The Effects of Donor Standing on Philanthropy: Insights from the Psychology of Gift-Giving

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I. INTRODUCTION

Societies have long struggled with contradictions between the ideals of philanthropy and the real motives of philanthropists. Cultural artifacts such as traditional Jewish legal codes[1] and the legend of Saint Nicholas of Myra[2] show that societies especially revere philanthropists who give anonymously, without expectation of repayment. But contrary to these ideals, donors often use philanthropy to obtain personal rewards, such as the wealthy patrons of ancient Greece whose opulent displays of benefactions were aimed at social status and political dominance.[3] The gap between ideals and reality creates a dilemma: societies wish to promote philanthropy, but offering incentives can taint the authenticity of the donor's intent. This dilemma is central to the recent policy debate about the enforceability of donor-imposed gift restrictions. The law has traditionally allowed donors to pursue their personal charitable goals by imposing restrictions on the use of charitable gifts, but until recently, donors lacked legal standing to enforce their restrictions in court.[4] In this Article, we describe the detrimental effects of donor enforcement rights on the public's shared interest in charitable assets, and we review psychological research suggesting that donor standing is unlikely to promote charitable giving.

The public's interest in charitable assets arises from the federal government's substantial allocation of financial resources to charitable organizations. Charitable assets are heavily subsidized through direct government spending, tax exemptions for charitable organizations, and tax expenditure provisions for charitable contributions. In 2007, for example, the most well-known subsidy—the individual income tax deduction for charitable contributions—cost the federal government $40.9 billion in forgone tax revenue.[5] By one account, the federal government is "the largest single source of direct and indirect revenue for

1. The Jewish scholar Moses Maimonides (1135-1204) identified eight levels of philanthropy with double-blind gifts occupying the second highest level of almsgiving. Jacob Neusner & Alan J. Avery-Peck, *Altruism in Classical Judaism*, *in* ALTRUISM IN WORLD RELIGIONS, 31, 35-36 (Jacob Neuser & Bruce D. Chilton eds., 2005).

2. According to legend, Saint Nicholas of Myra anonymously delivered bags of money to the poor, sometimes down the chimney. He is the basis of the character Santa Claus. *See* BRUCE DAVID FORBES, CHRISTMAS: A CANDID HISTORY, 69-70 (2007).

3. *See* Kevin C. Robbins, *The Nonprofit Sector in Historical Perspective: Traditions of Philanthropy in the West*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK, 13, 15-16 (Walter W. Powell & Richard Steinberg eds., 2d ed. 2006).

4. *See infra* notes 16-18 and accompanying text.

5. H. COMM. ON WAYS AND MEANS AND THE S. COMM. ON TAXATION, ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2008-2012, Table 6, at 72, *available at* http://www.house.gov/jct/s-2-08.pdf.

nonprofits."[6] The government's sizable financial support for the nonprofit sector vests the taxpaying public with a reasonable expectation that charitable assets should be used to advance socially beneficial objectives.

Donor-imposed gift restrictions have the potential to undermine the public's interest in charitable assets.[7] The charitable trust,[8] commonly used to convey tax-deductible, restricted gifts, provides donors with vast discretion to set restrictive terms without public scrutiny or recourse so long as the transaction does not suggest a *quid pro quo* exchange.[9] While many restrictions are well-intended, the broad legal definition of "charitable" creates potential for donors to restrict charitable gifts to activities and causes of personal importance to the donor, but of negligible benefit to the public. The recent creation of donor enforcement rights makes the imposition of restrictions more attractive to donors and reduces the independence of charities by entrenching restrictions that might not otherwise be enforced.

Historically, the common law prevented donors from exerting continued influence over charitable assets through the legal doctrine of standing.[10] In general, "the question of standing depends upon whether the party has alleged such a personal stake in the outcome of the controversy . . . as to ensure that the dispute sought to be adjudicated will be presented in an adversary context and in

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6. Peter D. Hall, *The Welfare State and the Careers of the Public and Private Institutions Since 1945*, *in* CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY 363, 365 (Lawrence J. Friedman & Mark D. McGarvie eds., 2003).

7. To account for the numerous legal vehicles for restricted charitable gifts, we use the words "donor," "settler," and "grantor" interchangeably and "charitable organization," "nonprofit organization," and "trustee" interchangeably throughout this article.

8. A trust is a fiduciary relationship with respect to property. *See* RESTATEMENT (THIRD) OF TRUSTS § 2 (2003):

> A trust . . . is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee.

The common law typically recognizes four elements of a trust: "(1) a designated beneficiary, (2) a designated trustee, who is not the same person as the beneficiary, (3) a clearly identifiable res, and (4) the delivery of the res by the settlor to the trustee with the intent of vesting legal title in the trustee." Agudas Chasidei Chabad of U.S. v. Gourary, 833 F.2d 431, 433-34 (2d Cir. 1987) (citation omitted) (providing elements of trust under New York law); *In re* Kent, 396 B.R. 46, 50 (Bankr. D. Ariz. 2008) (providing elements of trust under Arizona law). A charitable trust must have a charitable purpose and benefit an unidentifiable class of the community. *See* RESTATEMENT (THIRD) OF TRUSTS § 28 (2003); City of Palm Springs v. Living Desert Reserve, 82 Cal. Rptr. 2d 859, 865 (Cal. Dist. Ct. App. 1999); Doe v. Town of Colonial Beach, 37 Va. Cir. 238, 240 (Va. Cir. Ct. 1995); Rosser v. Prem, 52 Md. App. 367, 375 (Md. Ct. Spec. App. 1982).

9. *See infra* notes 24 and 38.

10. *See infra* note 13.

a form historically viewed as capable of judicial resolution."[11] At common law, donors lacked standing to enforce the terms of a charitable trust because no individual member of the public could claim a sufficient personal stake in the administration of charitable assets.[12] The attorney general, as *parens patriae*, was the proper party to enforce the public's shared interest in charitable assets.[13]

By separating the right to impose a gift restriction from the remedy to enforce it, the common law struck a balance between public and private interests. A donor could perpetuate a specific charitable intention by imposing restrictions on the future use of a charitable gift, but if charitable fiduciaries refused to comply, the public would decide whether the donor's restrictions should be

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11. Sierra Club v. Morton, 405 U.S. 727, 732 (1972) (internal citations and quotations omitted). The doctrine of standing requires that every plaintiff establish: "(1) an injury in fact (i.e., a concrete and particularized invasion of a legally protected interest'); (2) causation (i.e., a fairly... trace[able] connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit)." Sprint Commc'ns. v. APCC Servs., 128 S. Ct. 2531, 2535 (2008) (internal quotations omitted).

12. *See* Carl J. Herzog Found. v. Univ. of Bridgeport, 699 A.2d 995, 999 (Conn. 1997); Warren v. Bd. of Regents of the Univ. Sys. of Ga., 544 S.E.2d 190, 193 (Ga. Ct. App. 2001); Prentis Family Found. v. Barbara Ann Karmanos Cancer Inst., 698 N.W.2d 900, 913-14 (Mich. Ct. App. 2005); *see, e.g.*, Robert Schalkenbach Found. v. Lincoln Found., Inc., 91 P.3d 1019, 1024 (Ariz. Ct. App. 2004); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518, 645-46 (1819). As stated by the Court in *Woodward:*

> In every literary or charitable institution, unless the objects of the bounty be themselves incorporated, the whole legal interest is in trustees, and can be asserted only by them. The donors, or claimants of the bounty, if they can appear in court at all, can appear only to complain of the trustees. In all other situations, they are identified with, and personated by, the trustees; and their rights are to be defended and maintained by them.

Id.

13. *In re* Pruner's Estate, 136 A.2d 107, 109 (Pa. 1957) (footnotes and citations omitted):. The court in *Pruner's Estate* stated that:

> The beneficiary of charitable trusts is the general public to whom the social and economic advantages of the trusts accrue. But because the public is the object of the settlors' benefactions, private parties have insufficient financial interest in charitable trusts to oversee their enforcement. Consequently, the Commonwealth itself must perform this function if charitable trusts are to be properly supervised. The responsibility for public supervision traditionally has been delegated to the attorney general to be performed as an exercise of his *parens patriae* powers. These are the ancient powers of guardianship over persons under disability and of protectorship of the public interest which originally were held by the Crown of England as the "father of the country," and which as part of the common law devolved upon the states and federal government. Specifically, these powers permitted the sovereign, wherever necessary, to see to the proper establishment of charities through his officer, the attorney general, and to exercise supervisory jurisdiction over all charitable trusts.

Id.

enforced. The common law imposed a fiduciary duty of compliance on charitable trustees enforceable by the state attorney general, but insulated charities from vexatious litigation and harassment by donors.[14] Thus, the common law produced an equilibrium status: donor-imposed restrictions were binding only to the extent the attorneys general and the public at large chose to enforce them.

However, the attorneys general rarely intervened or filed suit to enforce donor-imposed terms of a restricted charitable gift. A growing number of courts and state legislatures began to view the common law standing rule as unfair absent routine oversight and enforcement by the state. Within the last decade, many state jurisdictions, fearing a possible chilling effect on charitable giving, abandoned the common law rule by statute or case law.[15] Under the Uniform Trust Code, adopted or introduced in half the states, the settlor of a charitable trust has standing to enforce the terms of a restricted charitable gift.[16] A number of other states have abandoned the rule by common law.[17]

The objective of this Article is to explore the consequences of granting donors the right to enforce terms of a restricted charitable gift. Part II describes the social objectives advanced by philanthropy, the policies designed to induce charitable giving, and the social costs of donor enforcement litigation. Part III examines the range of theories offered by proponents of donor standing with a particular focus on the assumption that the common law rule barring donor standing created a chilling effect on charitable giving. Part IV surveys three recent proposals for legal reform. Part V analyzes the chilling effect assumption based on research from experimental psychology. Part VI evaluates the validity of the chilling effect assumption and offers an argument against the grant of donor enforcement rights.

We conclude that once a federal tax benefit has been claimed, the law should not allow donor standing to enforce the terms of a restricted charitable gift because: (1) enforcement rights are not necessary to induce charitable giving; (2) enforcement rights encourage donors to view philanthropy as an economic exchange rather than as a gift; (3) when viewed as an exchange rather than as a gift, donors give less to charity, and/or impose restrictions that are inconsistent

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14. *See, e.g.*, Hooker v. Edes Home, 579 A.2d 608, 612 (D.C. 1990) (citation omitted). As noted by the court in *Hooker*:

> Principally, the rationale for vesting exclusive power in a public officer stems from the inherent impossibility of establishing a distinct justiciable interest on the part of a member of a large and constantly shifting benefited class, and the recurring burdens on the trust res and trustee of vexatious litigation that would result from recognition of a cause of action by any and all of a large number of individuals who might benefit incidentally from the trust.

