Preserving a Fresh Start for the Individual Debtor: The Case for Narrow Construction of the Consumer Credit Amendments*, 135 U. PA. L. REV. 59, 102 (1986); Charles G. Hallinan, *The "Fresh Start" Policy in Consumer Bankruptcy: A Historical Inventory and an Interpretive Theory*, 21 U. RICH. L. REV. 49, 67-68 (1986). Debtors themselves have sometimes made the assertion in their own defense. *In re Goodson*, 130 B.R. 897, 903 (Bankr. N.D. Okla. 1991). Professor Costigan also argued that beneficiaries of spendthrift trusts have stronger moral obligations to their families than to creditors, a theme that the Supreme Court recently alluded to in order to justify pension inalienability. Costigan, *supra* note 18, at 472, 478; *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 376 (1990); see also *Seidenberg v. Seidenberg*, 126 F. Supp. 19, 23 (D.D.C. 1954) (emphasizing this duty in the converse situation where family members are the creditors seeking access to the trust).

226. Some modern theorists do posit that debtors owe moral obligations to their creditors. See generally P.S. ATIYAH, *PROMISES, MORALS, AND LAW* (1981); CHARLES FRIED, *CONTRACT AS PROMISE* (1981); JAMES GORDLEY, *THE PHILOSOPHICAL ORIGINS OF MODERN CONTRACT DOCTRINE* (1991); RAWLS, *supra* note 69, at 342-50; J. Raz, *Promises and Obligations*, in *LAW, MORALITY AND SOCIETY* 210 (P.M.S. Hacker & J. Raz eds., 1977); Philip Shuchman, *An Attempt at a "Philosophy of Bankruptcy"*, 21 UCLA L. REV. 403, 455-58 (1973). For a further discussion in connection with the discharge in bankruptcy, which also tampers with the enforceability of obligations, see Hirsch, *supra* note 8, at 224-30.

If we grant that debtors are not morally bound to creditors, could it be asserted in the alternative that debtors have moral ties to each other? To the extent that debtors act in ways that enhance the risk of default, arguendo, they impose costs on other debtors, who must pay higher rates of interest when creditors aggregate their risk. On the other hand, those other debtors do assume this cost voluntarily: in a sense, then, their relation with their fellow debtors is again mediated through an arm's length bargain. The possibility of moral rights among debtors *inter se* has not been addressed in the theoretical literature, but it merits exploration.

227. "As to antecedent creditors, no harm could come to them, because their debts were contracted before the will became operative." *Matthews v. Van Cleve*, 221 S.W. 34, 37 (Mo. 1920). And again, "[t]he existing creditor has no right to complain if his debtor should acquire a certain interest, which has cost the creditor nothing, but which is walled against his depredation." *Spann v. Carson*, 116 S.E. 427, 434 (S.C. 1923); *McColgan v. Walter Magee, Inc.*, 155 P. 995, 997 (Cal. 1916); see also *How v. How*, 63 N.W. 627, 627 (Minn. 1895) (analogous argument concerning gifts of exempt property). For a modern recapitulation, see *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1083 (Ohio 1991).

have the right to reach it would from their perspective constitute a windfall—or, more aptly, a mirage, for were disabling restraints not permitted, few benefactors would bequeath to insolvent beneficiaries in the first place.<sup>228</sup>

But what of the case where a person solicits credit with a spendthrift trust already in hand? Of course, debtors could again respond that lenders extend credit with their eyes open and that they are savvy enough to distinguish exempt from nonexempt property when they see it.<sup>229</sup> But one criticism of disabling restraints (which like most others originated with Gray, although it has been often repeated since) is that spendthrift trusts operate to *hoodwink* creditors. Because they clothe potential debtors with the “appearance” of affluence, lenders are led to believe that beneficiaries are creditworthy, when in truth they are not. Apart from testamentary trusts, whose terms are public once the wills that create them mature, trusts executed inter vivos or under nonprobate will substitutes are private documents; their terms are inaccessible to creditors. Even the terms of testamentary trusts will in practice often prove obscure, catalogued by the name of the benefactor and recorded in whatever happened to be her domicile. As a consequence, creditors may fail to recognize that a debtor’s assets are inalienable.<sup>230</sup> In other words, spendthrift trusts are said to

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Discussing creditor nonreliance on expectancies in general, see Hirsch, *supra* note 114, at 613-14.

228. This point is discussed more fully *infra* notes 259-64 and accompanying text. Certainly, it cannot be asserted that benefactors have a moral obligation to provide for the *beneficiaries'* creditors. Even Professor Gray conceded that much. GRAY, *supra* note 16, § 261; *Summary of Events*, *supra* note 17, at 595; Hirsch, *supra* note 8, at 245-46 nn.235, 238; Scott, 577 N.E.2d at 1083.

229. In other words, creditors do not rely on spendthrift trusts because the law does not allow them to do so. For discussions, see *Broadway Nat'l Bank v. Adams*, 130 Mass. 170, 173-74 (1882); *Buckman v. Wolbert*, 9 Phila. Rep. 207, 207 (Dist. Ct. 1874); *Jourolman v. Massengill*, 5 S.W. 719, 728 (Tenn. 1887); *Matthews*, 221 S.W. at 37; *McColgan*, 155 P. at 997; *Nichols v. Eaton*, 91 U.S. 716, 726 (1875); *Spann*, 116 S.E. at 434; *Steib v. Whitehead*, 111 Ill. 247, 252 (1884); *supra* note 222. This reasoning has also been put forward to justify the effectiveness of spendthrift trusts in a federal bankruptcy proceeding, per 11 U.S.C. § 541(c)(2) (1988). *Bankruptcy Act Revision: Hearings on H.R. 31 and H.R. 32 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 94th Cong., 2d Sess. 1659 (1976); *Bankruptcy Reform Act: Hearings on S. 235 and S. 236 Before the Subcom. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 575 (1975).

230. CHESTER, *supra* note 15, at 136-37 (pointing to the increased popularity of private will substitutes as *heightening* the difficulty of credit investigation); Wicker, *supra* note 9, at 3 (same); GRAY, *supra* note 16, § 258 & n.1; GRISWOLD, *supra* note 1, § 555, at 637; Bushman, *supra* note 7, at 315-16; *Utley v. Graves*, 258 F. Supp. 959, 960 (D.D.C. 1966), *rev'd sub nom.* *American Sec. & Trust Co. v. Utley*, 382 F.2d 451 (D.C. Cir. 1967); *cf.* cases cited *supra* note 229. Several commentators have responded by suggesting the establishment of recording systems for spendthrift trusts. Costigan, *supra* note 18, at 492-93; Richard H. Oplinger, *Spendthrift Trusts in Arizona*, 1974 ARIZ. ST. L.J. 129,

implicate what modern theorists would term an "ostensible ownership" or "secret lien" problem,<sup>231</sup> leading to offers of credit at an economically inappropriate interest rate.

Once upon a time, this problem was pervasive. Before the days of credit ratings, merchants had little choice but to rely on instinct when deciding whether or not to sell on credit. In his London journal, Boswell set the scene unwittingly but tellingly. Feeling bored and in a playful mood, Boswell decided one day to make a test of how others perceived him. He strolled into a shop that he had not previously patronized, selected an expensive item of merchandise, and sought leave to purchase it on credit. To Boswell's delight, the shopkeeper agreed. This confirmed to Boswell that his "external appearance and address," was that of a man of substance. When on the following day he returned to the shop to settle the bill, he revealed what he had been up to and warned the shopkeeper against extending credit to total strangers. The shopkeeper was unperturbed. "[W]e know our men," he replied, "I would have trusted you with the value of a hundred pounds." As Boswell chortled at the end of the entry, "This I think was a good adventure and much to my honor."<sup>232</sup>

Suffice it to say that were Boswell delivered into our own time to reenact his little adventure, the story would have taken a different (and, for Boswell, mortifying) turn. I have located a critic of spendthrift trusts making the claim that creditors lend on appearance as late as 1964,<sup>233</sup> and rumors circulate of a grand old hotel in St. Moritz that continues to operate in this way. But in the computer age, when a credit check is just a demon-dialed phone call away (or, in more technical parlance, where the technology of credit information has drastically reduced information costs), merchants and commercial lenders need no longer rely on dress and deportment when they size up a potential debtor.<sup>234</sup> The modern question,

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231. See generally Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175 (1983)[hereinafter Baird & Jackson, *Possession*]; Douglas G. Baird & Thomas H. Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299 (1984); Charles W. Mooney, Jr., *The Mystery and Myth of "Ostensible Ownership" and Article 9 Filing: A Critique of Proposals to Extend Filing Requirements to Leases*, 39 ALA. L. REV. 683 (1988).

232. The story is related in, and the quotations taken from, Paul H. Haagen, *Imprisonment for Debt in England and Wales 105-06* (1986) (unpublished Ph.D. dissertation, Princeton University).

233. Gary P. Kreider, Note, *Spendthrift and Other Protective Trusts in Ohio*, 33 U. CIN. L. REV. 281, 285 (1964).

234. Rejecting the assertion that creditors any longer lend on appearance, see Bartelme, *supra* note 31, at 10 (1894!!); Costigan, *supra* note 18, at 488 (1934!). And for a dash of political *vérité*: "The



then, is whether a spendthrift trust is affirmatively deceptive: whether the inalienability of this asset will escape notice by a credit rating agency.

And the answer to that, most assuredly, is no. Critics of the spendthrift trust have missed what would seem a rudimentary point: the inalienable interest here, whether or not recorded in a readily accessible public document, *is not in the possession of the debtor*. What the debtor *does* possess—the income from the trust—is freely alienable. But the inalienable *corpus* of the trust remains in the hands of the trustee, not the beneficiary! The beneficiary, then, is the ostensible *nonowner*, for the fact that the property is possessed by another suffices to avoid the appearance of ownership. Like the ancient possessory pledge (and its modern vestige, the pawn transaction), the sacrifice of possession by the beneficiary serves as an implicit notice to the world, alternative to recordation, that her interest in the property is encumbered (in this instance not by a priority lien, but by a disabling restraint).<sup>235</sup> Likewise, under Article 9 of the Uniform Commercial Code, a security interest in personal property can be perfected by *transfer of possession*, as well as by *filing*.<sup>236</sup> There is nothing deceptive about the arrangement—what the creditor sees, the creditor gets. This whole criticism of spendthrift trusts is a red herring.<sup>237</sup>

As an aside, I might point out one possible exception to this analysis: where the spendthrift trust beneficiary doubles as trustee of the trust, which is permissible under some circumstances,<sup>238</sup> the corpus as well as the

paucity of statutes restricting spendthrift trusts suggests that creditors do not regard them as a serious problem." MCGOVERN ET AL., *supra* note 8, § 8.7, at 343-44. On modern credit-checking technology, see *Digital Credit*, THE ECONOMIST, Sept. 25, 1993, at 91 (noting, inter alia, the programming of credit information into the credit card *itself*). The advent of such technology has even raised *privacy* concerns in the minds of some commentators, see Vern Countryman, *The Diminishing Right of Privacy: The Personal Dossier and the Computer*, 49 TEX. L. REV. 837, 839-46, 868-71 (1971); Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1440-41.

The modern resources and resourcefulness of creditors is well enough known to have provoked parodies within popular culture. In the delightful 1991 feature film *L.A. Story*, Steve Martin seeks to make a reservation at an expensive French restaurant, only to be asked what he might be interested in ordering. When Martin expresses a preference for the duckling, the maître d', poring over banking records, replies that it is out of the question: "You can have the chicken," he sniffs.

235. DOUGLAS J. WHALEY, PROBLEMS AND MATERIALS ON SECURED TRANSACTIONS 11 (2d ed. 1989).

236. U.C.C. § 9-305 & cmt. (1990).

237. No one has thought to make the "ostensible ownership" argument in connection with ERISA pension benefits, Social Security benefits, or other inalienable welfare rights, though these afford a direct analogy.

238. Someone who is the sole beneficiary of a trust cannot serve as her own trustee, but she may be permitted to do so if more than one beneficiary is named. BOGERT & BOGERT, *supra* note 2, § 129; 2 SCOTT, *supra* note 2, §§ 99-99.5. Cases have upheld the power of one of several beneficiaries of a

income will reside in her hands. But even then, fiduciary law requires the beneficiary *qua* trustee to segregate and earmark the corpus: an emperor who wears trust clothing is obliged not to remove the label. Again, no ostensible ownership problem should arise.<sup>239</sup> While the investment account need only be denoted as a trust account, without delineating its terms, this signal should still suffice to put creditors on their guard, for spendthrift clauses today are scarcely exceptional.<sup>240</sup>

Another long-standing argument against involuntary disabling restraints, made both by courts and commentators, is that they encourage debtors who have them to take excessive credit risks. Because spendthrift trust beneficiaries have fewer (alienable) assets to lose, they have a greater incentive to borrow more. They can enjoy the upside benefits of borrowing, safe in the knowledge that their downside liability remains limited to their out-of-trust assets. Thus, as early courts put it, spendthrift trusts "smooth the ways of improvidence,"<sup>241</sup> making the beneficiary "habitually reckless."<sup>242</sup> Again translated into the modern language of economics, spendthrift trusts aggravate moral hazard by reducing the cost of engaging in risky activities, and thereby creating a perverse incentive to engage in them.