Id.

15. *See infra* note 49.

16. *See infra* note 49.

17. *See infra* note 50.

with public policy governing the charitable sector; and (4) donors are unlikely to protect the public's interest in charitable assets through enforcement of their gift restrictions.

II. PUBLIC POLICY AND PHILANTHROPY

Public policy encourages philanthropy and charitable giving[18] to relieve poverty, advance knowledge, foster education and religion, promote good health, lessen the burdens of government and provide other socially beneficial public goods and services, including arts and culture.[19] Policy makers have had difficulty codifying the full range of charitable activities, but all notions of philanthropy recognize that public welfare can be improved by voluntary contributions of private resources for enjoyment by the community as a whole.[20]

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18. We use the words "philanthropy" and "charity" interchangeably throughout this article. For commentary on the historical distinction between philanthropy and charity, see Robert A. Gross, *Giving in America: From Charity to Philanthropy*, *in* CHARITY, PHILANTHROPY, AND CIVILITY IN AMERICAN HISTORY 29, 31 (Lawrence J. Friedman & Mark D. McGarvie eds., 2003) (describing charity as "an impulse to personal service; ... engag[ing] individuals in concrete, direct acts of compassion and connection to other people;" and describing the objective of philanthropy as "the promotion of progress through the advance of knowledge. By eliminating the problems of society that beset particular persons, philanthropy aims to usher in a world where charity is uncommon – and perhaps unnecessary").

19. RESTATEMENT (THIRD) OF TRUSTS § 28 (2003); *see also* 26 U.S.C. § 501(c)(3) (2006) (providing a federal income tax exemption for organizations "operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals....").

20. The official comments and illustrations that follow Section 28 of the Restatement (Third) of Trusts provide a thoughtful and comprehensive discussion of this struggle:

> The common element of charitable purposes is that they are designed to accomplish objects that are beneficial to the community—i.e., to the public or indefinite members thereof—without also serving what amount to private trust purposes.... As long as the purposes to which the property of the trust is to be devoted are charitable, however, the motives of the settlor in creating the trust are immaterial.
>
> A trust purpose is charitable if its accomplishment is of such social interest or benefit to the community as to justify permitting the property to be devoted to the purpose in perpetuity and to justify the various other special privileges that are typically allowed to charitable trusts.

RESTATEMENT (THIRD) OF TRUSTS § 28, cmt. a (2003).

The law provides that an activity may be beneficial to society even if some members of the community object:

> If the general purposes for which a trust is created are such that they may be reasonably thought to promote the social interest of the community, the mere fact that a majority of the people or of the members of a court believe that the particular

Because the needs of society are constantly changing and are difficult to enumerate, the law provides donors and nonprofit organizations substantial flexibility to determine which social goals to pursue and how to go about pursuing them.

Public policy reflects the voluntary nature of philanthropy by providing incentives for charitable contributions rather than instituting mandatory giving requirements. Such incentives are viewed as important for inducing charitable giving because individuals are often reluctant to pay for collective goods without assurance that others will contribute their fair share. Professor Mark P. Gergen explains:

> Charities that provide goods for which we cannot or do not wish to charge beneficiaries deserve government support because, without the subsidy, society will tend to underfund them. The principal reason for this tendency is freeriding. Some people will refuse to pay for a good and rely on others to sustain it. Their refusal discourages more conscientious people from giving, because even conscientious people may not want to be taken advantage of by freeriders or they may despair of the possibility of successful collective action.[21]

Many incentives for charitable giving come in the form of financial subsidies administered through federal tax code.[22] Donors may deduct the value of

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purpose of the settlor is unwise or not well adapted to its social objective does not prevent the trust from being charitable. Thus, a trust to promote a particular religious doctrine or a particular system of taxation is charitable even though the view to be promoted has but a modest number of adherents. The role of the court in deciding whether a purpose is charitable is not to attempt to decide which of conflicting views of the social or community interest is more beneficial or appropriate but to decide whether the trust purpose or the view to be promoted is sufficiently useful or reasonable to be of such benefit or interest to the community, including through a marketplace of ideas, as to justify the perpetual existence and other privileges of a charitable trust. Thus, a trust to establish a museum to exhibit what a testator regarded as objects of art but which testimony establishes to be of no artistic value, or a trust to publish and distribute a testator's views that are irrational or other writings that are of no literary or educational value, is not charitable. The line between what is charitable and what is not is sometimes a difficult one to draw, for the difference may be one of degree and the line may be drawn differently at different times and in different places.

RESTATEMENT (THIRD) OF TRUSTS § 28, cmt. a(2) (2003).

21. Mark P. Gergen, *The Case for a Charitable Contributions Deduction*, 74 VA. L. REV. 1393, 1397, 1398 (1988) (describing justifications for subsidizing charitable giving through the tax code, arguing that the subsidy "theory must be modified to account for the pleasure people take in voluntary giving," and "suggest[ing] a category of public goods which do not deserve subsidy").

22. *See* 26 U.S.C. § 170(a)(1) (2006) (federal income tax deduction for charitable

donations to charitable organizations from otherwise taxable income,[23] and charitable organizations are exempt from federal taxation for income earned from charitable activities.[24]

The law also provides non-tax incentives[25] to encourage charitable giving. One non-tax incentive allows donors to exercise perpetual influence over the

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contributions); 26 U.S.C. § 2055 (2006) (federal gift and estate tax deduction for charitable contributions); 26 U.S.C. § 501(a)(3) (2006) (federal income tax exemption for qualified charitable organizations). In Bob Jones Univ. v. United States, the Court stated:

> When the Government grants exemptions or allows deductions all taxpayers are affected; the very fact of the exemption or deduction for the donor means that other taxpayers can be said to be indirect and vicarious "donors." Charitable exemptions are justified on the basis that the exempt entity confers a public benefit—a benefit which the society or the community may not itself choose or be able to provide, or which supplements and advances the work of public institutions already supported by tax revenues.

461 U.S. 574, 591 (1983). In Regan v. Taxation with Representation of Wash., the Court found that:

> Both tax exemptions and tax deductibility are a form of subsidy that is administered through the tax system. A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying.

461 U.S. 540, 544 (1983).

23. *See* Rev. Rul. 67-246, 1967-2 C.B. 105 ("To be deductible as a charitable contribution...a payment to or for the use of a qualified charitable organization must be a gift. To be a gift for such purposes in the present context there must be...a payment of money or transfer of property without adequate consideration."). But this prohibition applies only to an exchange that constitutes a direct quid pro quo. Under the tax code, a contribution is deductible even if the donor receives "indirect benefits such as publicizing a donor's name or the 'warm glow' that a donor might feel as a result of the gift...." John D. Colombo, *The Marketing of Philanthropy and the Charitable Contributions Deduction: Integrating Theories for the Deduction and Tax Exemption*, 36 WAKE FOREST L. REV. 657, 663 (2001). Professor Colombo argues that tax deductions should be disallowed in transactions where the donor receives an intangible, but economically quantifiable benefit. *Id.* at 700 (footnotes omitted). Colombo contends that:

> Adopting this view would mean that the Scientologists get no deduction for spiritual auditing where the service is provided under an enforced fee schedule. Neither do Catholics get a deduction for payments for commemorative masses, Protestants for pew rents, Jews for tickets to High Holy Days, the Mormons for their required tithe, the 'minimum contribution' of $1,250,000 for a named chair at the University of Illinois, or the $1,000,000 that gets one a private meeting with the Pope.

Id.

24. *See* 26 U.S.C. § 501(c)(3) (2006).

25. For a general discussion on the use of non-tax subsidies rather than tax-based

future use of charitable gifts[26] and enjoy vast discretion in crafting restrictions to govern their gifts.[27] Professor Evelyn Brody explains:

> The perpetual charitable trust has been called "a balancing of two imponderables." Laws enforce perpetual funds for charity because to do otherwise would discourage gifts. Implicitly the state has determined that net social welfare increases by permitting the dead hand of the testator to govern the enjoyment of wealth into perpetuity. In deciding between devoting their property to perpetual charitable use and keeping it in the family, donors take into account the likelihood that their donated property will remain governed by their wishes.[28]

A donor's restriction may establish criteria limiting the direct use of a gift so long as indirect benefits flow to a sufficiently large and indefinite class of society. [29]

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subsidies to promote public policy goals, see Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155 (1988).

26. Ball v. Hall, 274 A.2d 516, 523 (Vt. 1971) ("The State affords various privileges and immunities to a donor who is inspired to establish a charitable trust which are not available to trusts for private uses. Not the least of these is the release from the rule against perpetuities and various tax advantages. Such concessions are founded on the belief that the public interest derives substantial benefit from such creations.").

27. The donor's discretion is limited by Treasury Department regulations providing that a restricted gift must not constitute a conditional transfer:

> *Transfers subject to a condition or power.* If as of the date of a gift a transfer for charitable purposes is dependent upon the performance of some act or the happening of a precedent event in order that it might become effective, no deduction is allowable unless the possibility that the charitable transfer will not become effective is so remote as to be negligible. If an interest in property passes to, or is vested in, charity on the date of the gift and the interest would be defeated by the subsequent performance of some act or the happening of some event, the possibility of occurrence of which appears on the date of the gift to be so remote as to be negligible, the deduction is allowable. For example, A transfers land to a city government for as long as the land is used by the city for a public park. If on the date of the gift the city does plan to use the land for a park and the possibility that the city will not use the land for a public park is so remote as to be negligible, A is entitled to a deduction under section 170 for his charitable contribution.

26 C.F.R. § 1.170A-1(e) (2008).

28. Evelyn Brody, *Charitable Endowments and the Democratization of Dynasty*, 39 ARIZ. L. REV. 873, 942-43 (1997). *But see* Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation's Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689, 711 (2005) (noting that "trust law does not completely subordinate the public's interests to the settlor's" because under the doctrine of *cy pres*, a court can modify the purpose of a trust where the donor's purpose becomes impractical).

29. *See* RESTATEMENT (SECOND) OF TRUSTS § 375 (1959) ("A trust is not a charitable trust if the persons who are to benefit are not of a sufficiently large or indefinite class so that the community is interested in the enforcement of the trust."); RESTATEMENT (SECOND) OF TRUSTS §

Charities must comply with donor-imposed restrictions unless modified by court order.[30]

The common law provides two grounds for modification.[31] First, under the equitable doctrine of deviation, "[t]he court may modify an administrative or distributive provision of a trust, or direct or permit the trustee to deviate from an administrative or distributive provision, if because of circumstances not anticipated by the settlor the modification or deviation will further the purposes of the trust."[32] Second, under the equitable doctrine of cy pres, (from the French idiom "as near as possible"),[33]

> Unless the terms of the trust provide otherwise, where property is placed in trust to be applied to a designated charitable purpose and it is or becomes unlawful, impossible, or impracticable to carry out that purpose, or to the extent it is or becomes wasteful to apply all of the property to the designated purpose, the charitable trust will not fail but the court will direct application of the property or appropriate portion thereof to a charitable purpose that reasonably approximates the designated purpose.[34]

The availability of equitable grounds for modification, however, does not adequately address the public's interest in charitable assets. The combination of tax incentives and legal protections for donor intent creates tension between the public and private interests in charitable assets. The taxpaying public has a reasonable expectation that subsidized charitable assets, like all government funds, will be spent on activities and objectives that are beneficial to society. Legal protections for donor intent, however, allow the donor to determine the disposition of charitable assets without public approval. Professor Saul Levmore

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375 cmt. j (1959) ("A trust may be a charitable trust although the number of persons who receive a benefit from it is small, provided that the class from which they are to be selected is sufficiently large."). The law allows a small class of individuals to receive a disproportionate direct share of the gift because those individuals will, in turn, confer indirect benefits on society as a whole. To use the classic illustration, a merit-based education scholarship provides a disproportionate direct benefit to the recipient, but the recipient, by obtaining education, is expected to improve the community's welfare through her future intellectual contributions to society.

30. RESTATEMENT (THIRD) OF TRUSTS § 76(1) (2007).

31. Recent common law and statutory reform to the equitable grounds for modification of a charitable trust have relaxed the traditional prerequisites for relief. For cases and commentary, compare RESTATEMENT (SECOND) OF TRUSTS § 381 with RESTATEMENT (THIRD) OF TRUSTS § 66 (equitable deviation doctrine) and RESTATEMENT (SECOND) OF TRUSTS § 399 with RESTATEMENT (THIRD) OF TRUSTS § 67 (*cy pres* doctrine).

32. RESTATEMENT (THIRD) OF TRUSTS § 66 (1) (2003).

33. BLACK'S LAW DICTIONARY 387 (6th ed. 1990).

34. RESTATEMENT (THIRD) OF TRUSTS § 67 (2003).

observed that the income tax deduction for charitable contributions delegates to donors the legislative power to allocate public appropriations, stating:

> [T]he tax system can be seen as allowing taxpayers individually to allocate federal money to worthy causes. . . The charitable deduction makes the government a partner in every gift-giving venture; a taxpayer in the (hypothetical but arithmetically convenient) 50 percent [federal income tax] bracket, for instance, can be seen as joining forces with the government to give equal amounts to the cause chosen by the taxpayer (with characteristics or minimum qualifications set by the government). Hence each individual taxpayer's choice, deduction, or "ballot," not only reflects a private contribution but also triggers a matching government contribution in the form of a reimbursement of part of the taxpayer-donor's gift.[35]

Yet, the "characteristics" and "minimum qualifications set by the government" are not sufficient to avoid exposing charitable assets to donor-imposed restrictions that undermine the public's interest.

The statutory and regulatory criteria for determining the tax deductibility of charitable gifts provides donors with substantial flexibility to direct charitable resources to causes and interests of personal importance to the donor, but perhaps of little benefit to society.[36] Courts uphold the grant of a tax deduction so long as the gift structure does not suggest a *quid pro quo* transaction; the fair market value of benefits received by a donor in return for a charitable gift must not exceed a nominal amount.[37] The *quid pro quo* analysis, however, does not

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35. Saul Levmore, *Taxes as Ballots*, 65 U. CHI. L. REV. 387, 404-05 (1998) (footnotes omitted).

36. A charitable contribution is tax deductible if given to:

> A corporation, trust, or community chest, fund, or foundation—(A) created or organized in the United States or in any possession thereof, or under the law of the United States, any State, the District of Columbia, or any possession of the United States; (B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals; (C) no part of the net earnings of which inures to the benefit of any private shareholder or individual; and (D) which is not disqualified for tax exemption under section 501(c)(3) [26 U.S.C. § 501(c)(3)] by reason of attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

26 U.S.C. § 170(c)(2) (2006); *see* 26 C.F.R. § 1.170A–1(a) (2008) ("Any charitable contribution, as defined in section 170(c) [26 U.S.C. § 170(c)], actually paid during the taxable year is allowable as a deduction in computing taxable income irrespective of the method of accounting employed or of the date on which the contribution is pledged.").

37. *See* United States v. Am. Bar Endowment, 477 U.S. 105, 118 (1986) ("The *sine qua*

sufficiently account for the possibility that donor-imposed restrictions can greatly reduce the public's enjoyment of a charitable gift even though the donor receives no money or property of value in return.

When the interests of donors are not perfectly aligned with the public interest, donors can choose to impose restrictions that are inconsistent with or contrary to the goals of society. Professor Eric Posner addressed this potential conflict in his analysis of "pure" altruism and "impure" altruism.[38] Whereas pure altruists wholly adopt the public interest, impure altruists pursue self-interested objectives that might (or might not) conflict with the public interest. Nonprofit organizations are particularly vulnerable to exploitation by self-interested, "impure altruist" donors when their financial viability is highly dependent on voluntary contributions. Faced with the choice between accepting a restricted gift or receiving no gift at all, nonprofit organizations have strong incentives to accept a restricted gift regardless of the social consequences. This inclination gives nonprofit organizations an incentive to compete against each other for charitable donations by placating the interests of opportunistic donors.

The perils of this incentive are illustrated by purportedly charitable organizations offering to shelter taxable income of donors under the guise of carrying out the donors' "charitable" intent.[39] Scholars have advised nonprofit organizations to avoid exploitation by carefully scrutinizing donor-imposed restrictions before accepting donations.[40] But this advice underestimates the

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non of a charitable contribution is a transfer of money or property without adequate consideration. The taxpayer, therefore, must at a minimum demonstrate that he purposely contributed money or property in excess of the value of any benefit he received in return.").

38. *See* Eric A. Posner, *Altruism, Status, and Trust in the Law of Gifts and Gratuitous Promises*, 1997 WIS. L. REV. 567, 572-74 (1997); *see also* Katz, *supra* note 29, at 706.

39. At least one enterprising organization attempted, without success, to test the legal limits of an ostensibly charitable purpose. *See* United States v. Estate Preservation Servs., 202 F.3d 1093, 1101 (9th Cir. 2000) (affirming district court's injunction prohibiting the defendant from marketing "donor-directed foundations" that encouraged donors to "establish charitable foundations solely for their own benefit").

40. Panel on the Nonprofit Section Convened by Independent Sector, *Principles for Good Governance and Ethical Practice: A Guide for Charities and Foundations*, 24-25 (Oct. 2007), *available at* http://www.nonprofitpanel.org/report/principles/Principles_Guide.pdf. The guide states that:

> A charitable organization should carefully review the terms of any contract or grant agreement before accepting a donation. If the organization will be unable or unwilling to comply with any of the terms requested by a donor, it should negotiate any necessary changes prior to concluding the transaction. Particularly in the case of substantial contributions, the recipient should develop an agreement that specifies any rights it may have to modify the terms of the gift if circumstances warrant. Some charitable organizations include provisions in their governing documents or board resolutions indicating that the organization retains 'variance powers,' the right to modify conditions on the use of assets. Such powers should be clearly communicated to donors through a written agreement.

powerful incentives for nonprofit organizations to accept restricted charitable gifts even if the goals promoted by the donor fail to confer an acceptable public benefit.

The common law resolved this tension by setting default rules limiting the parties with standing to enforce the terms of a charitable trust: while donors had the right to restrict the use of a charitable gift, they lacked a personal remedy to enforce it. The Restatement (Second) of Trusts,[41] adopted in 1959, provided:

> A suit can be maintained for the enforcement of a charitable trust by the Attorney General or other public officer, or by a co-trustee, or by a person who has a special interest in the enforcement of the charitable trust, *but not by persons who have no special interest or by the settlor or his heirs, personal representatives or next of kin.*[42]

The common law rule produced an equilibrium status in tensions between donors and society: Donor-imposed restrictions were binding only to the extent the state attorney general and the public at large chose to enforce them. By vesting enforcement powers in the state attorney general rather than the donor, the law ensured that the public had a voice in deciding whether donor-imposed restrictions produced the best social use for subsidized charitable assets.

The Connecticut Supreme Court famously applied this common law rule in *Herzog Foundation v. University of Bridgeport.*[43] In that case, a donor gave $250,000 to a Connecticut university for need-based medical education scholarships, which the university used to award scholarships in its nursing program.[44] Five years after the initial gift installment, the university closed its nursing school and the donor sued to enjoin further disbursements of the gift for other academic programs.[45] The Connecticut Supreme Court, holding the donor lacked standing,[46] explained the attorney general had exclusive power to enforce the terms of a charitable trust unless the donor expressly reserved the right to do

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Id.

41. The common law governing restricted charitable gifts implicates the common law of trusts because restricted donative transfers often give rise to the creation of a charitable trust by implication. *See, e.g.*, RESTATEMENT (THIRD) OF TRUSTS § 13 (2003).

42. RESTATEMENT (SECOND) OF TRUSTS § 391 (1959) (emphasis added).

43. 699 A.2d 995 (Conn. 1997).

44. *Id.* at 996.

45. *Id.*

46. The court held that the donor lacked standing under the Connecticut Uniform Management of Institutional Funds Act ("CUMIFA"), Connecticut General Statutes §§ 45a-526–45a-534, but reached this conclusion after finding that the "common law landscape upon which CUMIFA was enacted" provided that "a donor had no standing to enforce the terms of a completed charitable gift unless the donor had expressly reserved a property interest in the gift." *Id.* at 997, 999.

so because "the public benefits arising from the charitable trust justify the selection of some public official for its enforcement."[47]

However, in the years following *Herzog*, the statutory and common law landscape governing donor standing began to change. In 2000, the National Conference of Commissioners on Uniform State Laws released the Uniform Trust Code ("U.T.C."), "the first national codification of the law of trusts,"[48] which included a provision that "[t]he settlor of a charitable trust, among others, may maintain a proceeding to enforce the trust."[49] Around the same time, state courts began to issue opinions eroding the common law rule barring donor standing.[50] Donor standing is now established law in many jurisdictions.