My response to this argument is that it is correct so far as it goes, but that in truth it has not taken us anywhere an economist would not want us to go. Yes, a debtor whose assets are shielded by a spendthrift trust has a greater incentive to engage in risky borrowing.<sup>243</sup> But that incentive exploits no externality and hence causes no inefficiency. Turn the tables for a moment, and consider the problem from the outlook of a prospective

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spendthrift trust to wear the hat of trustee as well. GRISWOLD, *supra* note 1, § 283; 2A SCOTT, *supra* note 2, § 151, at 83-84. Likewise, where a spendthrift trust corpus is composed of land and the beneficiary has possession, the disabling restraint remains valid. GRISWOLD, *supra* note 1, § 285.

239. 2A SCOTT, *supra* note 2, §§ 179.1, 179.3. These fiduciary duties were developed precisely for this purpose (among others). BOGERT & BOGERT, *supra* note 2, § 596, at 444-48.

240. See Baird & Jackson, *Possession*, *supra* note 231, at 190-94 (arguing generally that common knowledge of nonownership and alternative notice systems may efficiently substitute for consolidated filing systems). On the frequency of spendthrift clauses within trusts, see *supra* note 7.

241. *Brahmey v. Rollins*, 179 A. 186, 194 (N.H. 1935).

242. *Smith v. Towers*, 15 A. 92, 96 (Md. 1888) (dissent); *Hutchinson v. Maxwell*, 40 S.E. 655, 658 (Va. 1902); and of course GRAY, *supra* note 16, § 262, at 247. The same point has also been made of the discharge in bankruptcy, by analogy. Hirsch, *supra* note 8, at 208-09.

243. That incentive is tempered, however, by the debtor's anticipation of repeated transactions with the same creditor. Cf. J. Fred Weston, *Some Economic Fundamentals for an Analysis of Bankruptcy*, LAW & CONTEMP. PROBS., Autumn 1977, at 47, 59-61 (discussing debtor incentives stemming from the discharge).

lender. Knowing that a spendthrift trust beneficiary has a smaller equity cushion, and hence is a greater credit risk, the rational lender will demand a higher interest rate, consensual lien, or guarantee, or will refuse to lend at all. By contrast, those debtors lacking disabling restraints, with a larger equity cushion, will be offered credit at lower cost. Just as a spendthrift trust aggravates the debtor's moral hazard, so by the same token, and to the same extent, does it enhance (so to say) the creditor's "moral caution." Spendthrift trust beneficiaries will *want* to borrow recklessly but will be denied the opportunity. No inefficiency will result, because the premium demanded for such credit as is made available to her will reflect her heightened risk of default.<sup>244</sup>

Or will it? In a Coasian world of perfect information and costless transactions, certainly: creditors will then negotiate each contract for credit individually with each borrower, taking spendthrift trusts into account. But in the real world, information and transactions come at a price.<sup>245</sup> Spendthrift trusts are *not* akin to secret liens, they *are* discoverable; still, their discovery costs money. Creditors may find it more cost efficient to pool risk among debtors, offering credit to all at the same "prepackaged" rate.<sup>246</sup> In that event, creditors will spread the spendthrift trust premium among *all* borrowers, taking into account the *actuarial* risk that they create.<sup>247</sup> Such a strategy reduces transaction costs and so may raise the

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244. Cf. EASTERBROOK & FISCHER, *supra* note 214, at 49-52 (discussing the economics of corporate limited liability); POSNER, *supra* note 20, § 14.3, at 395-96 (same); LANDES & POSNER, *supra* note 38, at 13 (discussing liability insurance); Theodore Eisenberg, *Bankruptcy Law in Perspective*, 28 UCLA L. REV. 953, 981 (1981) (discussing the discharge). See generally Daniel R. Fischel, *The Economics of Lender Liability*, 99 YALE L.J. 131, 133-36 (1989).

245. Coase himself is perfectly aware of the limitations of his famous theorem: "while consideration of what would happen in a world of zero transaction costs can give us valuable insights, these insights are, in my view, without value except as steps on the way to the analysis of the real world of positive transaction costs." R.H. Coase, *The Coase Theorem and the Empty Core: A Comment*, 24 J.L. & ECON. 183, 187 (1981); see also Robert C. Ellickson, *The Case for Coase and Against 'Coaseanism'*, 99 YALE L.J. 611 (1989).

246. On patterns of rate-setting, see REPORT OF THE NAT'L COMM'N ON CONSUMER FIN., CONSUMER CREDIT IN THE UNITED STATES 112-13 (1972). Debtor differentiation is a much simpler matter than it once was, given modern computer techniques. For an early discussion, see Bentham, *supra* note 56, at 5; and more recently, see William P. Boggess, *Screen-Test Your Credit Risks*, 45 HARV. BUS. REV., Nov.-Dec. 1967, at 113.

247. Or, at least, the cost will be spread within categories of default-probability that can be efficiently differentiated. Cf. William H. Meckling, *Financial Markets, Default, and Bankruptcy: The Role of the State*, LAW & CONTEMP. PROBS., Autumn 1977, at 13, 23-24 (discussing the impact of bankruptcy discharge).

creditor's aggregate profit.<sup>248</sup> But because debtors who do not enjoy spendthrift trust protection will now have to bear part of the costs of those who do, a wealth transfer from the first to the second group will result. Add to this the empirical fact that trust assets contribute to the concentration of wealth in American society; spendthrift trust beneficiaries as a class almost certainly are richer than their trustless counterparts.<sup>249</sup> The upshot is that, when creditors engage in rate pooling, spendthrift trusts cause poorer debtors to subsidize the credit costs of wealthier ones.<sup>250</sup>

In fact, this apparently inequitable subsidy proves to be an *efficient* subsidy. The key to its efficiency lies in the preexisting market imperfection caused by the cost of debtor differentiation. When creditors set a prepackaged rate of interest for all borrowers, an interdebtor wealth transfer already occurs. Poorer debtors, who are more apt to default, have to pay *less* for credit than they otherwise would, because the standard rate reflects in part the lower likelihood of default of richer debtors with whom they are pooled. On that account, poorer debtors also have an incentive to borrow more (a phenomenon known technically as adverse selection). By contrast, more affluent debtors pay an interest rate that is *higher* than it would otherwise be, carried upward by the greater risk of default among poorer debtors in the pool. Among the better heeled, demand for credit will consequently drop.<sup>251</sup>

Thus in the first instance, it is wealthier debtors who subsidize the cost of credit to poorer debtors, not the other way around.<sup>252</sup> This subsidy

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248. Still, as discussed hereafter, the cost to creditors of rate pooling is that it drives better credit risks out of the market.

249. While empirical studies of trust wealth have appeared, no minute data have been compiled on the subset of trusts that comprise *spendthrift* trusts. Still, it is safe to assume that most trusts include disabling restraints as boilerplate. See *supra* note 7. For discussions of trust wealth, see BARLOW ET AL., *supra* note 116, at 20-22; CHESTER, *supra* note 15, at 125; 4 POWELL, *supra* note 8, ¶¶ 502-03; CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 139-43, 186-91 (1987); Oplinger, *supra* note 230, at 136; Powell, *supra* note 174, at 135.

250. See Bushman, *supra* note 7, at 316 (noting that creditors pass the cost of uncollectible debts from spendthrift trust beneficiaries "on to the public in the form of higher prices"). By comparison, see the discussion of the interdebtor consequences of the discharge (which is open to everyone, unlike spendthrift trusts) in Hirsch, *supra* note 8, at 205 n.94.

251. Given adverse selection, some creditors find that they can raise their return by holding down their standard credit price, enticing better credit risks to remain in the market, and then *rationing* the available credit. Joseph E. Stiglitz & Andrew Weiss, *Credit Rationing in Markets with Imperfect Information*, 71 AM. ECON. REV. 393 (1981).

252. Reaching this conclusion, see William C. Dunkelberg & Robert H. Smiley, *Subsidies in the Use of Revolving Credit*, 7 J. MONEY, CREDIT & BANKING 469 (1975).

induces a decline in aggregate borrowing.<sup>253</sup>

Now consider again the spendthrift trust. By sheltering the assets of some wealthier debtors, the credit risk of wealthier and poorer debtors will be brought closer into line, thereby *alleviating* market distortion. The subsidy from poorer to richer debtors caused by spendthrift trusts in fact constitutes a *cross-subsidy*, helping to neutralize the distortion caused by pooling, and thereby spurring aggregate demand for credit. Though the case is unusual, it can be reduced to a general proposition: when a market causes the *price* of its goods to become identical, we improve market efficiency by making the *cost* of those same goods identical. Spendthrift trusts serve this end, making debtors of unequal means more equally likely to default.<sup>254</sup> In a world where differentiation of debtors is costly, spendthrift trusts provide a second-best solution to the problem of credit rate-pooling.

Furthermore, moving a portion of the risk of borrowing from trust beneficiaries to their creditors is efficient if creditors are the superior risk bearers.<sup>255</sup> This should be true for one (or possibly two) reasons. First, creditors almost certainly can insure against (added) risk more cheaply, either by purchasing bad-debt insurance or by risk-spreading. Debtors cannot easily acquire comparable insurance.<sup>256</sup> Second, creditors may be in a better position than debtors to *lessen* efficiently the probability that the (added) risk borne will result in a loss, and thereby to reduce the overall cost of the credit transaction.<sup>257</sup> Of course, it is debtors who ultimately

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253. See COOTER & ULEN, *supra* note 96, at 66-67 (discussing risk pooling by insurance companies).

254. An equivalent argument could be made for *pension* inalienability under ERISA: pension wealth also contributes to wealth concentration in the United States. For an empirical study, see Edward P. Lazear & Sherwin Rosen, *Pension Inequality*, in ISSUES IN PENSION ECONOMICS, *supra* note 188, at 341. I have made a similar argument in the related context of inheritance disclaimer law. Hirsch, *supra* note 114, at 614-17. Indeed, the argument could be offered as a theoretical justification for making *all* inherited wealth exempt *per se* from creditors' claims, given its tendency to concentrate wealth (see, for example, MAURO BARANZINI, A THEORY OF WEALTH DISTRIBUTION AND ACCUMULATION 3n, 4n, 216-24 (1991) (citing also to earlier studies of the effect of inheritance on wealth distribution)), but to make *all* inherited wealth exempt from creditors' claims would, absent an effective notice system, raise creditor-deception and tracing problems. See also *infra* notes 279-80 and accompanying text.

255. See generally Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 90-91 (1977). Again, this result cannot efficiently be achieved via individual negotiation, see *supra* notes 213-14 and accompanying text.

256. Howard, *supra* note 205, at 1064; Samuel A. Rea, Jr., *Arm-Breaking, Consumer Credit and Personal Bankruptcy*, 22 ECON. INQUIRY 188, 191-92 (1984); but see Eisenberg, *supra* note 244, at 982.

257. That is, creditors may be able to take steps that reduce the useless hazard of a particular risk and do so at lower cost than the hazard thereby averted.

control their own fate and who must act so as best to avoid a default. But consumer debtors may lack the expertise necessary to know how to do so. Creditors, being in the business, may be better equipped to abate risk both by monitoring debtors and by regulating more closely their extension of credit. But on this point, at least, the case is ambiguous.<sup>258</sup>

A final, secondary argument that can be made on behalf of disabling restraints (and I have alluded to it already) is that their abolition would not, in the end, be of much assistance to creditors. The policy analyst must always bear in mind that legal rules have *ex ante* consequences: they affect the world both after *and before* the fact.<sup>259</sup> If spendthrift trusts did not exist, benefactors would have to invent them—and in fact little inventiveness is required to imagine informal substitutes for the spendthrift trust that would work almost as well.<sup>260</sup> Most simply, a benefactor could bequeath the corpus to a trusted (and solvent) family member, with precatory instructions to apply the income on behalf of the intended beneficiary. The *de facto* trustee would face strong extralegal pressures within the family to carry out the benefactor's wishes.<sup>261</sup> To be sure, such a device is not

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258. Discussing the discharge by analogy, compare Eisenberg, *supra* note 244, at 981-83; Howard, *supra* note 205, at 1063-65; Jackson, *supra* note 44, at 1399-1400. Discussing corporate limited liability by analogy, compare POSNER, *supra* note 20, § 14.3, at 394-95; EASTERBROOK & FISCHEL, *supra* note 214, at 51-52; Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 91 (1985). Discussing pension inalienability by analogy, see Weiss, *supra* note 78, at 1292-93. A further complication arises from the fact that society bears part of the debtor's risk (by virtue of welfare support), and also part of the creditor's risk (by virtue of the tax deductibility of bad debts). And society, though in a poor position to influence the conduct of either debtor or creditor, is (almost by definition) the ideal risk spreader. See also *supra* notes 215-18 and accompanying text.