A. *Social Costs of Donor Standing*

Donor enforcement rights can impose substantial social costs on the public's enjoyment of charitable assets. By allocating litigation rights to donors, the law creates the possibility that donors will use policy incentives designed to promote

47. *Id.* at 998, n.3 (citations omitted).

48. UNIF. TRUST CODE, Prefatory Note (2005).

49. UNIF. TRUST CODE § 405(c) (2005). The code has been adopted or introduced in twenty-four states. Unif. Law Comm'rs, *A Few Facts About the Uniform Trust Code*, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-utc2000.asp (last visited Dec. 29, 2009). In 2002, NCCUSL considered adding a donor standing provision to the Uniform Prudent Management of Institutional Funds Act, but ultimately decided not to include the provision. *See* UNIF. MGMT. OF INSTITUTIONAL FUNDS ACT § 8 (Draft Oct. 20, 2002), *available at* http://www.law.upenn.edu/bll/ulc/umoifa/draft1102.pdf (preliminary draft containing donor standing provision); Memorandum from Susan Gary to UMIFA Drafting Comm. § 8 (Oct. 20, 2002), *available at* http://www.law.upenn.edu/bll/ulc/umoifa/memo1102.pdf; (memorandum regarding donor standing provision). The Uniform Prudent Management of Institutional Funds Act includes a provision granting a lesser degree of control to the donor than standing to sue: "If the donor consents in a record, an institution may release or modify, in whole or in part, a restriction contained in a gift instrument on the management, investment, or purpose of an institutional fund." UNIF. PRUDENT MGMT. OF INSTITUTIONAL FUNDS ACT § 6(a) (2006), *available at* http://www.upmifa.org/DesktopDefault.aspx?tabindex=1&tabid=55.

50. *See* Smithers v. St. Luke's Roosevelt Hosp. Center, 723 N.Y.S.2d 426, 434 (N.Y. App. Div. 2001) (granting standing to donor's widow because "[t]he donor of a charitable gift is in a better position than the Attorney General to be vigilant and, if he or she is so inclined, to enforce his or her own intent"); L.B. Research and Educ. Found. v. UCLA Found. 29 Cal. Rptr. 3d 710, 717 (Cal. Ct. App. 2005) (granting donor standing because, "[a]lthough the public in general may benefit from any number of charitable purposes, charitable contributions must be used only for the purposes for which they were received in trust. Moreover, part of the problem of enforcement is to bring to light conduct detrimental to a charitable trust so that remedial action may be taken."); Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 118-19 (Tenn. Ct. App. 2005) (granting standing to the United Daughters of the Confederacy to enforce Vanderbilt University's 1917 contractual obligation to retain the name "Confederate Memorial Hall" on the facade of its student dormitory).

charitable giving (e.g., tax deductibility, perpetual recognition of gift restrictions) to further personal objectives instead of the collective goals shared by society. The misuse of policy incentives by donors, even if not in violation of the tax code in its current state, is inconsistent with the broader social purposes underlying public subsidies for the nonprofit sector. In this section, we identify three potential costs that can detract from society's enjoyment of charitable assets: (1) enforcement litigation brought for the purpose of obtaining relief beneficial to the donor, but detrimental to the public interest; (2) enforcement litigation designed to punish the donee for a civil violation of the donor's restriction (i.e., where trustees are not accused of embezzlement or personal misuse of institutional funds); and (3) psychological incentives that encourage donors to promote idiosyncratic goals through unduly narrow restrictive terms.

1. Relief Contrary to the Public Interest

In *Howard v. Administrators of the Tulane Education Fund*,[51] alleged descendants of Josephine Louise LeMonnier Newcomb filed suit in 2006 to enforce the terms of gifts to Tulane University made between 1886 and 1901. Newcomb's donations were used to establish the H. Sophie Newcomb Memorial College as a department within the University "for the higher education of white girls and young women."[52] In the wake of Hurricane Katrina, Tulane found itself in financial turmoil and undertook a reorganization "to create a unified undergraduate collegiate structure by establishing a single undergraduate college, the Newcomb-Tulane College, into which Newcomb College would be merged."[53] Claiming the terms of Newcomb's donation required the University to "continue H. Sophie Newcomb Memorial College as a separate entity within Tulane University," the donor's descendants sued to enjoin the consolidation of Newcomb College.[54]

The trial court denied the plaintiffs' request for injunctive relief and the Louisiana Court of Appeal dismissed the action *sua sponte* for lack of standing.[55]

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51. 986 So. 2d 47, 51 (La. 2008).

52. *Id.* The provision for "white girls" would not be enforceable because the Fourteenth Amendment to the United States Constitution prohibits state actors including courts from engaging in or enforcing discrimination on the basis of race. *See* Pennsylvania v. Board of Dirs. of City Trusts of Philadelphia, 353 U.S. 230, 230-31 (1957) (charitable gift restriction limiting Girard College admission to "poor white male orphans" held unenforceable under the Fourteenth Amendment).

53. *Howard*, 986 So. 2d at 52 n.3 (the university also stated that "the Newcomb funds will be applied to the same programs as before the elimination of Newcomb College, i.e., the Newcomb Fellows, the Newcomb College Center for Research on Women, and the mentoring, leadership, and academic programs formerly administered by Newcomb College.").

54. *Id.* at 52.

55. *Id.* at 50.

But the Louisiana Supreme Court reversed, holding that "Louisiana law grants a would-be heir or legatee standing to enforce a condition of a donation."[56] Explaining that "[a] donor may impose on the donee any charges or conditions he pleases, provided they contain nothing contrary to law or good morals," the court held that Newcomb's restrictions were enforceable by her heirs.[57]

The plaintiffs brought this litigation amidst the financial turmoil caused by Hurricane Katrina. Tulane faced the devastating loss of revenue from a semester-long emergency closure, coupled with hundreds of millions of dollars in property damage.[58] To address the crisis, Tulane's trustees decided to reduce redundant administrative functions while preserving the academic programs. For example, even though Newcomb College's faculty, academic programs and classes had been fully integrated since the 1980s, until Hurricane Katrina, Newcomb continued to maintain separate admissions and "its own administrative and advisory structure, dean and diploma."[59] The trustees sought to eliminate unnecessary administrative costs by consolidating all seven undergraduate schools into a single entity named Newcomb-Tulane College.[60] Notably, the trustees' plan provided continued and prominent recognition of Sophie Newcomb's name.[61]

The injunctive relief sought by the plaintiffs is at odds with the public's interest in Tulane University, a public charity which could no longer afford the expense of maintaining a separate administration for Newcomb College. The public has a strong interest in the financial viability of Tulane and in the efficient use of its scarce, depleted resources. If the plaintiffs prevail on the merits,[62] they will force Tulane to reinstate the administrative redundancies without any apparent benefit to its academic programs. The cost of restoring those

56. *Id.*

57. *Id.* at 55.

58. Brief on Behalf of the Adm'rs of the Tulane Educ. Fund d/b/a Tulane Univ. Defendant-Respondent at 5, Howard v. Adm'rs of the Tulane Educ. Fund, 986 So. 2d 47 (La. Apr. 7, 2008) (No. 2007-C-2244).

59. *Id.* at 4-5.

60. *Id.* at 5.

61. *Id.* at 6.

62. On August 28, 2009, on remand from the Louisiana Supreme Court, the trial court granted summary judgment for Tulane, finding "the language of Josephine Newcomb's will contains no enforceable conditional obligation to support plaintiff's claim" because Newcomb's expression of testamentary intent was precatory. Montgomery v. Adm'rs of the Tulane Educ. Fund, Case No. 2008-08619, Judgment (La. Civ. Dist. Ct., Parish of New Orleans Aug. 28, 2009). As of September 14, 2009, a group supporting the plaintiff's cause was raising money to fund an appeal of the summary judgment ruling. *See* The Future of Newcomb College, Appeals and Challenges, Sept. 14, 2009, http://newcomblives.com/main/?p=274. ("When this case was filed, we anticipated that the best chance of obtaining a court order requiring Tulane to reinstate Newcomb College as it existed pre-Katrina would be on appeal, most likely at the Louisiana Supreme Court.").

redundancies would reduce the amount of resources available for academic programs, thereby diminishing Tulane's benefit to the public.

2. Punishment for Civil Violation of Donor's Restriction

In *Robertson v. Princeton University*,[63] descendants of the donor claimed that Princeton University had failed to comply with restrictions governing the Robertson Foundation. Charles and Marie Robertson established the foundation in 1961 "for the express purpose of strengthening the government of the United States by training men and women for government service, particularly for federal government careers in international affairs."[64] The plaintiffs, entitled to standing as trustees of the foundation,[65] alleged that Princeton had spent funds on programs that were inconsistent with the donors' stated intent.[66] In their prayer

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63. Robertson v. Princeton Univ., Civil Action No. 99-02 (N.J. Super. Ct. Nov. 12, 2004).

64. Verified First Amended Complaint, *Robertson*, Civil Action No. 99-02. The mission of the Foundation, as recited in its Certificate of Incorporation, was to "strengthen the Government of the United States and increase its ability and determination to defend and extend freedom throughout the world by improving the facilities for the training and education of men and women for government service." *Id.* at 2-3. The Certificate of Incorporation provided that the programs supported by the Foundation be established at Princeton University, "and as a part of the Woodrow Wilson School," Princeton's graduate school for public and international affairs. Composite Certificate of Incorporation of The Robertson Foundation at 1 (as amended through July 26, 1961), *available at* http://www.princeton.edu/robertson/documents/docs/Robertson_Foundation_Certificate_of_Incorporation.pdf. At the time the Foundation was incorporated, its assets – 700,000 shares of the Great Atlantic & Pacific Tea Company – were valued at $35 million. Verified First Amended Complaint at ¶ 33, *Robertson*, Civil Action No. 99-02. More recently, the Foundation's assets were valued at $880 million. *See* Ben Gose, *Terms of Endowment*, THE CHRONICLE OF PHILANTHROPY, Nov. 15, 2007, at 10.

65. A trustee has standing to enforce the terms of a charitable trust. *See* RESTATEMENT (SECOND) OF TRUSTS § 391 (1935).