259. For a general discussion, see Frank H. Easterbrook, *The Supreme Court, 1983 Term—Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 10-12, 19-33 (1984).

260. There also exist formal alternatives to spendthrift trusts: discretionary trusts and forfeiture restraint (or "protective") trusts, both of which are inalienable, voluntarily or involuntarily, at law. Beyond trusts law, a general power of appointment in most jurisdictions is immune to involuntary levy until the donee exercises the power. RESTATEMENT (SECOND) OF PROPERTY, *supra* note 34, § 13.2. Thus, a general power has the attributes of a "quasi-spendthrift trust," discussed *supra* note 23 and accompanying text. Still, a rule barring involuntary inalienability could be extended from spendthrift trusts to these devices as well: forfeiture restraints could be deemed void to the extent that they operate to thwart involuntary liens, and creditors could be permitted to levy against discretionary trusts to the greatest extent that the trustee could make distributions to the indebted beneficiary (as is already the case when forfeiture restraints and discretionary trusts are self-settled, see RESTATEMENT (SECOND) OF TRUSTS §§ 150 *illus.* (2), 156(2), 159 (1955)). Likewise, general powers could be made subject to levy, as they have been under several state statutes. RESTATEMENT (SECOND) OF PROPERTY *supra* note 34, § 13.2 statutory note. In short, *formal* alternatives to the spendthrift trust could easily be neutralized, were legislators minded to do so.

261. Some estate planners see advantages in such arrangements over formal trusts, even where the benefactor has the luxury to choose between them. LAWRENCE A. FROLIK & MELISSA C. BROWN,

foolproof,<sup>262</sup> but professional estate planners, frowning their brows more intently, doubtless could conjure up more ingenious alternatives.<sup>263</sup> All told, there is reason enough to suppose that a rule barring direct spendthrift trusts would mainly cause benefactors to implement the same or similar provisions by indirection. Creditors would gain next to nothing, and benefactors would be driven to suboptimal solutions to their estate planning problems.<sup>264</sup>

To take stock of where we stand: disabling restraints against both voluntary and involuntary alienation appear independently compatible with public policy. Accordingly, both ought to be permitted, either separately or in combination. Though quasi-spendthrift trusts allowing *beneficiaries* to

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ADVISING THE ELDERLY OR DISABLED CLIENT § 12.5[2][b] (1992). *See also* Sanford J. Schlesinger et al., *Medicaid Planning Ideas: What Works and What Doesn't*, 20 EST. PLAN. 331, 335 (1993) (discussing, by analogy, the advantages and disadvantages of informal devices to maintain a beneficiary's Medicaid eligibility); Atkinson, *supra* note 31, at 1125-34 (discussing, by analogy, the ability of benefactors informally to constrain charitable trustees). The formal trust itself originated out of such informal arrangements. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 210-13 (2d ed 1979).

262. Despite extralegal influences, a de facto trustee might breach the terms to which she was not formally bound, or she might eventually become insolvent and face an involuntary levy against the de facto corpus by *her own* creditors (who could not reach a formal trust, see 4 SCOTT, *supra* note 2, § 308), or she might die unexpectedly.

263. One possibility would be a so-called "secret trust," wherein the benefactor fails to formalize a trust arrangement for the benefit of another, but the secret trustee explicitly agrees to carry out its terms. Such an arrangement could be memorialized by a private document in the hands of the secret beneficiary. Courts in general have given effect to secret trusts (by recourse to an equitable constructive trust) on suit by the secret beneficiary, where proof of the benefactor's intent and acquiescence by the secret trustee is sufficient. MCGOVERN ET AL., *supra* note 8, § 6.2, at 247-48; RESTATEMENT (SECOND) OF TRUSTS § 55 & cmts. (1955). By resort to this device, the secret beneficiary would enjoy a further measure of protection both against a breach of secret trust by the secret trustee or a levy by the secret trustee's creditors, because the secret beneficiary could bring suit *formally* to recover the secret corpus whenever she liked; whereas creditors of the secret beneficiary would in practice be unable to prove the existence of the secret trust (given concealment of the evidence) and hence would have no recourse against the secret trustee, so long as the secret beneficiary forbore to bring suit herself.

264. *See* Little, *supra* note 37, at 433-34 (arguing that the then-existing statutory ban on spendthrift trusts in Kentucky was ineffective and accordingly should be repealed). This also appears to have been the basis for the decision overturning the prior judicial ban on spendthrift trusts in Ohio, *Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1083 (Ohio 1991); *see also* *How v. How*, 63 N.W. 627, 627 (Minn. 1895) (making an analogous argument for permitting gifts of exempt property). Compare Professor Gray, who argued that "evasion is not so easy," and that testators will be disinclined to substitute for a spendthrift trust more discretionary arrangements. GRAY, *supra* note 16, §§ 260-61; *see also* BOGERT & BOGERT, *supra* note 2, § 222, at 388-89 (asserting that alternatives to the spendthrift trust are not identical to it); MCGOVERN ET AL., *supra* note 8, § 8.7, at 344 (speculating that the absence of creditor opposition to spendthrift trusts stems from the alternative of "protective" trusts); *Summary of Events*, *supra* note 17, at 596 (asserting that the existence of means of "evading just obligations" does not justify "the invention of new ones").

reach the corpus yet simultaneously holding *creditors* at bay sound gimmicky and may appear inequitable at first sight,<sup>265</sup> the fact remains that they can be grounded in sound estate planning. Where a beneficiary does possess the acumen and character to make her own financial choices but faces outstanding liabilities or forthcoming economic hazards to which she is risk averse, a quasi-spendthrift trust fits her needs precisely. Here, what I earlier termed the preservative, security, and value maintenance functions of disabling restraints can be fulfilled without tacking onto them the paternal and socializing functions unnecessarily. Though compatible, these functions are independent and so need not invariably accompany one another. At the same time, involuntary restraints cause no hardship to creditors, for they do not rely on inalienable property coming into a debtor-beneficiary's possession either before or after they make their loans. Nor does the severance of voluntary from involuntary restraints make the slightest difference to lenders, for the former are of no legal consequence to them.<sup>266</sup>

### III. EXCEPTIONS

Thus far we have addressed the overall virtues and vices of disabling restraints. Thus far is not quite the end of our journey, however: we have finally to consider whether any particular limitations ought to be placed on the spendthrift trust's general effectiveness. In his treatise on the subject, Dean Griswold submitted that "[t]he difficulty comes not so much from the existence of spendthrift trusts as from their generally unrestrained extent,"<sup>267</sup> an opinion shared by many modern lawmakers. In recent decades, they have ringed about the spendthrift trust a wide array of caveats, varying in their details from jurisdiction to jurisdiction; no latter-day estate planner can look to statutory warrants for this device without

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265. Professor Scott rejected quasi-spendthrift trusts as "seem[ingly] . . . against public policy," though without analysis. 2A SCOTT, *supra* note 2, § 152.3, at 113. For the current state of the law, see *supra* note 23.

266. If anything, creditors will prefer that a trust contain only a freestanding involuntary restraint: as a practical matter, they then have a chance to convince the debtor voluntarily to alienate her interest in the trust so that they can satisfy their claims. BOGERT & BOGERT, *supra* note 2, § 222, at 398; see also Douglass G. Boshkoff, *The Bankrupt's Moral Obligation to Pay His Discharged Debts: A Conflict Between Contract Theory and Bankruptcy Policy*, 47 IND. L.J. 36, 36-37 (1971) (noticing, by analogy, the high frequency with which debtors voluntarily reaffirmed their debts following discharge in a bankruptcy proceeding, a practice since brought under judicial supervision, 11 U.S.C.A. § 524(c)-(d) (1993 & Supp. 1995)).

267. GRISWOLD, *supra* note 1, § 556, at 639-40; see also his alternative model acts, *id.* §§ 565-66.



reading the fine print.<sup>268</sup> Is there sound policy back of the current mélange of legal constraints, or ought lawmakers to rethink them?

One restriction found in some jurisdictions involves the *sort of property interest* susceptible to a disabling restraint. While virtually all states permit the benefactor to attach a spendthrift clause to life and term estates in trust, her right to make a vested or contingent remainder inalienable prior to the time when it becomes possessory is accepted far less widely.<sup>269</sup> In unison, commentators have voiced opposition to enlarging the scope of disabling restraints to remainders, observing that these interests are not created in order to assure the beneficiary's long-term support.<sup>270</sup> True enough, at least in some cases, though not all; at any rate, the argument reads too narrowly the potential functions of a disabling restraint even in those cases where it is true.

Where the benefactor couples an estate for years in a spendthrift trust with a remainder in the *same* beneficiary, she *does* intend to look out for the beneficiary's long-term support. Here the benefactor follows what I argued earlier is the morally superior estate plan for the prodigal beneficiary—namely, the mandate of a disabling restraint for part of her life, as opposed to her whole life, on the assumption that maturity will accompany age.<sup>271</sup> To strike down disabling restraints on remainders is to foreclose this option, for the benefactor who fears *transient* irresponsibility will wish to withhold from the beneficiary immediate access to the residual interest along with future installments out of the term estate. One is simply the natural culmination of the other.

Even where the benefactor provides for a life or term estate in one beneficiary followed by a remainder in another, her motive may be similar. She may wish to give priority to the first beneficiary for life or years and at the same time to postpone the remainder in a younger beneficiary until the second beneficiary has grown sufficiently mature to look out for her

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268. Noting this trend, see *supra* note 11.

269. See *supra* note 12.

270. 6 AMERICAN LAW OF PROPERTY, *supra* note 32, § 26.100, at 545-46; BOGERT & BOGERT, *supra* note 2, § 222, at 390; GRISWOLD, *supra* note 1, §§ 105-06, at 104-05. For more general criticism of this doctrinal expansion, see 4 POWELL, *supra* note 8, § 42.25[5][a][iv]; Powell, *supra* note 135, at 701-04; Recent Cases, 29 HARV. L. REV. 557 (1916). Easily the best and most thorough discussion, drawing the same general conclusion, is Niles, *supra* note 134. *But see* Recent Cases, 26 WASH. L. REV. 141, 142 (1951) (approving the expansion on grounds of testamentary intent effectuation).

271. See *supra* notes 184-87 and accompanying text.

own long-term support.<sup>272</sup> Whether the benefactor disables alienation of a present or a future interest, her aim can remain the same—for both have present value and unless restrained could be rapidly dissipated by a beneficiary who does not (yet) know better.

In refusing to set aside the voluntary transfer of a remainder interest in 1916, Judge Learned Hand had this to say:

We have no public concern for the preservation of family inheritances, and ought, I believe, have no tenderness towards expectants of rich reversions. . . . I find it hard to have patience with the waterish sentiment which seeks to make such a man the court's ward, and to protect him against the consequences of his own folly. If he is to have the enjoyment of great wealth, let him share its responsibility. If the prospect of a dollar so teased his appetite that the future ceased to be a reality, either let him be regarded as an incompetent and put in ward, or let us treat him as a person in a world of persons, and let him weave his fate as he will.<sup>273</sup>

But for its elegance of expression, the statement is unexceptional as a criticism of paternal restrictions on beneficial autonomy generally. The same logic is equally pertinent, and impertinent, to disabling restraints over life or term estates and might as easily be directed to, or deflected from, them as to and from the remainders that follow them. As structural analogues, the two cases should stand or fall together.

Furthermore, restraints on the involuntary alienation of a remainder interest may serve a socializing, preservative, security, or value maintenance function, as previously discussed.<sup>274</sup> Again, life or term estates and

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272. See the discussion in *In re Estate of Vought*, 250 N.E.2d 343, 348 (N.Y. 1969) (Breitel, J.). Judge Fuld, dissenting in that case, doubted whether "the policy considerations in favor of permitting a restraint upon the alienability of property until such time as the beneficiary is believed to be equipped to manage it wisely . . . operate where a remainderman is given an absolute and unqualified right to dispose of the property as he chooses, subject only to the prior life estate of another." *Id.* at 349. In other words (one presumes he meant), a benefactor so concerned would place an age contingency on the remainder (to any age she liked if the remainderman were already born, or to the age of 21 if the remainderman were unborn, as permitted with precisely this end in view under the Rule Against Perpetuities, see, e.g., SIMES, *supra* note 30, at 68-69) and then apply the disabling restraint to the age contingency (i.e., making the interest inalienable prior to the age at which it vests in interest) rather than to the remainder itself. That approach might well be sounder estate planning; still, it remains possible that a benefactor might simply guess at the life expectancy of the life tenant and assume that the remainderman would then be, roughly speaking, old enough.

273. *Provident Life & Trust Co. v. Fletcher*, 237 F. 104, 110-11 (S.D.N.Y. 1916). On the issue of wardship, cf. *supra* note 143.

274. See *supra* notes 139-42, 202-12 and accompanying text.

remainders are analogous in these respects.<sup>275</sup> Again, symmetry demands that they be legally amalgamated.

Another restriction imposed in a number of jurisdictions caps the *amount of property* that a benefactor can safeguard within a spendthrift trust,<sup>276</sup> an approach endorsed by a number of commentators.<sup>277</sup> If our only concern were to protect the state from public charges, we would have no reason to condone spendthrift trusts generating incomes above the level of welfare support; but as we have seen, additional interests lie at stake. The amount in question has no bearing on the paternal, socializing, protective, security, or value maintenance functions of voluntary and involuntary restraints.<sup>278</sup> (In this respect, spendthrift trust policy arguably differs from the policy underlying exemptions, which have also been criticized when left uncapped.<sup>279</sup>) Nor do creditors gain when restraints against involuntary alienation are curtailed, because interest rates will adjust accordingly. Expanding the scope of involuntary restraints may even hold out social *benefits*. If spendthrift trusts enhance the efficiency of a credit market that

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275. Cf. *Boston Safe Deposit & Trust Co. v. Collier*, 111 N.E. 163, 165 (Mass. 1916) ("Whether income or principal is placed beyond the power of alienation or of attachment, the result to creditors of the beneficiary is merely a question of degree."). In another opinion, Judge Breitel adverted to the value maintenance function: had the court struck down a disabling restraint upon a remainder, "the creator's wishes would be completely frustrated, the beneficiary not only getting the funds the creator had intended be delayed, but the beneficiary receiving a fraction, after discount, of what was eventually intended." *Vought*, 250 N.E. at 349. The problem of value maintenance has often been raised in connection with contingent remainders (indeed, more frequently than in connection with life estates). See the cases cited in *Hirsch & Wang*, *supra* note 3, at 35 n.136.

276. Restrictions of this sort take several forms: limiting disabling restraints either to a set sum or to a set fraction of the corpus of a trust, or to a variable amount the court deems adequate for the beneficiary's support. See *supra* note 10.

277. GRISWOLD, *supra* note 1, § 556, at 640, § 565, at 648; Costigan, *supra* note 18, at 484, 487, 497-98; Emanuel, *supra* note 15, at 206-09; Powell, *supra* note 135, at 704-06; Note, *supra* note 135, at 1328.

278. Nor, of course, does the background policy of giving effect to testamentary intent, see *supra* notes 27-28 and accompanying text.

279. Voicing objection to uncapped exemptions on the ground that they are intended only to ensure subsistence, see Vukowich, *Exemption Rights in Bankruptcy*, *supra* note 44, at 770-71; Vukowich, *Debtors' Exemption Rights*, *supra* note 44, at 782-88, 876-78. Some commentators have pointed to capped exemptions as a justification for corpus limits on spendthrift trusts, see 6 AMERICAN LAW OF PROPERTY, *supra* note 32, at 547; Read, *supra* note 9, at 843-46, 851-52, though at least one court looked to uncapped exemptions as a *precedent* for spendthrift trusts, see *Nichols v. Eaton*, 91 U.S. 716, 726 (1875); see also GRAY, *supra* note 16, at vii (noting the equation). Recognizing policy distinctions between spendthrift trusts and exemptions, see Vukowich, *Debtors' Exemption Rights*, *supra* note 44, at 790-92.

aggregates risk among differently situated debtors,<sup>280</sup> corpus limits would interfere with the process of making debtors more equal credit risks. Hence, corpus limits impede market efficiency.

Still another type of restriction debated now and again involves the *sort of beneficiary* eligible to receive a spendthrift trust. Some theorists have proposed limiting disabling restraints to members of the benefactor's family, and one jurisdiction (at present) does take this approach.<sup>281</sup> The argument in its favor is that a benefactor knows her family members best of all; restrictions imposed on nonrelatives are less likely to reflect their individual needs. Yet, the fact that the benefactor wishes to provide *at all* for a nonrelative—certainly an exceptional desire<sup>282</sup>—is in itself indicative of familiarity. The love and affection that prompts gratuitous transfers almost invariably follows from knowledge. To limit spendthrift trusts to beneficiaries bound to the benefactor by ties of affinity or consanguinity, as opposed to close association, appears unduly formalistic from a sociological point of view.

Other theorists have proposed limiting spendthrift trusts to beneficiaries of diminished capacity, an approach once (but no longer) taken in a handful of jurisdictions.<sup>283</sup> The argument here is that a spendthrift trust is worse than useless when imposed on a person of financial ability, a point not without force. Nevertheless, commentators have been insufficiently precise in framing this idea. A restraint against *voluntary* alienation benefits only the financially intemperate or unsophisticated. A restraint against *involuntary* alienation also functions to preserve gratuitous transfers from prior creditors, to provide security against future credit risk, and to maintain the value of a life estate or future interest, irrespective of the beneficiary's personal qualifications. A suitability-based restriction on spendthrift provisions should apply only to the first, not to the second, type of disabling restraint. It could be implemented simply by empowering capable beneficiaries to petition for their removal, as previously discussed.<sup>284</sup>

A pervasive restriction on spendthrift trusts, found in some measure in

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280. See *supra* notes 245-54 and accompanying text. Here too may lie a justification for the uncapped exemptions which drew fire in *supra* note 279.

281. For commentary and statutory references, see *supra* note 179.

282. Hirsch & Wang, *supra* note 3, at 41 & n.161.

283. For prior commentary and statutory references, see *supra* note 167.

284. See *supra* note 167 and accompanying text. Once again, however, a suitability-based standard should be read broadly to encompass diminished capacity *and* overall need of the family, in order to take into account the socializing function of spendthrift trusts.

virtually every jurisdiction,<sup>285</sup> involves the *type of creditor* against whom they are effective. Alimony creditors, child support creditors, furnishers of necessary services, tax authorities, and (in a few jurisdictions) tort victims<sup>286</sup> may be permitted to reach a spendthrift trust, though the precise scope of the exception and the rights accorded under it depend upon state law. In some jurisdictions, excepted creditors can levy against the corpus of the trust; in others they can only garnish the income from the trust, and in still others they must exhaust all other remedies before doing even that; furthermore, the extent of the invasion permitted to the creditor lies at the discretion of the court in some jurisdictions.<sup>287</sup>

In common, creditors who have achieved favored status under these various state laws hold claims that fail to arise out of a bargain with the debtor. They become creditors "involuntarily," and hence stand in a different position, both ethically and economically, from ordinary commercial lenders. Here, we cannot blithely dismiss the creditor's moral claim as submerged by the stipulations of their transaction. *There has been none*. On this moral basis many commentators have defended the right of involuntary creditors to reach a spendthrift trust.<sup>288</sup> Yet the issue is by no means simple to resolve. *Arguendo*, the strength of a debtor's moral obligation to involuntary creditors will depend on the extent of her

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285. Statutes in Delaware, Montana, and Nevada are exceptional in making no exceptions. BOGERT & BOGERT, *supra* note 2, § 224, at 456 n.2; MONT. CODE ANN. § 72-33-301 & cmts. (1993).

286. Only two jurisdictions—Georgia and Louisiana—presently permit tort victims to reach a spendthrift trust. BOGERT & BOGERT, *supra* note 2, § 222, at 416 n.59, 421 n.59. *See also id.* § 222, at 11 n.59 (Supp. 1994) (citing California law permitting felony victims to reach spendthrift trusts, in the court's discretion, to satisfy restitution judgments).

287. The statutory provisions and case law are discussed in *id.* § 224; GRISWOLD, *supra* note 1, §§ 331-52, 364-65; MCGOVERN ET AL., *supra* note 8, § 8.7, at 345-46; 4 POWELL, *supra* note 8, § 42.26[3]-[7]; 2A SCOTT, *supra* note 2, § 157; *see also* RESTATEMENT (SECOND) OF TRUSTS § 157 (1955); Deborah M. Ezatoff, Case Note, 13 FLA. ST. U. L. REV. 433, 440-41, 443 (1985) (discussing the rule, found occasionally, that invasion of a spendthrift trust by an excepted creditor is allowed only as a last resort).

These excepted creditors' rights may be compared with the rights of certain creditors to reach inalienable pension rights, exempt property, the assets of a discharged debtor following a bankruptcy proceeding, and the assets of an undercapitalized corporation, *see* Emanuel, *supra* note 15, at 205; Janet A. Flaccus, *A Potpourri of Bankruptcy Changes: 1994 Bankruptcy Amendments*, 47 ARK. L. REV. 817, 830-34 (1994); Hirsch, *supra* note 114, at 621 & nn.163-65; Sherman, *supra* note 14, at 271-85.

288. Professor Scott thought it would be "shocking indeed" to give effect to a spendthrift trust against such creditors, for "[t]hey are in quite a different position from ordinary creditors who have voluntarily extended credit." 2A SCOTT, *supra* note 2, § 157, at 186, § 157.1, at 192, § 157.5, at 220. Professor Bogert referred in similar fashion to "[t]he strong equity behind these claims." BOGERT & BOGERT, *supra* note 2, § 224, at 456, 478-79; *see* GRISWOLD, *supra* note 1, § 365, at 443; Oplinger, *supra* note 230, at 138.

culpability in placing creditors in that position and on the strength of her independent moral ties to the creditor. An intentional tortfeasor seemingly has a stronger moral obligation than a negligent one;<sup>289</sup> by similar token, the child-support debtor's moral obligation appears more compelling than that of a delinquent taxpayer.<sup>290</sup> Still, that obligation, to the extent we acknowledge its existence, entails no more (but could it entail less?) than doing all the debtor can to restore the status quo. In the context of a spendthrift trust, that means using payments as they become due to right the situation, not invading a corpus that the debtor lacked power to dip into for her own consumption. The benefactor, after all, owes no moral duty to the debtor's involuntary creditors and so remains ethically free to fetter the corpus—or, for that matter, not to transfer it to the debtor in any way, shape, or form. Yet that reasoning can be taken a step further: if the benefactor has sought to establish a trust that is invulnerable to levies of execution or to garnishment, does not the benefactor's moral right not to satisfy a claim for which she bears no responsibility suffice to neutralize the *debtor's* moral obligation to do so even with income distributions as they become due to her?<sup>291</sup> The issue is truly enigmatical.

Turning to another dismal science, we may consider whether the decision to bestow special rights on involuntary creditors will serve the ends of economic efficiency. This it may, for several reasons. First, granting involuntary creditors the right to reach a spendthrift trust could operate to negate the need for state support of the *creditor*, as opposed to the debtor. By permitting invasion of the private trust, lawmakers can reduce dependence on the costly public welfare apparatus.<sup>292</sup> Second, rendering

289. Cf. 11 U.S.C. § 523(a)(6) (1988) (rendering claims arising out of intentional torts, but not negligent torts, nondischargeable in bankruptcy). See also 11 U.S.C.A. § 523(a)(13) (Supp. 1995) (rendering restitution judgments for crime under 18 U.S.C. nondischargeable in bankruptcy).

290. See *Seidenberg v. Seidenberg*, 126 F. Supp. 19, 23 (D.D.C. 1954) ("The duty of a married man to support and protect his wife and children is inherent in human nature. . . . It is a responsibility far superior to that of paying one's debts . . .").

291. Opinions denying involuntary creditors the right to reach a spendthrift trust have made the point:

[T]he testatrix was under no obligation to her son's wife and children. . . . She was at perfect liberty to give it all to a stranger had she so desired. Being thus empowered, it is difficult to ascertain by any ordinary process of reasoning, how or why she should be precluded from disposing of it as she did. The wife and children were not damaged—they were no worse off than before.

*Schwager v. Schwager*, 109 F.2d 754, 760 (7th Cir. 1940) (footnote omitted); *Erickson v. Erickson*, 266 N.W. 161, 164 (Minn. 1936).

292. Here economies of scale are of no significance. The question is simply whether private funds will be available to substitute for funds flowing through an expensive agency. Cf. *supra* note 42 and

trust assets vulnerable to involuntary creditors' claims deters potential debtors from incurring involuntary liabilities. To the extent that a debtor is otherwise judgment-proof, she can incur such liabilities without bearing the cost; placing more of her assets at risk mitigates this externality. Finally, invasion of a spendthrift trust may serve to impose an involuntary liability on the party better able to bear it.

These rationales are of varying relevance to different sorts of involuntary claims. Consider alimony and child support.<sup>293</sup> Here deterrence plays no part; lawmakers do not assign these costs in order to reduce the incidence of divorce. But by allowing alimony and child-support creditors to bypass a disabling restraint, those costs may be better distributed<sup>294</sup> and (in cases of indigence) assigned in a manner calculated to avoid welfare eligibility.<sup>295</sup> These are acknowledged goals of the system of liability within family law.<sup>296</sup> By contrast, liability for tort is premised primarily on deterrence,<sup>297</sup> and an argument for trust susceptibility to tort claims can

accompanying text.

293. For prior commentary, see Carolyn L. Dessin, *Feed a Trust and Starve a Child: The Effectiveness of Trust Techniques Against Claims for Support and Alimony*, 10 GA. ST. U.L. REV. 691 (1994); Ezatoff, *supra* note 287; Robert A. Seligson, Note, 44 CAL. L. REV. 615 (1956).