66. The plaintiffs alleged that Princeton devoted "the vast bulk of the Foundation's budget...to non-mission related research, administrative costs and University overhead." Verified First Amended Complaint at ¶ 98, *Robertson*, Civil Action No. 99-02. For example, the plaintiffs alleged that Princeton used the foundation's funds to meet the expenses of the Office of Population Research and the Center for International Studies, "even though neither program serves the Foundation's mission nor have ever been considered part of the Wilson School's graduate program." *Id.* at ¶ 97. The plaintiffs alleged, "As noted by many critics over the years, most of the Wilson School's faculty are joint appointments with other academic departments, and most have not shown any commitment to – or even awareness of – the Foundation's mission." *Id.* at ¶ 105. The plaintiffs alleged that Princeton created joint faculty appointments with other academic departments using the foundation's funds but without any requirement that the appointed faculty adhere to the donor's stated mission. *Id.* at ¶ 106. The plaintiffs alleged that from 1999 to 2002, "Princeton secretly used Foundation money to provide fellowships for graduate students in the Politics, Economics, and Sociology departments of the University," but that Princeton "eliminated the Foundation's funding of" those fellowships when the plaintiffs

for relief, the plaintiffs sought entry of an order "that Princeton be removed from any control over or involvement with the Robertson Foundation."[67] They amended the complaint to assert a cause of action for fraud and demanded punitive damages.[68] Princeton denied all wrongdoing.[69]

The parties engaged in extensive briefing on cross-motions for summary judgment. The court, explaining its decision in more than 360 pages of judicial opinions, allowed the case to proceed to trial.[70] To avoid further litigation costs, however, the parties settled.[71] Princeton agreed to reimburse $40 million of the plaintiffs' legal expenses, which the plaintiffs had paid for using funds from a separate private charitable foundation under their control.[72] According to Princeton, the settlement agreement provided:

- The Robertson Foundation will be dissolved and its funds will be transferred to an endowment fund at Princeton with the same object and purpose as the Robertson Foundation, as understood and interpreted by Princeton.
- Robertson Foundation funds will be used to reimburse the Banbury Fund[73] for certified legal fees and expenses in connection with the Robertson v. Princeton litigation of $40 million . . . .

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filed suit. *Id.* at ¶¶ 115-17. The plaintiffs alleged that Princeton used the Foundation's funds to pay for 49% of the cost to build Wallace Hall, a new academic facility devoted to the humanities, even though only six out of eighty-eight hours of classroom instruction in the building are devoted to Wilson School programs, and "[e]ven those classes have little if anything to do with the Foundation's mission." *Id.* at ¶¶ 136, 138.

67. Verified First Amended Complaint at 68, *Robertson*, Civil Action No. 99-02.

68. *Id.* at 67-68.

69. *See Id.*

70. *See* Robertson v. Princeton University, No. C-99-02 (N.J. Super. Ct. Ch. Div. Oct. 25, 2007).

71. *See* Robertson Executed Settlement Agreement, http://www.princeton.edu/robertson/documents/docs/Robertson_Settlement_Agreement-Executed.pdf (last visited Feb. 28, 2010).

72. "Princeton's attorneys estimate that each party to the litigation likely would have incurred additional legal expenses in excess of $20 million to continue to prepare the case for trial, conduct the lengthy trial and pursue any subsequent appeals." Princeton University, Press Release, *Settlement Retains Princeton's Control, Use of Robertson Funds* (Dec. 10, 2008) *available at* http://www.princeton.edu/main/news/archive/S22/81/66C43/index.xml?section=topstories.

73. According to Princeton, the Banbury Fund "is a private foundation controlled by the Robertson Family" and "has paid the Robertsons' litigation expenses...and the costs of a public relations firm retained to publicize their suit." Victoria B. Bjorklund, *Robertson v. Princeton – Perspective and Context* at 21 (Jan. 2008), *available at* http://www.princeton.edu/robertson/documents/docs/Endowments_and_Donor_Restrictions.pdf (Ms. Bjorklund, a member of the law firm Simpson Thacher & Bartlett LLP, served as trial counsel for Princeton University. *Id.* at 1. We therefore attribute the positions expressed in her paper to Princeton

- Robertson Foundation funds will be used to provide $50 million (plus interest) in funding for a new foundation to prepare students for careers in government service . . . .[74]

The Robertson Foundation litigation and settlement agreement imposed enormous social costs contrary to the public's interest in the advancement of knowledge and education. The donor's original charitable contribution received substantial financial subsidies through the federal income tax deduction[75] followed by decades of preferential treatment through the federal income tax exemption for charitable foundations and nonprofit organizations.[76] The litigation was further subsidized through the plaintiffs' use of a tax-sheltered charitable foundation to pay their legal fees and public relations expenses during the course of the six-year dispute.[77] Under the settlement agreement, Princeton will use the Robertson Foundation's funds to reimburse the plaintiffs' litigation expenses. In addition, Princeton spent approximately $40 million in defense costs in the pre-trial phase of litigation; the defense funds were presumably drawn from non-foundation sources within the university's treasury.[78] The litigation was immensely taxing on the court and diverted a significant sum of resources—in excess of $80 million—to legal expenses that would have otherwise funded academic programming consistent with the social objectives of philanthropy and charitable giving.

3. Idiosyncratic Donor Goals

Enforcement rights can encourage the donation of gifts restricted to idiosyncratic and personal goals of the donor, but of little value to society. As explained more fully in the psychological analysis below (Part IV, infra), the grant of standing to enforce a gift restriction is likely to compel some donors to

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University.) Princeton discovered that the Banbury Fund's Form 990-PF describes its expenditures as "[e]xpenses paid on behalf [of the] Robertson Foundation, a 509(a)(3) organization, to insure adherence by the Foundation to the charitable and educational purposes of its charter." *Id.* at 21. Based in part on information submitted on behalf of the Banbury Fund to the IRS, Princeton estimates that the Banbury Fund dispensed more than $25 million in connection with the Robertson Foundation litigation. *Id.*

74. *See supra* note 72.

75. The legal entity established by the donors received tax-exempt status under Section 501(c)(3) of the Internal Revenue Code on September 21, 1962. *See* Exhibit C at 38, *available at* http://www.princeton.edu/robertson/documents/docs/Nonprofit_Forum.pdf (last visited Feb. 28, 2010).

76. *Id.* at 35, 44-45.

77. *Id.*

78. *See* Understanding the Robertson v. Princeton Settlement at 3, *available at* http://www.princeton.edu/robertson/documents/docs/1208_Understanding_the_Robertson_settlement.doc (last visited Feb. 28, 2010).

view charitable giving as a reciprocal exchange rather than an offering to the community. Once induced by the availability of enforcement rights, the desire for reciprocity may lead donors to seek personal benefits from the gift transaction, even if such benefits are intangible and do not rise to the level of economic consideration. For example, donors often view the advancement of their own ideas as a personal benefit. While enforcement rights may imbue some donors with the confidence to pursue imaginative and unconventional charitable objectives, they may also create the temptation to use the binding effect of a restrictive covenant to dedicate scarce public resources to obscure and socially irrelevant goals. When a donor exacts reciprocity by pursuing idiosyncratic and narrow charitable objectives, the donor lessens the gift's usefulness and value to society.

III. THEORIES ABOUT DONOR STANDING AND THE CHILLING EFFECT ON CHARITABLE GIVING

Given the substantial social cost of donor enforcement litigation, we now explore the policy justifications underlying the recent trend of granting donor standing. Our policy question is simple: Why is donor standing good for society? Of the numerous answers and theories found in the case law and scholarly literature, all expressly or impliedly share a common assumption—that the availability of donor enforcement rights is important for promoting charitable giving (or, stated in the alternative, the lack of donor enforcement rights has a chilling effect on charitable giving). In this Part, we identify this assumption in the various judicial and academic analyses supporting donor standing. Our discussion is structured along two doctrinal themes: principles of contract law and donor supervision of nonprofit governance.

A. *Principles of Contract Law*

The judicial grant of donor standing is based on principles of contract law.[79] In general, the law enforces contractual agreements to protect the reasonable expectations of private parties, produce gains from trade and stimulate economic activity:

> By announcing the protection of the expectation interest, the law places a value on such expectations. Expectations of future values are treated as if they were present values constituting intangible property rights. "Contract rights" can be transferred—sold or assigned—because they are legally enforceable rights as expectations even before the right has been earned by the performance. By protecting the expectation interests induced by the

79. *See supra* note 81.

> making of innumerable promises, the social institution of contract has an exponential effect on trade and commerce. It is, indeed, the indispensable mechanism of a free market system.[80]

Courts applying principles of contract law to the enforcement of restricted charitable gifts conclude that legal recognition of donors' expectations is necessary to maintain a system of charitable giving.[81] Courts have warned that the failure of charitable organizations to carry out their purported contractual obligations will cause charitable giving to decrease.[82] For example, in *Tennessee Division of the United Daughters of the Confederacy v. Vanderbilt University*, the court observed:

> Moreover, we fail to see how the adoption of a rule allowing universities to avoid their contractual and other voluntarily assumed legal obligations whenever, in the university's opinion, those obligations have begun to impede their academic mission would advance principles of academic freedom. To the contrary, allowing Vanderbilt and other academic institutions to jettison their contractual and other legal obligations so

80. 1-1 CORBIN ON CONTRACTS DESK EDITION § 1.03 (2009).

81. For judicial decisions granting donor standing under principles of contract law, see Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98, 118-19 (Tenn. Ct. App. 2005) (enforcing terms of a restricted gift under contract law); L.B. Research and Educ. Found. v. UCLA Found., 29 Cal. Rptr. 3d 710, 711 (Cal. Ct. App. 2005) (construing a restricted gift as a contract rather than a charitable trust because the written agreement "shows an intent to provide that if the [fund] were not used for the designated ... purposes it should revert ... to ... a contingent donee, [and that L.B. Research] intended to impose an enforceable obligation on [the UCLA Foundation] to devote [the fund] to [the stated] purposes [on the stated conditions]" (citing City of Palm Springs v. Living Desert Reserve, 82 Cal. Rptr. 2d 859, 865 (Cal. Dist. Ct. App. 1999)). In Stock v. Augsburg College, Case No. C1-01-1673, 2002 Minn. App. LEXIS 421 (Minn. Ct. App. Apr. 16, 2002), an alumnus of Augsburg College donated $500,000 for the construction of a new building and the college agreed to name a wing of the building in the donor's honor. Following media reports that the donor had mailed racist letters to interracial couples, some of which were threatening, the college refused to name the wing. The donor's suit for breach of contract was dismissed on statute of limitations grounds, but the court wrote extensive dicta rebuking the college:

> We suggest it would be startling news to Augsburg's alumni that their college's 'charitable and educational mission' includes specifically soliciting contributions for a particular purpose, formalizing that solicitation by a specific vote of the board of regents, and then claiming the power to say, 'Oops, we changed our mind. We are not going to give you money back, instead we are going to keep it ... The keeping of one's promise honors us all.

Id. at 17.