294. Better distributed in a welfare sense, on the assumption that social welfare is enhanced when, *ceteris paribus*, costs are borne by the deeper pocket. We cannot in the process assume that total utility will be enhanced, however, due to the infeasibility of interpersonal utility comparisons. For related discussions, see GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 39-45 (1970); Hirsch & Wang, *supra* note 3, at 12 n.41, 34 n.129. Here, the question of who is the superior insurer has no relevance, for insurance against the costs of divorce is not commercially available to either party. *Cf. supra* notes 255-58 and accompanying text.

It is possible to argue that alimony creditors *are* in fact voluntary creditors, given that they enter upon the marriage willingly. MCGOVERN ET AL., *supra* note 8, § 8.7, at 345-46. In this sense, a disabling restraint in the hands of one spouse could be deemed simply an implicit term of the marital contract agreed to by the other. Still, this does not change the fact that a divorce generates costs that require efficient distribution. A commercial lender can *spread* the risk caused by spendthrift trusts and profit in the aggregate despite them; whereas, a marital contract is not (at least ordinarily) entered into for profit and the risk involved (at least in a monogamous society) is not susceptible to being spread. Discussing generally the frailty of the contract analogy in the marital setting, see Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 13-33 (1989).

295. This second point has been emphasized in several opinions upholding the rights of alimony and child support creditors to reach a spendthrift trust. *Shelley v. Shelley*, 354 P.2d 282, 286-87 (Or. 1960); *Hurley v. Hurley*, 309 N.W.2d 225 (Mich. Ct. App. 1981); *see also* *Schlaefel v. Schlaefel*, 112 F.2d 177, 185 (D.C. Cir. 1940) (same, in connection with exempt insurance benefits).

296. HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* §§ 7.1-2, 17.5, 18.1 (practitioner's ed., 2d ed. 1987).

297. Efficient cost distribution and avoidance of welfare costs are secondary goals of the tort liability system. For discussions, see CALABRESI, *supra* note 294, at 26-28, 283 & n.9; William R. Keeton & Evan Kwerel, *Externalities in Automobile Insurance and the Underinsured Driver Problem*, 27 J.L. & ECON. 149 (1984) (justifying compulsory liability insurance to avoid welfare costs). *See*

be made on that alternative basis<sup>298</sup> and, in the same vein, on the tortfeasor's status as the superior insurer.<sup>299</sup> In either event, a rule permitting invasions of the corpus (despite the debtor's powerlessness to do so herself) appears warranted as a response to efficiency concerns.<sup>300</sup>

An economic justification for the susceptibility of spendthrift trusts to tax claims is less manifest.<sup>301</sup> Incurring tax liability is hardly something lawmakers want to deter, and the public fisc is (in the scientific sense) the *ideal* cost bearer. To the extent that a tax debtor depends on her trust for basic support, the state would be picking its own pocket, extinguishing a private resource only to throw the beneficiary upon less efficient means of public support. Still, the exception for state claims can be premised, not unpersuasively, on a theory of collateral consequences: subjecting

generally IZHAK ENGLAND, *THE PHILOSOPHY OF TORT LAW* (1993); LANDES & POSNER, *supra* note 38; STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* (1987).

298. The same argument has been made in the adjacent province of corporate limited liability, though veil-piercing involves considerations extraneous to spendthrift trusts (such as jurisdictional conflicts and effects on capital markets) which dull the analogy. For a discussion, see Robert B. Thompson, *Unpacking Limited Liability: Direct and Vicarious Liability of Corporate Participants for Torts of the Enterprise*, 47 VAND. L. REV. 1 (1994) (see also the earlier references cited therein). For other relevant analogies, see Hirsch, *supra* note 114, at 618-21 & n.165.

Making the related point that allowing tort victims to reach spendthrift trusts would serve to restore injured parties and prevent them from becoming public charges, see Laurene M. Brooks, Comment, *A Tort-Creditor Exception to the Spendthrift Trust Doctrine: A Call to the Wisconsin Legislature*, 73 MARQ. L. REV. 109, 133-41 (1989); Frank A. Gregory, Note, *Trusts: Tort Claims as an Exception to the Spendthrift Trust Doctrine*, 17 OKLA. L. REV. 235, 237-38 (1964); Wicker, *supra* note 9, at 18. Other commentators have focused on the moral rights of tort creditors, see William N. Antonis, Note, *Spendthrift Trusts: Attachability of a Beneficiary's Interest in Satisfaction of a Tort Claim*, 28 NOTRE DAME LAW. 509, 515 (1953); Weston C. Overholt, Jr., Note, *Tort Liability of the Beneficiary of a Spendthrift Trust*, 57 DICK. L. REV. 220, 221-22 (1953); and the references in *supra* note 288.

299. I base this conclusion on the assumption that the tortfeasor can at lower cost prevent the accident from occurring than can the victim. Assuming as well that an insurance company can monitor the insured's behavior efficiently, the tortfeasor should then be able to obtain liability insurance at a lower cost than the victim can obtain accident insurance. Compare the related discussion in POSNER, *supra* note 20, § 6.14, at 204-06.

300. Professor Scott commended the rule, found in some jurisdictions, that gives courts discretion over the amount of property involuntary creditors can extract from a spendthrift trust. 2A SCOTT, *supra* note 2, § 157.1, at 194-95. On the other hand, if we can presume that the amount awarded to involuntary creditors is reasonable per se, such discretion is unnecessary. Cf. Shelley v. Shelley, 354 P.2d 282, 287 (Or. 1960); Emanuel, *supra* note 15, at 207; Ezatoff, *supra* note 287, at 443-44.

301. Case law in the area has focused on federal preemption, which of course merely passes the deliberative buck on to a higher authority. E.g., *United States v. Grimm*, 865 F. Supp. 1303, 1312 (N.D. Ind. 1994); *United States v. Riggs Nat'l Bank*, 636 F. Supp. 172, 177 (D.D.C. 1986); *United States v. Rye*, 550 F.2d 682, 685 (1st Cir. 1977); cf. *Mercantile Trust Co. v. Hofferbert*, 58 F. Supp. 701, 705 (D. Md. 1944). According to Professor Bogert, decisions holding spendthrift trusts vulnerable to federal or state tax claims "are not based on public policy but rather on legal impossibility." BOGERT & BOGERT, *supra* note 2, § 224, at 474. *Non sequitur!*



spendthrift trusts to tax liability enhances tax equity, which is vital, or at least valuable, to a system of tax collection founded on voluntary compliance.<sup>302</sup>

The case for subjecting spendthrift trusts to liability for necessary services, such as emergency medical care and other nondeferrable assistance, is also uneasy.<sup>303</sup> Though services of this nature are often tendered without a bargain, their providers (assuming a modicum of prudence) can factor the risk of default into the price demanded and hence profit in the aggregate, just like ordinary commercial lenders, notwithstanding spendthrift trusts.<sup>304</sup> Unlike commercial lenders, however, providers who choose to *withhold* necessary services exact external costs.<sup>305</sup> Were spendthrift trusts enforceable against them, providers might simply grow more reluctant to make their services available absent a prior showing of creditworthiness, with consequent harm to the beneficiary. A rule permitting invasion of spendthrift trusts to pay for necessary services functions to offset this externality. The problem, in fact, structurally resembles that of tort liability, except that here it is the incentives of the *creditor*, not of the debtor, that need to be altered for the sake of efficiency.<sup>306</sup>

If we are to grant involuntary creditors some nature of right in the otherwise inalienable assets of a debtor, however, we should also hear the special pleadings of one other class of creditors, hitherto denied relief.

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302. See 1 OFFICE OF THE SECRETARY, U.S. DEP'T OF THE TREASURY, TAX REFORM FOR FAIRNESS, SIMPLICITY, AND ECONOMIC GROWTH: THE TREASURY DEPARTMENT REPORT TO THE PRESIDENT 3 (1984) (discussing the importance of perceptions of tax equity generally). This argument may presuppose a higher salience of legal rules than empirical evidence warrants, however. See *infra* note 360. For a related discussion, see Hirsch, *supra* note 114, at 622.

303. Case law defending this exception has emphasized that it is compatible with the benefactor's ostensible purpose of providing support for the beneficiary in spite of her improvidence. 2A SCOTT, *supra* note 2, § 157.2, at 201-02; e.g., *American Sec. & Trust Co. v. Utley*, 382 F.2d 451, 453 (D.C. Cir. 1967); *Sisters of Mercy Health Corp. v. First Bank of Whiting*, 624 N.E.2d 520, 522 (Ind. App. 1993). This analysis fails, however, to apply to cases where the benefactor has other purposes in mind, such as value maintenance (or, for that matter, the hope of getting involuntary benefits free of charge for the beneficiary).

304. This is true of purchase-money creditors in general. For an early discussion, see Bentham, *supra* note 56, at 6.

305. These being: leaving beneficiaries untreated or leaving it to government to fill the gap inefficiently.

306. See the related economic analysis of good samaritans, justifying their restitution, in LANDES & POSNER, *supra* note 38, at 142-48; POSNER, *supra* note 20, § 6.9; William M. Landes & Richard A. Posner, *Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism*, 7 J. LEGAL STUD. 83 (1978); see also Hirsch, *supra* note 114, at 622.

These are the unsophisticated trade creditors—plumbers and kindred small-scale service providers—who may, even today, be no better equipped than Boswell’s shopkeeper to determine efficiently the debtor’s creditworthiness and who may have no idea how to factor the risk of default into the price of the services they perform.<sup>307</sup> These gentle souls arguably cannot operate their businesses other than on trust, and so they too may reasonably be categorized as involuntary creditors upon default. A rule permitting such creditors, at least at the court’s discretion, to ignore a disabling restraint could again serve to fix liability on the party better able to bear it.<sup>308</sup>

Against all of the efficiency justifications for permitting involuntary creditors to pierce a spendthrift trust must still be weighed the *ex ante* consequences of such exceptions, however. Once again, benefactors might be moved to substitute for formal (but leak-prone) trusts more informal (but watertight) arrangements for the protection of vulnerable beneficiaries. Creditors’ victories might thus prove fleeting, as benefactors maneuvered around legal obstacles, and hence also Pyrrhic from the perspective of lawmakers seeking after elusive efficiency.

To make allowance for *ex ante* consequences, I would permit involuntary creditors in general to reach spendthrift trusts, but at the same time permit benefactors to *name* in the instrument of trust specific involuntary creditors who are nonetheless barred from tapping into it. This “exception to the exception” would apply where the benefactor is aware of an existing claim or anticipates a claim by an individual creditor whom she specifically desires not to satisfy—hence, where a rule permitting satisfaction by that creditor is most likely to induce the benefactor to take preemptive measures.<sup>309</sup> I hasten to add that not a single jurisdiction follows this approach today, but a pervasive analogy can be found in a close relative of the spendthrift trust, known as the “supplemental needs trust.” If a trust

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307. *But see* Howard, *supra* note 205, at 1064 & n.134 (arguing, in the context of the bankruptcy discharge, that even small-scale sellers set their prices with the risk of default in mind).

308. Were we to treat unsophisticated trade creditors as equivalent to involuntary creditors, we would also face the more mundane difficulty of arriving at a suitable definition of the category. One approach would be to delineate by statute an exclusive list of qualifying service providers, but an alternative might be to permit courts to invade a spendthrift trust simply where they find *under all the circumstances* that a credit check prior to the extension of credit was unreasonable. The appeal of such a standard is that it addresses the general moral and economic problem at issue here in an equally general (and hence precise) way. The associated danger, of course, is that the vagueness of the standard would invite burdensome litigation.

309. Many benefactors have indicated a desire to avoid satisfying existing debts of a beneficiary as the primary motive for adding disabling restraints to their bequests. *See supra* note 202 and accompanying text.

instrument *so specifies*, a beneficiary can receive support supplemental to publicly provided institutional care or Medicaid benefits without in the process forfeiting those benefits, even though the state, as a public creditor and furnisher of necessary support services, could in most jurisdictions ignore with impunity a *disabling* restraint.<sup>310</sup> Once again, one gathers from judicial discussions, the idea is to encourage benefactors to make gratuitous transfers that they would otherwise almost certainly choose to divert from the intended beneficiary, given the state's financial claims against her.<sup>311</sup>

A final restriction on the effectiveness of spendthrift trusts, presently enforced in every single American jurisdiction, is the bar on their *self-settlement*. Nowhere can an individual effectively create a spendthrift trust for herself (and collusive arrangements with third parties to make reciprocal transfers have been avoided by the courts).<sup>312</sup> *This restriction makes no sense.*<sup>313</sup> The benefits of a spendthrift trust are the same, irrespective of

310. BOGERT & BOGERT, *supra* note 2, § 224, at 470 & n.26; 2A SCOTT, *supra* note 2, § 157.2, at 204-08, § 157.4, at 214.

311. "A contrary conclusion would totally frustrate the settlor's intent. . . . It would also invite anyone, finding himself in the position of [the settlor] in the future, to make no testamentary provision for a handicapped child." *Tidrow v. Director, Mo. State Div. of Family Servs.*, 688 S.W.2d 9, 12 (Mo. Ct. App. 1985). "We know of no public policy to prohibit a person who is not liable for the support of a charity patient in a public institution to give to the patient extra comforts or luxuries . . . nor do we find a public policy to seize such gifts before the patient has received them. . . . [T]o grant the department's petition destroying the trust would destroy also [the benefactor's] purpose to save his son from a pauper's grave." *In re Wright's Will*, 107 N.W.2d 146, 149 (Wis. 1961). On the general effectiveness of supplemental needs trusts, see Clifton B. Kruse Jr., *Welfare Without Guilt: Benefiting from a Supplemental Needs Trust*, PROB. & PROP., May-June 1991, at 33. *But see* Act of May 7, 1993, ch 108, 1993 Minn. Laws 298 (amending MINN. STAT. § 501B.39 (1992)) (limiting supplemental needs trusts to basic needs for which public funding is insufficient, among other restrictions). The rationale of encouraging benefactors to make transfers may also underlie a Wisconsin statute barring the state from reaching a spendthrift trust to satisfy claims for public support *only* in those instances where the beneficiary suffers from a long term disability. BOGERT & BOGERT, *supra* note 2, § 222, at 445 n.59. In such cases, lawmakers can anticipate the benefactor's anticipation of claims for public assistance.

312. *See supra* note 13. This rule is surrounded by a penumbra within which the status of a trust as self- or other-settled is unclear, *see supra* note 14 and accompanying text, and several cases have also carved out limited exceptions to the ban on self-settlement. *See infra* notes 322, 338, 346. On collusion, *see* MCGOVERN ET AL., *supra* note 8, § 8.7, at 347.

313. To some extent the restriction may be a vestige of history. Professor Scott asserted that "[t]he principle [was] embodied" in a British statute dating to the reign of Henry VII (alas, not the IVth, *cf.* Holmes, *supra* note 118, at 469) restricting the creation of *any* self-settled trust, 3 Hen. VII, c. 4 (1487), a statute spawning analogues in many American jurisdictions. 2A SCOTT, *supra* note 2, § 156, at 168-69 *But see* Joseph G. Porter, *Spendthrift Trusts for Settlers*, 68 TR. & EST. 102, 103 (1939) (asserting that the analogous spendthrift trust rule was a judicial construct, developed independently of statutes). For a different sociohistorical explanation for this restriction, *see* Friedman, *supra* note 7, at 581-82.

Minimizing the distinction between self- and other-settled trusts, but not in order to advocate the extension of authority to self-settle them, *see* Brahmev v. Rollins, 179 A. 186, 192 (N.H. 1935);

who creates it; if anything, when a trust is self-settled, those benefits are bound to be *greater*. At the very least, self-settled spendthrift trusts ought to be treated no differently from other-settled ones. But before I proceed to argue this point, let me begin by retracting it—or rather part of it.

The customary argument against permitting persons to self-settle spendthrift trusts is that, unlike the other-settled sort, they operate affirmatively to *remove* assets that would otherwise be available to creditors.<sup>314</sup> This is in part a valid point: were debtors able to convert all of their assets into inalienable form, the supply side of the market for general credit could easily crumble. General creditors in these circumstances would be making, in effect, *no* recourse loans, which might not be viable at a finite interest rate.<sup>315</sup>

Again, however, analytical rigor requires us to sever the dual elements of a spendthrift trust in order to discern exactly what is at stake here. If an individual self-settles a trust barring only *voluntary* alienation, creditors suffer not at all. The instant criticism has no bearing on such a trust.<sup>316</sup> Only self-imposed restraints against *involuntary* alienation operate to the detriment of creditors, by reducing the assets available for levies of execution. Yet in this connection, we have in place already a tried and tested legal regime serving to protect creditors from asset withdrawals and thereby to preserve a robust market for credit. Under the law of contracts, debtors and creditors can bind themselves to abide by whatever restrictions they see fit to include in their agreement;<sup>317</sup> and under the law of fraudu-

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Sherrow v. Brookover, 189 N.E.2d 90, 93 (Ohio 1963).

314. MCGOVERN ET AL., *supra* note 8, § 8.7, at 347; McColgan v. Walter Magee, Inc., 155 P. 995, 997 (Cal. 1916).

315. In this respect, the preservative function of spendthrift trusts can assume a substantively different, and affirmatively deleterious, form when accomplished via self-settlement. Cf. *supra* notes 202, 227-28 and accompanying text. If allowed without limit, creditors would then have to resort to security interests or extralegal mechanisms of debtor control in order to protect their interests. See generally Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORGANIZATION 5 (1985).

316. Nonetheless, the bar on self-settlement applies to voluntary, as well as to involuntary, restraints. RESTATEMENT (SECOND) OF TRUSTS § 156(1) (1955). Still, the utility to the beneficiary of a trust barring only voluntary alienation would not be very great. See *supra* notes 24-26 and accompanying text.

317. Several limitations on the rights of bargaining parties to restrict their conduct do exist: a debtor cannot waive *ex ante* her right to petition for bankruptcy relief, for example; nor can she bind herself not to grant security interests to subsequent creditors (a so-called "negative pledge"). 11 U.S.C. § 524(a) (1988); U.C.C. § 9-311 (1990). In these situations, public policies apart from the interests of the bargaining parties come into play. For discussions, see Hirsch, *supra* note 8, at 209-10; RAY D. HENSON, HANDBOOK ON SECURED TRANSACTIONS UNDER THE UNIFORM COMMERCIAL CODE 193-94 (2d ed. 1979).

lent conveyances, certain "boilerplate" limitations on debtor conduct are also read into every contract for credit.

If a debtor transfers assets while insolvent or in anticipation of subsequent insolvency, thereby depriving creditors of the opportunity to recover what is in effect the corpus of the loan itself, fraudulent conveyance law provides that creditors can reach the transferred property; likewise, creditors can set aside any transfer made with intent to hinder the satisfaction of their claims.<sup>318</sup> Presumably, no creditor in the ordinary run of situations would grant a debtor leave to render herself spontaneously judgment-proof; nor would creditors readily consent to acts performed by debtors with the intention of evading their contractual obligations. By saving creditors the trouble of drafting these restrictions into loan contracts, fraudulent conveyance law reduces transaction costs. But beyond these points, the parties' wishes are more difficult to anticipate, and so it is left up to them expressly to introduce further restraints (or unrestraints) on conduct into each contract; additional presumptions of intent would fail to promote transactional efficiency.<sup>319</sup>

From the perspective of creditors, the self-settlement of a spendthrift trust closely resembles a conveyance to third parties: whether property is alienated or simply rendered *inalienable*, creditors lose their opportunity to levy against it, which is all that matters from their point of view. With this observation comes a simple solution to the problem at hand. In order to sidestep the hazard indicated by critics of self-settled spendthrift trusts, lawmakers need only deem the creation of an involuntary disabling restraint a "transfer" for purposes of fraudulent conveyance law.<sup>320</sup> In that event, the limits on self-settling construed into contracts for credit will match precisely those covering outright gifts to others; creditors surely would no sooner (and no later) allow a debtor to render *inalienable* the corpus of property that was loaned to her than they would allow her to give the corpus away. But beyond this point, so long as the debtor lacks fraudulent intent and remains solvent, gifts *as well as self-imposed involuntary restraints* do no immediate injury to creditors; hence, we cannot anticipate

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318. U.F.C.A. §§ 4, 6, 7, 7A U.L.A. 474, 507, 509 (1918); U.F.T.A. §§ 4, 5, 7A U.L.A. 652-53, 657 (1984).

319. For a discussion of the public policies underlying fraudulent conveyance law, see Douglas G. Baird & Thomas H. Jackson, *Fraudulent Conveyance Law and Its Proper Domain*, 38 VAND. L. REV. 829 (1985); cf. David G. Carlson, *Is Fraudulent Conveyance Law Efficient?*, 9 CARDOZO L. REV. 643 (1987) (criticizing Baird and Jackson).

320. Cf. Weiss, *supra* note 78, at 1293 (arguing that the opportunity to self-settle ERISA pensions in anticipation of insolvency provides a justification for making pensions subject to creditors' claims); see also *infra* note 347.

creditors' level of tolerance for those restraints. A contractual ban on involuntary restraints, as on gifts, by solvent debtors should be enforceable, but it should not be implicit. The two problems are structurally analogous and should be treated alike.

In his celebrated treatise on the law of trusts, Professor Bogert asserted that fraud was the only credible explanation for self-executing a spendthrift clause. When a person does so, fraudulent intent should be conclusively presumed, as in effect it is under current law.<sup>321</sup> I take issue with this hypothesis.

Why might an individual wish to disable herself and her creditors from reaching a portion of her property other than to defraud them? One possible motive corresponds with that of a paternal benefactor—just as a parent may recognize in her child a propensity to overspend or overborrow, so might an individual recognize this same propensity in herself. By creating her own voluntary and involuntary disabling restraints, an individual can deprive herself of the opportunity to overspend or overborrow, and thereby shield herself from financially destructive impulses that she anticipates having to contend with in the future. As a consequence, she spares herself from eventual regret.<sup>322</sup> This strategy, known today as precommitment or self-paternalism, is of course the same one that Ulysses followed when he lashed himself to the mast of his ship, lest he succumb to the song of the Sirens.<sup>323</sup> It is a strategy adopted often enough in everyday life.<sup>324</sup> To

321. BOGERT & BOGERT, *supra* note 2, § 223, at 448-49; *see also* RESTATEMENT (SECOND) OF TRUSTS § 156 cmt. a (1955) (deeming proof of fraudulent intent unnecessary in a creditor's challenge to a self-settled spendthrift trust).

322. One case ruling that an individual could self-settle a spendthrift trust—if he is a convict awaiting confinement—acknowledged this motivation: "It takes no great foresight on [the self-settlor's] part . . . to foresee that his wealth and his unfortunate situation will result in efforts being made by those who have access to him to obtain his wealth. It takes no great foresight on his part to foresee that imprisonment, which is punishment, will weaken his will, and that his desire for liberty will make him credulous." Booth v. Chadwick, 154 S.W.2d 268, 274 (Tex. Civ. App. 1941). For prior commentary asserting that self-settlement should be available for "the man who realizes that he is a spendthrift," *see* Costigan, *supra* note 18, at 492; Note, *supra* note 135, at 1332.

323. For general discussions, *see* ELSTER, *supra* note 59, at 1-111; THOMAS C. SCHELLING, CHOICE AND CONSEQUENCES 57-112 (1984); Mary E. Deily & W. Robert Reed, *Temptation, Willpower, and the Problem of Rational Self-Control*, 5 RATIONALITY AND SOC'Y 455 (1993); Hoch & Loewenstein, *supra* note 77, at 501; Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649 (1992); Thomas C. Schelling, *Self-Command in Practice, in Policy, and in a Theory of Rational Choice*, AM. ECON. REV. 1 (May 1984) (separately paginated *Papers and Proceedings* issue); Thomas C. Schelling, *Enforcing Rules on Oneself*, 1 J.L. ECON. & ORGANIZATION 357 (1985).

324. Sometimes, even to the point of Ulyssian physical restraint. Drug addicts sometimes request that others *lock them up* until they have gone cold turkey. *E.g.*, Jeremy Lerner & Ralph Tefferteller, *The Addict in the Street*, in GETTING BY: ILLUSTRATIONS OF MARGINAL LIVING, 131, 135-36 (Jerry Jacobs, ed. 1972).

pick an illustration that may resonate with the reader, why does a scholar agree to present a paper at a professional conference? One reason is to gain recognition, of course, and perhaps also to gain access to the reactions and insights of his peers; but there may be more to it than that. An ulterior motive may be to commit himself to write the paper at all!<sup>325</sup> We inhabitants of the academy are not, let us face it, the most disciplined folk on earth; sometimes it helps to know that we have a deadline. Nor is it only lazy professors, making academic choices, who follow this sort of strategy. Politicians, thrown into the arena of public choice, do it too. My favorite example is the proposed Balanced Budget Amendment (which remains in limbo at the federal level, though it has already found its way into several state constitutions<sup>326</sup>). Knowing that when the time comes they may become enthralled by the sweet melodies of the lobbyists, beckoning them to make expensive appropriations, many politicians would rather lash themselves to the mast of legislative restraint. Homer no doubt would have been delighted!

Are there any extant examples of precommitment in connection with individual *financial* choices? Indeed there are.<sup>327</sup> Some sport and entertainment figures use intermediaries (often their attorneys) as receiving agents for their salaries and then put themselves on an "allowance." According to press accounts, Frank Sinatra, a legendary big spender, has had resort to this device.<sup>328</sup> More humble wage earners sometimes make a practice of claiming too few exemptions on their W-4 forms in order to force themselves to save during the year, a strategy formalized via "contractual" saving devices such as payroll saving plans and, in the longer term, by Individual Retirement Accounts and voluntary contributions to ERISA-qualified pension plans.<sup>329</sup>

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325. Perhaps drawing on personal experience, several students of self-paternalism have made this point; see, for example, Thaler & Shefrin, *supra* note 77, at 397.