82. Tenn. Div. of the United Daughters of the Confederacy v. Vanderbilt Univ., 174 S.W.3d 98 (Tenn. Ct. App. 2005).

> casually would seriously impair their ability to raise money in the future by entering into gift agreements such as the ones at issue here.[83]

A related theoretical justification for donor standing is based on principles of agency costs[84] and transaction costs.[85] In *An Agency Costs Theory of Trust Law*, Professor Robert H. Sitkoff accepted the goal of preserving contractual expectations and proposed rules designed to improve the efficiency of private donative transfers.[86] Sitkoff's commentary, primarily confined to private rather than charitable transfers, expanded on Professor John H. Langbein's contractarian

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83. *Id.* at 118-19.

84. Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621, 637 (2004) ("The losses to the parties that stem from ... a misalignment of interests [between the principal and agent] are called agency costs. The Jensen and Meckling definition is ubiquitous in the legal literature: Agency costs refers to the sum of the costs of the principal's 'monitoring expenditures,' the costs of the agent's 'bonding expenditures,' and the 'residual loss' as measured by the 'dollar equivalent of the reduction in welfare experienced by the principal' as result of the divergence in the principal's and the agent's interests.").

85. Katz, *supra* note 29, at 708 (internal quotations omitted). As noted by Katz:

> Transaction costs are defined as those costs other than price which are incurred in trading goods and services. In the context of contract formation, for example, these include the costs of bargaining with potential sellers (or buyers) to some agreement about exchanging some goods and services for others, anticipating and covering various future contingencies that might affect the agreement, and formalizing the agreement, putting it into the form of an enforceable contract.

Id.

86. Sitkoff advocates the "systematic application of agency theory to the law of donative trusts" as an analytical model to understand theoretical and practical issues of trust law:

> On the theoretical side, this approach points to a further research agenda for the economic analysis of trust law. Beneficiaries assume the role of risk-bearing residual claimants (at least in the context of donative trusts), and important questions for research include the following: When and why do individuals choose to organize their relationships, both commercial and donative, by reference to the law of trusts rather than some other branch of organizational law? What is the private trust's default governance arrangement, and why is that arrangement the default? Does the law do a good job of supplying the terms for which the relevant parties would have bargained with full information and low negotiation costs? And, for that matter, who are the relevant parties? What is the role of markets—including labor, product, and capital—in all of this? Because trusts are chiefly governed by state law, is there a regulatory competition among the
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> states, and if so, to what end?
>
> On the practical side, agency cost analysis offers fresh insights into recurring problems in trust law including, among others, modification and termination, settlor standing, fiduciary litigation, trust-investment law and the duty of impartiality, trustee removal, the role of so-called trust protectors, and spendthrift trusts.

Sitkoff, *supra* note 84, at 625-26 (footnotes omitted).

theory of trust law.[87] Because contracts, by definition, are agreements entered into voluntarily by competent adults, Sitkoff argued that the law should make it easier and less expensive for informed parties to enter into, monitor and enforce their private agreements.[88] Rules that force contracting parties to resort to more expensive and socially wasteful means of reaching the result impede efficiency.[89] Sitkoff's observations were based on his theory of "settlor primacy," holding that the law resolves conflicts between donors and beneficiaries in favor of donors to encourage gifting:[90] If the law did not protect donor intent, "the overall volume of gifting would fall."[91] Stated alternatively, the law prioritizes donors' interests over beneficiaries' interests to increase the willingness of donors to give, which in turn, is advantageous to beneficiaries who benefit from greater overall gifting.[92] Sitkoff concluded that trust law directs the trustee to act in the best interests of beneficiaries, "but only to the extent that doing so is consistent with the ex ante instructions of the settlor."[93]

Sitkoff argued that the law's prioritization of donors' interests suggests it would be economically efficient to grant donors standing to enforce their ex ante restrictions in court.[94] Donor enforcement rights would reduce transaction costs because the majority of donors would opt to bargain for those rights if offered by the trustee.[95] Donor enforcement rights would reduce agency costs by giving the

87. *Id.* at 643-44 (noting that "[t]he settlor-trustee relationship is indeed contractual, as settlors and trustees are free to dicker over the terms of the trust, such as compensation, even if in fact they do not"). At common law, when a settlor conveyed property in trust for the benefit of others, the trustee was charged with administering the trust and owed the beneficiaries fiduciary duties of care, loyalty and obedience. Since the trustee owed those duties to the beneficiaries and not the settlor, the settlor lacked standing to sue the trustee for breach absent a reversionary interest in the trust corpus. Langbein argued that trustee fiduciary duties create, in essence, a contract between the settlor and trustee wherein the trustee promises to carry out the settlor's donative intent as expressed or implied by the terms of the trust in exchange for compensation. Langbein contended "that the default regime of trust law can be understood as comprising a type of specialized contract," providing default rules that "apply only when the trust instrument does not supply contrary terms." John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 652, 650 (1995).

88. *See* Sitkoff, *supra* note 84, at 650, 652.

89. *See id.* at 649.

90. Restricted gifts conveyed in trust create conflicts of interest between settlors and beneficiaries. Settlors want their donative intentions carried out while beneficiaries want free reign to enjoy the gifted property without the encumbrance of the settlor's restrictions. *See id.* at 639-40.

91. *See id.* at 659 n.197.

92. *See id.* at 659-60.

93. *See id.* at 648.

94. *See id.* at 648-49.

95. Default rules that please the majority of contracting parties reduce transaction costs inherent in forming a contract. Sitkoff explained, "for the usual transaction-costs-savings reasons, the underlying law of trust governance should supply those terms for which the

party most interested in the restriction an incentive to monitor and deter the trustee's breach of fiduciary duties.[96]

A related contractarian justification protects donor intent to encourage pluralism and civic engagement. In *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment,* Professor Iris J. Goodwin argued that laws granting donor standing encourage donors to engage in creative, mission-driven philanthropy, which in turn, fosters positive civic interaction and engagement.[97] Goodwin claimed donor standing strengthens the community by promoting individual participation in civil society, which ultimately helps sustain a well-functioning democracy.[98] Social involvement and civic engagement stimulate positive interactions that build meaningful communities and civic virtue.[99] The loss of civic interaction and "the norms of reciprocity that inhere in civil society" would undermine the functioning of our democratic system.[100]

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majority of settlors and trustees would have bargained if they had full information and low negotiation costs." *See id.* at 644 ("[T]he proper question becomes: What was the intention of the parties to the trust deal respecting this point, and if they did not articulate their intention on this matter, which default rule captures the likely bargain they would have struck had they thought about it." (quoting Langbein, *supra* note 87, at 664)). Sitkoff seems to agree with Langbein that most settlors of private donative trusts would opt to include enforcement rights against trustees. *See, e.g.*, Sitkoff, *supra* note 84, at 667-68; Langbein, *supra* note 87, at 664 ("[T]he parties are routinely assumed to have intended enforcement by the promisee (the settlor-equivalent person) as well as the beneficiary.").

96. *See* Sitkoff, *supra* note 84, at 668. As noted by Sitkoff:

> The donative settlor's motivation for interposing a trustee between the trust assets and the beneficiary, tax considerations aside, is often a lack of faith in the beneficiaries' judgment. Given the likelihood of feckless, unborn, minor, unidentifiable, or otherwise incompetent beneficiaries, and given the possibility of a free-rider problem among the beneficiaries, settlor standing might minimize agency costs by making the threat of litigation more viable as a deterrent against actions by the trustee that are not in the best interests of the beneficiaries or that breach a contrary instruction of the settlor. Many trust beneficiaries, as other commentators have noted, are not particularly effective monitors, and even when they are, their preferences are not necessarily congruent with the settlor's.

Id.

97. Iris J. Goodwin, *Donor Standing to Enforce Charitable Gifts: Civil Society vs. Donor Empowerment*, 58 VAND. L. REV. 1093, 1099 (2005).

98. Goodwin described the term "civil society" as "a loose framework of associations and activities that would allow ordinary people to engage one another voluntarily around matters relevant and important to the commonweal[th], but only indirectly related to governance or the state." *Id.* at 1101. Such activities include "attending church or synagogue, contributing to a charity, volunteering at a hospital or in a tutoring service, serving in the parent-teacher association, or taking part in a volunteer fire department. These are activities that neither involve the government (voting or jury service, for example) nor commerce (working or shopping)." *Id.* at 1102.

99. *Id.* at 1104 ("People who attend parent-teacher association meetings are more likely to contribute to charity; people who contribute to charity are more like[ly] to vote and to join

Goodwin argued that donor participation is a critical aspect of civic engagement: "Only individual donors can provide an endless stream of new perspectives on changing societal aspirations and needs, each one with the potential of yielding a new charitable mission."[101] Donor standing serves as an "inducement to a particular type of donor engagement within the charitable sector"—a type of engagement wherein the donor supplies an innovative charitable mission, brought to life through the legal construct of a restricted gift, which in turn, "bespeak[s] a kind of civic imagination where private interests stretch to encompass the interests of others; self-interest is imaginatively reconstructed as common interest."[102] Donors should have standing to enforce the terms of restricted charitable gifts to allay concerns "that trustees can be cavalier with restrictions and that enforcement mechanisms are lax."[103] Goodwin concluded that "the donor is often in a better position to be vigilant with respect to the oversight of her restricted gift than the Attorney General," but acknowledged that eventually, with the passage of time, the donor's private interest in the gift must yield to the public's interest in the charity.[104]

B. *Donor Supervision of Nonprofit Governance*

Other proponents of donor standing believe the availability of enforcement rights is necessary to restore the confidence of donors in charitable institutions. According to this view, private supervision of nonprofit organizations is important to deter poor charitable governance, not merely to ensure compliance with the terms of donor-imposed restrictions. The availability of donor enforcement rights would restore confidence in the nonprofit sector and encourage charitable giving.

Professor Henry Hansmann, in his groundbreaking study of organizational behavior in the nonprofit sector, argued that a "nondistribution constraint" governs all managers and directors of nonprofit organizations: "The prohibition on distributions of net earnings to controlling individuals is the essential defining feature of a nonprofit organization. If nonprofits are to fulfill their appropriate role, this constraint must be well defined and well policed."[105] Hansmann proposed that patrons of nonprofit organizations, including donors and

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the volunteer fire department, and on and on.").

100. *Id.* at 1105.

101. *Id.* at 1127, 1128 (noting, however, that "important though the donor may be as a source of charitable mission, charity in the final analysis is not about the donor, but is rather about the mission").

102. *Id.* at 1159.

103. *Id.*

104. *Id.* at 1160.

105. Henry B. Hansmann, *Reforming Nonprofit Corporation Law*, 129 U. PA. L. REV. 497, 553 (1981).

beneficiaries, have standing to enforce the fiduciary duties underlying the nondistribution constraint:

> [T]he elements of a nonprofit's charter, and particularly its nondistribution constraint, can be viewed as terms in a contract between the organization's managers and its patrons. Under the terms of that implicit contract, the patron contributes funds to the organization and grants the managers the right to take reasonable compensation for themselves out of those funds, while the management pledges to devote all of those funds, beyond reasonable compensation, to the organization's general purposes, or to the particular services requested by the patron. It follows that a patron has much the same interest in having the nonprofit's managers adhere to its charter as he or she has in having an ordinary profit-seeking merchant adhere to the terms of a contract of sale. To characterize a contribution to a nonprofit as a mere gift in which the donor no longer retains an interest is simply to define away these important elements of the transaction.
>
> But whatever legal metaphor is used—whether gift or contract—it is clear that patrons will commonly feel a strong interest in seeing that the managers of nonprofits adhere to their fiduciary duties. Thus, it makes sense to deny standing to patrons only if the consequence would be large numbers of spite suits, strike suits, or suits filed through sheer idiocy—which are presumably what the courts and commentators have in mind when they raise the specter of "harassing" litigation—or of suits that, though based on a real grievance, are feebly litigated and thus do more harm than good. Yet it appears extraordinarily unlikely that suits of this nature would ever become a sufficiently significant problem to outweigh the benefits of enlisting patrons into the enforcement effort.[106]

In the nearly thirty years since Hansmann's article, commentators have endorsed the notion of private supervision of nonprofit organizations by donors and others. For example, in *The Things People Do When No One Is Looking: An Argument for the Expansion of Standing in the Charitable Sector*, Joshua Nix argued that the availability of private enforcement rights is necessary because the law leaves managers of nonprofit organizations largely unaccountable for poor directorial decision-making and self-dealing conduct.[107] Nix viewed the availability of intermediate sanctions[108] as inadequate to prevent self-dealing

106. *Id.* at 609.

107. Joshua B. Nix, *The Things People Do When No One Is Looking: An Argument for the Expansion of Standing in the Charitable Sector*, 14 U. MIAMI BUS. L. REV. 147 (2006).

108. Intermediate sanctions are imposed on "disqualified persons": "There is hereby imposed on each excess benefit transaction a tax equal to 25 percent of the excess benefit." 26 U.S.C. § 4958(a)(1) (2006). The statute defines an "excess benefit transaction" as "any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to or for the use of any disqualified person if the value of the economic

transactions because the Treasury Department's regulations defer, in part, to the approval of fiduciary conduct by the charity's own board of directors.[109] Nix argued that charitable trustees often fail to exercise independent, intelligent judgment in approving self-dealing transactions by insiders of nonprofit organizations because nonprofit boards of directors are self-perpetuating and immune from the level of accountability imposed on elected directors of for-profit corporations.[110] Nonprofit board members lapse into a state of inattentiveness that inhibits criticism, independent analysis and informed decision-making.[111] Since nonprofit directors often abdicate their oversight responsibilities, external accountability is necessary to deter managerial misconduct:

> A consensus of criminologists now agree that where the goal is to deter criminal behavior, increasing the likelihood of a criminal's apprehension is a far more powerful deterrent than increasing the severity of punishment. A nonprofit director or executive who breaches her duty of loyalty to the company by funneling resources into her own pocket is unlikely to be deterred from doing so if she is relatively certain that this malfeasance will go undetected. It is essential that we provide more protections for nonprofit organizations so as to increase the public's confidence in these necessary entities and insulate them from the reach of the unfortunate state of human nature. To accomplish this goal, there must either be an increase of funding for agencies already charged with charitable oversight or the utilization of

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benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit." 26 U.S.C. § 4958(c)(1)(A).

109. Nix, *supra* note 107, at 157.

110. *Id.* at 157-59.

111. Nix explains two psychological theories for board inattentiveness:

> The core principle of diffusion of responsibility is that people are more likely to acquiesce to the will of the group or just "go along" instead of asserting their individual thoughts or feelings in situations where there is a lack of individual accountability. Generally, subjects in experiments designed to study this concept have said that they failed to voice their concerns or act when in a large group because they assumed that if a problem existed, someone else would take care of it. Deindividuation is a related concept that was first studied by Festinger, Pepitone and Newcomb in 1952 and deals with the phenomenon that individuals who are in a large group tend to lose their personal identities and do things that are inconsistent with their self-identified personalities. Larger groups, of which an individual is a part, give that individual anonymity and also allow them to share the blame, reducing the sense of individual responsibility. Nonprofit boards that are especially large and consist of persons who have other responsibilities and duties at for-profit companies are very likely to allow themselves to be dominated by a motivated board member with an agenda.

Id. at 159-60 (footnotes omitted).

> another set of eyes that can watch over nonprofit organizations and protect the public's interest in charity.[112]

Nix concluded that donors, current employees, former employees and beneficiaries of public charities should have standing to bring charges of "fraud, malfeasance, misappropriation of funds, breach of fiduciary duty, or any other act of self-dealing."[113]

C. *Assumptions about Donor Standing*

All of the theories about donor standing described above explicitly or implicitly justify the grant of enforcement rights by reason of one of two key assumptions. Contract law theories emphasize the importance of preserving donors' expectations in the reciprocal aspect of charitable transactions as necessary to maintain donor confidence in the system of philanthropy.[114] Other theories assume that donors, if granted standing, will play an active role in safeguarding charitable assets to protect the public interest.[115] Both theories assume that the lack of donor enforcement rights creates a chilling effect on charitable giving, and conversely, that granting donor standing would restore confidence and trust in the social institution of philanthropy, thereby encouraging higher levels of charitable giving.[116]

IV. RECENT PROPOSALS TO REFORM THE LAW GOVERNING DONOR STANDING

Three opinion leaders in the field of nonprofit law recently proposed rules to reform the grant of donor standing. In this section, we consider the opinions of Professors Ronald Chester, Edward Halbach and Evelyn Brody.

Professor Ronald Chester,[117] a strong proponent of donor standing, characterized a charitable donee's failure to comply with a donor-imposed restriction as an "abuse."[118] Chester endorsed U.T.C. Section 405(c) and argued

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112. *Id.* at 152-53.

113. *Id.* at 188-89. Under his proposal, a plaintiff would file charges with the state attorney general, who would investigate the matter and prepare findings of fact. The attorney general would then decide whether to pursue enforcement or allow the plaintiff to do so. *Id.* at 189-90.

114. *See supra* notes 80-96.

115. *See supra* notes 97-104.

116. *See supra* notes 80-82, 90-92, 98-99.

117. Professor Chester is a member of the Consultative Group for the American Law Institute's Restatement (Third) of Trusts and Principles of the Law of Nonprofit Organizations.

118. Ronald Chester, *Grantor Standing to Enforce Charitable Transfers Under Section 405(c) of the Uniform Trust Code and Related Law: How Important Is It and How Extensive Should It Be?*, 37 REAL PROP. PROB. & TR. J. 611, 612, 628 (2003).

that "there are ample practical reasons to justify this largely new grant of standing, including the lack of effective enforcement by state attorneys general of restrictions on charitable transfers."[119] Chester explained, "[i]f the gift recipient simply ignores the grantor's expressed wishes and the Attorney General does not intervene, the transferor or his representative may be the only party who can police this abuse."[120] Chester concluded that "[t]he reasons for extending standing to grantors and their successors are chiefly practical . . . : state attorneys general simply are not doing a good job of policing charities on their use of restricted funds."[121] Although Chester argued donor standing would increase enforcement of donor-imposed restrictions, he did not explicitly state why he viewed increased enforcement as desirable. Enforcement litigation itself is not a collective good, but a policy designed to implement society's preference that individuals contribute resources to charity. We therefore understand Chester's argument to imply that more enforcement is important to induce charitable giving.

Professor Edward Halbach, Reporter for the American Law Institute's Restatement (Third) of Trusts, argued that a modest grant of standing—*i.e.*, a less expansive grant than U.T.C. 405(c) (Professor Chester's proposal)—"can go far toward satisfying the legitimate demand for greater assurance for settlors, and for the donor public generally, of effective and informed enforcement of charitable trusts, while reducing burdens on resources of attorneys general, and while also enhancing the likelihood of attentive, voluntary compliance by trustees."[122] Halbach endorsed donor standing with three limiting qualifications.[123] First, standing would be limited to major donors relative to the total funding of a charity.[124] Second, the right would be personal to the donor or his personal representative during a reasonable period of estate administration, but would not extend to successors in interest.[125] Third, the scope of the donor's enforcement right would be limited to enforcement of the restriction; it would not extend to other matters of charitable governance or fiduciary decision-making.[126]

Professor Evelyn Brody, Reporter for the American Law Institute's Principles of the Law of Nonprofit Organizations, proposed a more cautious approach to donor standing and, more generally, to laws honoring donor intent:

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119. *Id.* at 614.

120. *Id.* at 628.

121. *Id.* at 635-36.

122. Edward C. Halbach, Jr., *Standing To Enforce Trusts: Renewing and Expanding Professor Gaubatz's 1984 Discussion of Settlor Enforcement*, 62 U. MIAMI L. REV. 713, 726-27 (2008).

123. *Id.* at 725-26.

124. *Id.*

125. *Id.*

126. *Id.* at 726.

> [U]nderlying the approach taken in the ALI draft is my general wariness of over-privileging "donor intent," because I view that term as shorthand for a web of actors and actions. A gift can be legally restricted because of conditions initiated and drafted by the donors' attorneys, or by actions taken by the charity itself in soliciting the gift. The wooing of a major donor is a long-term endeavor, but neither the current development officer nor the donor might be available when it is time to deal with imprecise or poorly-thought-through restrictions. While determining intent is a general problem in contract law, the longevity of the restriction in the charity context argues for increased scrutiny—and even skepticism—of claims about what the donor intended.[127]

Brody proposed a rule limiting enforcement rights to donors that explicitly reserve the right to sue with the consent of the charity.[128] Brody further proposed that "a gift once made is no longer the donor's property and that the fiduciaries of a charity must, within the bounds of their fiduciary duties, be trusted to exercise their wisdom and discretion in implementing donor intent."[129] Brody suggested that the "policy of adhering to a gift restriction, whether going to administration or charitable purpose, and including any enforcement right of the donor or other private party, diminishes with time and unanticipated circumstances."[130]

V. PERSPECTIVES FROM EXPERIMENTAL PSYCHOLOGY: WILL DONOR STANDING INCREASE CHARITABLE GIVING?

In this section, we consider the question of donor standing from the perspective of experimental psychology. Psychology, the science of the mind, addresses a variety of topics from sensation and perception to concepts and behavior. Experimental psychology uses controlled laboratory experiments to test hypotheses about the nature and organization of various mental processes. Here we review results and conclusions from psychological research about human social behavior as it relates to charitable giving and the issue of donor standing.[131]

From a psychological perspective, the issue of donor standing can be cast in terms of particular mental states: the feelings of *trust* and *mistrust*. In psychological terms, proponents of donor standing hypothesize that donors

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127. Evelyn Brody, *From the Dead Hand to the Living Dead: The Conundrum of Charitable-Donor Standing*, 41 GA. L. REV. 1183, 1259 (2007).