326. *E.g.*, PA. CONST. art. 8, § 12.

327. Professor Schelling has decried the law's failure in general to *enforce* mechanisms of precommitment, calling this "a gap in our legal institutions." SCHELLING, *supra* note 323, at 103; *id.* at 79, 98-107. In fact, this supposition is inaccurate with regard to financial planning: both informal and legal precommitment devices do exist in that regard, as will appear hereafter.

328. Jerry Adler et al., *Frankie and Ronnie*, NEWSWEEK, Jan. 19, 1981, at 20, 20. Noting the practice among professional athletes, see Thaler & Shefrin, *supra* note 77, at 401.

329. KATONA, *supra* note 100, at 230-31 (coining the phrase "contractual saving"); KATONA & MUELLER, *supra* note 133, at 131-43, 237-41; RICHARD THALER & H.M. SHEFRIN, PENSIONS, SAVINGS, AND TEMPTATION (Graduate School of Business and Public Administration Working Paper No. 81-26, Cornell Univ. 1981); Paul Taubman, *Determinants of Pension Benefits*, in PENSIONS, LABOR, AND

Alternatively, persons may intentionally place assets out of easy reach, for example, by converting them into illiquid forms. Thus did the ever-observant Justice Holmes applaud whole life insurance as "one of the best recognized forms of investment *and self-compelled saving*."<sup>330</sup> A related tactic is to make purchases or borrowing more difficult by intentionally leaving behind most of one's cash or one's credit cards when going shopping.<sup>331</sup> But perhaps the classic example of financial precommitment is the so-called Christmas club. Christmas clubs, which by tradition pay no or low interest, lock in the deposits made to them until December of each year. Participants have been willing to pay a premium (in the form of forgone interest) to bind themselves not to spend by depositing moneys into these, rather than into their regular, interest-bearing accounts. And banks, recognizing this desire, have been canny enough to *demand* a premium for a service that is already in their mercenary interest!<sup>332</sup>

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INDIVIDUAL CHOICE 123, 155 (David A. Wise ed., 1985); Thaler, *supra* note 58, at 199-200; Thaler & Shefrin, *supra* note 77, at 401; Gordon C. Winston, *Addiction and Backsliding: A Theory of Compulsive Consumption*, 1 J. ECON. BEHAV. & ORGANIZATION 295, 315-16 (1981); *infra* note 347. Individual retirement accounts and some pension plans do permit early withdrawal, though at some monetary penalty. In such cases, precommitment takes the form of a "side bet" (as the theorists say), inhibiting deleterious conduct by making it more costly. AINSLIE, *supra* note 77, at 153-54; Howard S. Becker, *Notes on the Concept of Commitment*, 66 AM. J. SOC. 32, 35-36 (1960).

In still another variation, consumers with liquid assets on which to draw may nonetheless prefer to make purchases with installment credit, in order to force themselves to save (in effect) by making debt payments; whereas, if they financed the purchase with their liquid assets, they might lack the willpower to restore them. KATONA, *supra* note 100, at 277-78 (adding that "[a]mong installment buyers with sizable liquid assets such an awareness of their own frailty was not uncommon"); Dolde & Tobin, *supra* note 39, at 62.

330. Grigsby v. Russell, 222 U.S. 149, 156 (1911) (emphasis added).

331. Hoch & Loewenstein, *supra* note 77, at 501; Rook & Hoch, *supra* note 107, at 26. Other credit card holders make a habit of using their cards only for emergencies, in order to avoid using them excessively for ordinary consumption. R.Y. Awh & D. Waters, *A Discriminant Analysis of Economic, Demographic, and Attitudinal Characteristics of Bank Charge-Card Holders: A Case Study*, 29 J. FIN. 973, 979-80 (1974). Such self-imposed habits are known in the technical literature of self-paternalism as "rules of thumb." For other rules of thumb observed in connection with debt, see Thaler & Shefrin, *supra* note 77, at 397-98 & n.5. For a general discussion, see AINSLIE, *supra* note 77, at 236-42. Finally, of course, one may avoid having credit cards at all, a tactic often recommended by consumer credit counselors. SULLIVAN ET AL., *supra* note 107, at 178, 189; *In re Goodson*, 130 B.R. 897, 903 (Bankr. N.D. Okla. 1991).

332. SCHELLING, *supra* note 323, at 57-58; Loewenstein & Thaler, *supra* note 77, at 186; Thaler & Shefrin, *supra* note 77, at 392-93; Winston, *supra* note 329, at 315-16, 322-23 (noting generally the development of "anti-markets" in products or firms that consumers buy or employ in order to help them *not* to consume). The child's version of the illiquid Christmas club account: the venerable piggy bank! Richard H. Thaler, *How to Get Real People to Save*, in PERSONAL SAVING, CONSUMPTION, AND TAX POLICY 143, 145-46 (Marvin H. Kosters ed., 1992).



Both from a moral and a utilitarian standpoint, self-paternalism appears even easier to justify than parental paternalism. Self-paternalism entails no interference with individual autonomy.<sup>333</sup> And it is also more likely to accomplish its aim of maximizing happiness over time, in that the self-paternalist knows herself better than the other-paternalist does. In addition, as we have seen, observers taking on the role of paternalist may fall prey to a variety of attribution errors to which the actor herself is immune.<sup>334</sup> This is not to say that all actors are infallible in their self-knowledge. Like an observer, they too may miscalculate, failing to anticipate emergencies, or they may succumb to "self-deception."<sup>335</sup> Once again, the safety valve of a judicial petition to dissolve a self-imposed disabling restraint should, I believe, remain available.<sup>336</sup> Still, a self-settled spendthrift trust is, if anything, more likely to redound to the beneficiary's ultimate advantage than an other-settled one.

333. ELSTER, *supra* note 59, at 85; Calabresi & Melamed, *supra* note 39, at 1113; Gerald Dworkin, *Paternalism*, in *PATERNALISM*, *supra* note 179, at 19, 23. On the other hand, it is possible to argue that self-paternalism crowds the *subsequent* autonomy of the individual and thus presents a moral dilemma similar to (actually a weak form of) self-enslavement. See Gordon C. Winston, *The Reasons for Being of Two Minds: A Comment on Schelling's "Enforcing Rules on Oneself,"* 1 J.L. ECON. & ORGANIZATION 375, 378 (1985) (viewing self-paternalism as akin to paternalism in a two-person model wherein "we have the *imposition* of a rule or constraint on the future self by the present self"). On the dilemma of self-enslavement, see generally the references in Hirsch, *supra* note 8, at 204 n.91. Furthermore, self-paternalism can be criticized on a basis analogous to a key criticism of other-paternalism, namely that it forms the subsequent values of the object. See *supra* note 69. Just as an other-paternalist may impose her own values on her object, so may a self-paternalist impose her *early* values on her *later* self. The consequence in this context will be not external influence on character, but rather "excessive rigidity of character." ELSTER, *supra* note 69, at 114-15 & n.12. Discussing various criticisms of self-paternalism, see Kuklin, *supra* note 323, at 661-71.

334. See *supra* notes 152-56 and accompanying text.

335. SCHELLING, *supra* note 323, at 104-05; Kuklin, *supra* note 323, at 664-65, 670-71. Whereas self-deception is usually associated with wishful thinking, and hence tends in the direction of overly optimistic self-assessments, the phenomenon sometimes takes the perverse form of excessive pessimism and so could lead persons to seek to impose unwarranted restraints upon themselves. On self-deception, see BARON, *supra* note 73, at 44-47, 294-302; ELSTER, *supra* note 69, at 148-57; ELSTER, *supra* note 59, at 172-79; KAPLAN, *supra* note 154, at 109, 155; SELF-DECEPTION AND SELF-UNDERSTANDING (Mike W. Martin ed., 1985); George A. Quattrone & Amos Tversky, *Self-Deception and the Voter's Illusion*, in *THE MULTIPLE SELF* 35 (Jon Elster ed., 1986); David Pears, *The Goals and Strategies of Self-Deception*, in *THE MULTIPLE SELF*, *supra*, at 59; Donald Davidson, *Deception and Division*, in *THE MULTIPLE SELF*, *supra*, at 79; Jon Elster, *Deception and Self-Deception in Stendhal: Some Sartrian Themes*, in *THE MULTIPLE SELF*, *supra*, at 93; Amélie O. Rorty, *Self-Deception, Akrasia and Irrationality*, in *THE MULTIPLE SELF*, *supra*, at 115. Suggesting that self-deception has adaptive value, see Harold A. Sackeim, *Self-Deception, Self-Esteem, and Depression: The Adaptive Value of Lying to Oneself*, in 1 *EMPIRICAL STUDIES OF PSYCHOANALYTICAL THEORIES* 101 (Joseph Masling ed., 1983).

336. See *supra* note 167 and accompanying text.

Apart from exercises in self-paternalism, self-imposed restraints against involuntary alienation hold out other, economic benefits. Conceivably, an individual might wish to create an involuntary restraint for purposes of value maintenance if she happened to inherit a life estate or other future interest not yet clothed with such a restraint.<sup>337</sup> More significantly, self-imposed involuntary restraints would afford potential borrowers an opportunity to modulate efficiently their credit risk-cost ratios. The larger the corpus of property placed out of creditors' way, the safer the debtor against the risk of default—but also the lower the availability of, and the higher the price demanded for, any credit she seeks.<sup>338</sup> The motive identified here corresponds with the security function of disabling restraints.<sup>339</sup> In the case of self-settled trusts, however, the utility of that function is once again amplified, for the debtor stands in a position to apply this device to all her (net) property<sup>340</sup> and to select a credit risk-cost ratio that she deems personally optimal. In this respect, a self-imposed involuntary restraint would be structurally analogous to a mortgage or an Article Nine security interest, which enables *creditors*, in turn, to modulate *their* risk-return ratios.<sup>341</sup> Again, the debtor could in theory accomplish

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337. See *supra* notes 207-12 and accompanying text. Presumably, commercial annuities and nonexempt pension accumulations do *not* pose a value maintenance problem, given that they have a definite cash surrender value. But a disabling restraint might conceivably be applied to other items of property that the individual happens to value subjectively above their objective value.

338. Once again, there is nothing deceptive to creditors about a self-settled spendthrift trust. These require delivery to a third-party trustee or segregation in a labeled trust account. See *supra* notes 229-40 and accompanying text. But see Mackason's Appeal, 42 Pa. 330, 337-38 (1862) (asserting the contrary); cf. Booth v. Chadwick, 154 S.W.2d 268, 274 (Tex. Civ. App. 1941) (suggesting, in a case permitting prison inmates to self-settle spendthrift trusts, that the inmates' lack of opportunity to "defraud trusting creditors" was exceptional).

339. Professor Griswold endorsed self-settled spendthrift trusts on this basis: "There is ample room to argue that a man while solvent should be able to lay by a moderate source of support for the uncertain future." GRISWOLD, *supra* note 1, § 557, at 644-45. In this regard, "A man who earns his own way should have the same opportunity for protection from adversity as the man who takes his support from others." *Id.*

340. That is to say, within the constraints set by fraudulent conveyance law, or so I would advocate. See *supra* text at note 320.

341. Discussing the efficiency of security interests in this respect, see James J. White, *Efficiency Justifications for Personal Property Security*, 37 VAND. L. REV. 473, 491-502 (1984). But cf. Alan Schwartz, *The Continuing Puzzle of Secured Debt*, 37 VAND. L. REV. 1051, 1060-66 (1984); Alan Schwartz, *A Theory of Loan Priorities*, 18 J. LEGAL STUD. 209 (1989) (setting forth a broader discussion). Schwartz questions White's assumption that commercial lenders display disparate risk preferences, thereby weakening the argument for the utility of security interests. Whereas White's assumption may be problematic with respect to commercial actors, it is plainly applicable to consumers; thus, by analogy, his argument gains strength in connection with debtor opportunities to tinker with risk.

the same result by negotiating individual loan covenants to limit recourse in separate credit transactions. But that approach would entail a higher (almost certainly prohibitive) aggregate transaction cost.<sup>342</sup>

It bears noticing that in a variety of contexts lawmakers already allow persons unilaterally to enhance their financial security by insulating a portion of their assets from creditors' claims. If an individual engages in commercial activity, of course, she can protect nonbusiness assets from business creditors by incorporating,<sup>343</sup> or by forming a limited partnership or a limited liability company.<sup>344</sup> Within limits set by the law of fraudulent conveyances, individuals can also protect assets from nonbusiness creditors by converting them into exempt property,<sup>345</sup> by conveying separate property into a tenancy by the entirety,<sup>346</sup> or by making voluntary contributions to an ERISA-qualified pension plan.<sup>347</sup> In the wake of

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342. See *supra* notes 213-14 and accompanying text.

343. On the utility of incorporation to achieve an optimal risk-return package, see POSNER, *supra* note 20, § 14.4, at 397; Posner, *supra* note 205, at 503.

344. The point failed to dawn on some early critics of self-settled spendthrift trusts, possibly because limited liability was not universal in the nineteenth century. But to a modern ear, the fear that "[e]very man about to engage in business where there was a chance of loss, would place himself under the pupilage of trustees." has a delightfully ironic tone. Mackason's Appeal, 42 Pa. 330, 338 (1862); see also Schenck v. Barnes, 50 N.E. 967, 968 (N.Y. 1898). On the historical rise of limited liability, see STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 1.03[1] (1991). On the modern variant of limited liability companies, see James W. Lovely, *Agency Costs, Liquidity, and the Limited Liability Company as an Alternative to the Close Corporation*, 21 STETSON L. REV. 377 (1992); on their use in estate planning, see Richard M. Horwood, *Limited Liability Companies Provide New Planning Options*, 21 EST. PLAN. 266 (1994).

345. Alan N. Resnick, *Prudent Planning or Fraudulent Transfer? The Use of Nonexempt Assets to Purchase or Improve Exempt Property on the Eve of Bankruptcy*, 31 RUTGERS L. REV. 615, 620-43 (1978). Though exemption statutes typically place limits on the value of the items exempted from creditors' claims, whole life insurance policies in some jurisdictions are exempt without limit under state law. BUIST M. ANDERSON, *ANDERSON ON LIFE INSURANCE* § 21.7 (1991); SCHWARZSCHILD, *supra* note 14, at 206-23; Brackney, *supra* note 14.

346. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 327, 374-75 (3d ed. 1993) (noting that tenancies by the entirety are presently permitted in somewhat less than half the states); e.g., Sawada v. Endo, 561 P.2d 1291 (Haw. 1977); *In re Estate of Wall*, 440 F.2d 215, 219-20 (D.C. Cir. 1971) (applying fraudulent conveyance law to tenancies by the entirety). Because tenancies by the entirety are exempt from creditors' claims, several courts have held valid spendthrift trusts that were self-settled with entireties property. See *supra* note 14. This raises the possibility that, in jurisdictions where the opportunity arises, a married person could self-settle a spendthrift trust in two steps rather than one.

347. MICHAEL J. CANAN, *QUALIFIED RETIREMENT AND OTHER EMPLOYEE BENEFIT PLANS* §§ 14.1-.6 (1988) (noting additional statutory limits on voluntary contributions); Richard A. Montague, Jr. & Gena R. Lentz, *The Case of the Missing Footnote: Can Creditors Recover Fraudulent Transfers from ERISA-Qualified Pension Plans?*, 13 MISS. C. L. REV. 91 (1992). Still another expedient of growing popularity among the well-to-do is the offshore asset protection trust, which is effectively shielded from

these venerable contrivances, the prohibition against self-settled spendthrift trusts appears all the more unthematic.

### CONCLUSION

And yet, and yet. When we have cleared our minds of all the theoretical chatter, spendthrift trust laws may still leave us feeling troubled, in much the same way as the old English game laws were troubling. Each in their respective age created an asymmetry between the legal rights of different socioeconomic groups.<sup>348</sup> The spendthrift trust beneficiary, racking up debts on her American Express card, can dodge her obligations free and clear; whereas the impoverished wage earner, borrowing on her Sears card, finds her wages garnished when she runs into difficulty settling her account.<sup>349</sup> The law is at its old business of fortifying the Haves (some would say) and leaving the Have-nots to their own devices.<sup>350</sup>

Of course, it is easy to respond that spendthrift trusts are open to everyone in the abstract; unlike the game laws, modern trust law does not nakedly discriminate between the rights of different individuals on the basis of social status.<sup>351</sup> That is too facile, however, for spendthrift trusts are

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creditors' claims. Discussing offshore trusts and the challenge they pose to the traditional policy against self-settled spendthrift trusts, see Elena Marty-Nelson, *Offshore Asset Protection Trusts: Having Your Cake and Eating It Too*, 47 RUTGERS L. REV. 11 (1994).

348. On the game laws, see *infra* note 351.

349. I have exaggerated the point slightly for rhetorical effect: assuming she has no other unencumbered assets, the spendthrift trust beneficiary should have no easy time obtaining an American Express card. Still, the potential benefits of a spendthrift trust to those in a position to acquire them are clear. See *supra* notes 200-214 and accompanying text.

350. In this regard, it has sometimes been suggested that spendthrift trusts tend to concentrate wealth in society. Professor Gray spoke of the spendthrift trust as establishing an "aristocracy," and he dipped back beyond the game laws, to the Statute de Donis Conditionalibus of 1258, establishing the fee tail estate, for a comparable symbol of the times. GRAY, *supra* note 16, at vi, § 262. For similar assertions, see 6 AMERICAN LAW OF PROPERTY, *supra* note 32, § 26.3, at 413; Friedman, *supra* note 7, at 576-77, 582-83; Manning, *supra* note 18, at 403-04; Scott, *supra* note 35, at 644; Vukowich, *Exemption Rights in Bankruptcy*, *supra* note 44, at 770. Spendthrift trusts may indeed redound to the financial advantage of their beneficiaries, as we have seen; nevertheless, they do not function like future interests to hold together fortunes across generations; hence, they do not contribute (other than incidentally) to the *intergenerational* transmission of inequality. In that sense, the suggestion that disabling restraints foster "aristocracy" or "plutocracy" appears inapt.

351. The English game laws of the late seventeenth and eighteenth centuries limited hunting only to those persons who enjoyed a sufficient annual income. This legal distinction grew even starker after 1723, when the Black Act made violations of some of the game laws a capital offense. Douglas Hay, *Poaching and the Game Laws on Cannock Chase*, in ALBION'S FATAL TREE 189, 189-93 (Douglas Hay et al. eds., 1975); E.P. THOMPSON, WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT (1975). At

of concrete use only to the recipients of a particular *sort* of income (to wit, the passive sort), which amounts to the same thing.<sup>352</sup> Indeed, the sense of social injustice flowing from this reality can only be heightened by the fact that some individuals, rightly or wrongly, deem inherited wealth morally illegitimate to begin with.<sup>353</sup> The point was noticed long ago, in an obscure opinion by an obscure judge, who in 1911 pronounced that "it would be very unfortunate if we were constrained to hold that the income from property held in trust . . . should be more secure than that income which a man produces by his own toil and efforts."<sup>354</sup> More recently, critics of the spendthrift trust have returned to this theme, assailing the doctrine for creating "inequality before the law."<sup>355</sup> A certain Professor Callahan, writing two decades ago in the *Wayne Law Review*, concluded his critique of the spendthrift trust with the rallying cry, "Workers of Michigan arise!"<sup>356</sup> Should we, as policy analysts, hearken to Professor Callahan's call to arms?<sup>357</sup>

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one time, however, spendthrift trust law was as nakedly discriminatory in some jurisdictions as any edict of the House of Lords. Within jurisdictions permitting creditors to reach surplus income from spendthrift trusts above the amount necessary for their beneficiaries' support, courts examined the beneficiaries' *station in life* in order to assess how much of the income was necessary and how much was surplus. Professor Gray was vexed enough by the general validity of disabling restraints; the station-in-life rule drove him past anger, to the brink of apoplexy. GRAY, *supra* note 16, at xi. But the station-in-life rule, at least, has since become extinct in the United States. BOGERT & BOGERT, *supra* note 2, § 227, at 516-19; C.R. McCorkle, Annotation, *Surplus Income of Trust, in Excess of Amount Required for Support and Education of Beneficiary, as Subject to Claims of Creditors*, 36 A.L.R.2d 1215 (1954).

352. See Stewart E. Sterk, *Restraints on Alienation of Human Capital*, 79 VA. L. REV. 383 (1993) (arguing by analogy that because of their disparate impact, rules rendering *human* capital inalienable, such as the discharge in bankruptcy, are suspect on egalitarian grounds).

353. Kenneth V. Greene, *Inheritance Unjustified?*, 16 J.L. & ECON. 417, 418-19 (1973). This sentiment, of course, does not hold among the well-heeled. See VEBLEN, *supra* note 86, at 37 (asserting that "wealth acquired passively by transmission from ancestors or other antecedents [has become] even more honorific than wealth acquired by the possessor's own effort").

354. *Brearley School, Ltd. v. Ward*, 201 N.Y. 358, 373 (1911) (Bartlett, J.).

355. Bushman, *supra* note 7, at 312, 316-18 (quotation at 318); CHESTER, *supra* note 15, at 135-38; JESSE DUKEMINIER & STANLEY M. JOHANSON, *WILLS, TRUSTS, AND ESTATES* 548-49 (4th ed. 1990) (voicing concern about the "symbolic impact" of the spendthrift trust).

356. Kenneth R. Callahan, *Trusts and Succession*, 22 WAYNE L. REV. 663, 695 (1976); see also *id.* at 692-95.

357. Legislators in at least one jurisdiction have responded to this concern. In California, the statute authorizing spendthrift trusts is modelled after garnishment law, so that each respectively accords to income from trusts and income from wages the same degree of protection against creditors' claims. Compare CAL. PROB. CODE § 15306.5 (a-c) (West 1987) with CAL. CIV. PROC. CODE §§ 706.050-051 (West 1987) and 15 U.S.C. § 1673 (a) (1988). This legal symmetry was intentional. See Legislative

At the end of the day, I will venture to say that the answer is no. In connection with spendthrift trusts, we may implement the rules dictated by economic theory with equanimity, heedless to any perceptions or misperceptions of injustice they may generate.

Law and economics has its limitations, but it also has its place. On the one hand, for a Richard Posner or a Gary Becker to examine racial discrimination as a problem in *efficiency*,<sup>358</sup> apart from being vaguely distasteful, seems almost to trivialize the issue. Surely, one's willingness to pay in connection with racial discrimination wanes insignificant beside one's willingness to fight for fundamental ideals of human dignity. But when it comes to issues that fail to stir us in this way, we may with propriety give vent to economic concerns.<sup>359</sup> Spendthrift trusts, of all things, surely fall into this second category. Professor Callahan's exhortation to the workers of Michigan thus ultimately strikes me as ironic (and I strongly suspect it was intended to be so). The image of outraged wage earners, flaming torches in hand, converging on state capitals to protest the spendthrift trust appears little short of ludicrous.<sup>360</sup> At most, one can imagine *jury* revolt against technical private law rules that strike them as viscerally unjust. That has happened on occasion (*Texaco v. Pennzoil* being a good example).<sup>361</sup> But juries will rarely sit in spendthrift trust cases. And for persons not called upon to participate in the judicial process, the issue will remain essentially invisible.

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Committee Comment—Assembly 1984 Amendment, *reprinted after* CAL. CIV. PROC. CODE § 709.010 (West 1987) (discussing prior, substantively equivalent law).

358. POSNER, *supra* note 20, §§ 26.1-5; GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed. 1971).

359. Conceivably, we could weave into a welfare analysis the loss of utility that results when those who lack spendthrift trusts experience *envy* of those who do. Whether lawmakers ought to acknowledge envy as a *morally* legitimate policy determinant, absent manifest social repercussions, seems doubtful, however. See the modern discussion in RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 82-83 (1981); and a bit earlier, *Exodus* 20:17.

360. See Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 408-09 (surveying studies suggesting widespread public ignorance of legal rules and judicial pronouncements not personally affecting those surveyed). *But see* GRAY, *supra* note 16, § 263a (anticipating that spendthrift trusts would "inflame" class jealousy and prompt political agitation against them). Historically, one can point to instances in which disaffected debtors actually took the law into their own hands. See, for example, ROBERT A. FEER, *SHAYS'S REBELLION* (1988). An organized debtor movement no longer exists in this country, however. For a related discussion, see Hirsch, *supra* note 8, at 245 n.236.

361. See the discussion in Michael Ansaldi, *Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem*, 27 HOUS. L. REV. 733, 835-40 (1990).

Only in academic fora (such as these pages) will the question arise, and there any offense caused by the outcomes of economic analysis carries no social significance. Thirty years ago, a commentator opined that the “raging controversy over spendthrift trusts [has] generated more heat than light.”<sup>362</sup> That controversy, such as it was, has since cooled, but even were it to blaze anew, it would remain safely confined, as it has always been, to a community of scholars who often seem to thrive on heat.

Perhaps it helps to warm their imagination.

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362. Kreider, *supra* note 233, at 284. Asserting a different heat-to-light ratio, see Emanuel, *supra* note 15, at 179-80. Gray himself admitted to feeling feverish: “While I was musing, the fire burned. *Vae mihi si non evangelizavero* [woe unto me if I have not evangelized].” But Gray added, “I trust that my strong opinion . . . has not rendered me careless in collecting the authorities, or unfair in the statement of them.” GRAY, *supra* note 16, at iv, xi. *Dubitatur!*