128. *Id.* at 1261.

129. *Id.* at 1260 (citations omitted).

130. *Id.* at 1267.

131. We recognize that some readers might be unfamiliar with the psychological literature reviewed here. For more information, the abstracts and full text of our references can be quickly accessed on Google's academic search engine at http://scholar.google.com/.

experience mistrust in their interactions with charities, donors' trust will increase when they have the ability to legally enforce gift restrictions, and enhanced trust will increase charitable donations. Trust is a distinctive human mental state that is associated with specific eliciting events, physiological processes, and behavioral responses. For example, experimental research has found that trusting behavior is linked with the hormone oxytocin[132] and that intranasal administration of oxytocin causes a significant increase in trusting behavior.[133] By viewing philanthropy in terms of the underlying mental states of trust and mistrust, a rich body of empirical findings from experimental psychology can be brought to bear on the question of donor standing.

We begin this section by raising questions about the economic rationale for donor standing and reviewing known shortcomings of common economic assumptions about human behavior. Then, we describe psychological approaches to understanding behavior and how they relate to economic models. Subsequently, we focus on psychological research about how people think about the social world and, more particularly, how people think about gift-giving and exchange. We then bring this research to bear on charitable giving, arguing that donor standing might produce unintended and undesirable effects.

A. *The Question of Donor Standing*

There is a basic problem of mistrust between donor and charity. A donor transfers wealth to a charity, trusting the charity to use the gift as expected, thereby satisfying the donor's goals. The charity chooses how to use the gift, given the desires of donors, beneficiaries, and the charity itself. When these interests are not perfectly aligned, the charity must decide whether to break trust with the donor or to compromise its own interests or the interests of its beneficiaries. Given the possibility that the charity will break trust, the donor should, in theory, discount the expected value of making a donation in proportion to the perceived probability of untrustworthy behavior. Therefore, donors should donate less money than they would if charities were completely trustworthy.

Given standard economic assumptions—people make rational choices, they choose alternatives that maximize their utility, and they discount values in proportion to uncertainty—the problem of mistrust should decrease charitable giving.[134] Donor standing is a policy designed to counteract this chilling effect by

132. Paul J. Zak et al., *The Neurobiology of Trust*, 1032 ANNALS N.Y. ACAD. SCI. 224, 224-26 (2004).

133. Michael Kosfeld et al., *Oxytocin Increases Trust in Humans*, 435 NATURE 673, 673-76 (2005).

134. *See, e.g.*, Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Michael C. Jenson & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); Stephen A. Ross, *The Economic Theory of Agency: The Principal's Problem*, 63 AM. ECON. REV. 134 (1973).

increasing donor confidence in charities.[135] Consequently, allowing donors to litigate against charities for violating the terms of restricted gifts will deter charities from untrustworthy behavior, decrease donors' perceptions of risk and thereby increase donations. Armed with the right to sue, donors will give away more money. Charities are not made worse off because they can simply decline donations with unfavorable terms. More resources will be channeled to beneficiaries, and everyone seems to benefit.[136]

Although seemingly straightforward, the logic of granting donors standing should be carefully examined. Sometimes legal solutions create more problems than they solve.[137] What if charities that acquiesce to gift restrictions outcompete organizations that maintain operational independence from their donors? What if donor goals differ from the needs of beneficiaries, and charities are unable to prioritize beneficiaries? What if the expertise of charitable organizations is undermined by gift restrictions imposed by less knowledgeable donors? What if possible or actual legal battles foster suspicion, mistrust, and hostility among donors and charities? Clearly, a comprehensive consideration of the effects of donor standing requires an inquiry that goes beyond simple economic approaches.

We will argue that the economic argument for donor standing is at best suspect and might be exactly wrong, i.e., donor standing might *decrease* donations. Our arguments draw on results from experimental psychology about how the human mind represents and processes gift-giving as distinct from market exchange. Because humans think about gifts in a way that fundamentally differs from how they think about exchange, straightforward economic arguments are often systematically incorrect when applied to gift-giving situations. Charitable behavior, therefore, might be especially prone to misunderstanding, particularly when cast in simple economic terms. We will argue that donor standing is unlikely to function as intended and might produce undesirable side-effects.

B. *Failures of Simple Economic Models of Human Behavior*

Simple economic models work well in some contexts and fail in other contexts. Consider the following questionable cases.

In some cultures, it is customary for a man to give a woman an expensive engagement ring at the proposal of marriage. There is a risk of losing the ring if

135. *See supra* notes 80-104.

136. *See supra* notes 80-82, 90-92.

137. *See, e.g.*, ROBERT C. ELLICKSON, THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH 107-09, 116-17, 120-27 (2008); Elinor Ostrom, *Policies that Crowd Out Reciprocity and Collective Action, in* MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS FOR COOPERATION IN ECONOMIC LIFE 253, 266-70 (Herbert Gintis et al. eds., 2005); Sim B. Sitkin & Nancy L. Roth, *Explaining the Limited Effectiveness of Legalistic "Remedies" for Trust/Distrust*, 4 ORG. SCI. 367 (1993).

the engagement dissolves, and this risk should make people more reluctant to give rings. One legal solution would be to allow men to sue for the return of the ring. Indeed, many, but not all, jurisdictions recognize a civil action to reclaim an engagement ring.[138] Are men more likely to give engagement rings in jurisdictions that allow them to sue?

Recently, a man who donated a kidney to his wife demanded its return upon discovering her infidelity.[139] This illustrates that organ donation involves some risk of future regret, such as when donors later need the organ themselves.[140] A simple economic model might suggest that donors would give more organs if they could impose and enforce restrictions on organ usage, such as a stipulation that the organ be returned if the donor needs it. Recipients would not be worse off because they could simply decline organs with unfavorable terms. But should organ donors be given the opportunity to sue to enforce the terms of organ donation?

We do not, of course, presume a close analogy between charitable contributions and engagement rings or organ donation. Nonetheless, these examples show that simple economic arguments can be misleading and should be approached with caution. Indeed, the idea that humans are best understood as self-interest maximizers who invariably respond to incentives, i.e., as "*Homo economicus,*" is on the decline even in its home discipline of economics.[141] Experiments show that economic models work extremely well for understanding impersonal commodity markets, but fail in other contexts such as asset markets and, most relevant here, personal interactions.[142] These results are no surprise to psychologists because the field of psychology abandoned purely incentive-based explanations of behavior over half a century ago.[143] The psychologist B. F. Skinner famously proposed the bold hypothesis that behavior can be explained solely in terms of the history of rewards and punishments associated with the

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138. *See* Adam D. Glassman, *I Do! Or Do I? A Practical Guide to Love, Courtship, and Heartbreak in New York – or – Who Gets the Ring Back Following a Broken Engagement?*, 12 BUFF. WOMEN'S L. J. 47, 54-55 (2004); Nadine Brozan, *If Things Fall Apart, Who Gets the Ring?*, N.Y. TIMES, Oct. 5, 2008, *available at* http://www.nytimes.com/2008/10/05/fashion/weddings/05field.html?_r=1&pagewanted=2#.

139. Sarah Netter, *Medical Expert Says Surgeon's Quest for Kidney Compensation is 'Soap Opera'*, ABC NEWS, Jan. 8, 2009, *available at* http://abcnews.go.com/print?id=6603460.

140. Mary D. Ellison et al., *Living Kidney Donors in Need of Kidney Transplants: A Report from the Organ Procurement and Transplantation Network*, 74 TRANSPLANTATION 1349, 1349-51 (2002).

141. *See generally* MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS FOR COOPERATION IN ECONOMIC LIFE (Herbert Gintis et al. eds., 2005); VERNON L. SMITH, RATIONALITY IN ECONOMICS: CONSTRUCTIVISTS AND ECOLOGICAL FORMS 6-11 (2008).

142. SMITH, *supra* note 141, at 246-47.

143. *See generally* STEVEN PINKER, HOW THE MIND WORKS (1997) [hereinafter PINKER, HOW THE MIND WORKS]; STEVEN PINKER, THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE (2002) [hereinafter PINKER, THE BLANK SLATE].

behavior.[144] By cleverly administering incentives, Skinner taught pigeons complex behaviors such as dancing, ping pong, and bowling.[145] He thought that the same incentive-based learning could explain the spectacular diversity of animal behavior.[146] But this hypothesis was soon discarded as it became clear that incentives fail to explain how rats travel through mazes, how children learn language, how desert ants navigate their featureless environment, why beavers build dams but otters do not and innumerable other behavioral observations.[147]

Following the logic of simple self-interest models can easily lead to absurdities. Self-interest models predict that people will not care for their children because doing so is individually costly.[148] Neither will people help their friends, take revenge on their enemies, pay taxes, or die for their country. Further, the incentive-seeking *Homo economicus* should be infinitely vulnerable to inducements. For example, women should be more likely to go on a date when the invitation is accompanied by a cash offer, children should always obey allowance-wielding parents, and state coercion should be sufficient to eliminate murder. Clearly, this idealized model cannot be applied indiscriminately.

Indeed, experiments have shown that people violate self-interest even in anonymous laboratory interactions.[149] Participants give money away to strangers, they cooperate with individuals and groups even when they could be exploited, and they act as trusting and trustworthy partners despite incentives to break trust.[150] People also spend money to take revenge on others, even when this cannot possibly yield future benefits. By violating rationality, people sometimes perform better than purely self-interested agents, and sometimes they perform worse. In short, this experimental literature shows that personal interactions, even

144. *See, e.g.*, PINKER, THE BLANK SLATE, *supra* note 143, at 20.

145. B.F. SKINNER, THE BEHAVIOR OF ORGANISMS: AN EXPERIMENTAL ANALYSIS (1938).

146. *Id.*

147. The movement in psychology that replaced Skinner's incentive-based behaviorism is referred to as the "cognitive revolution" of the 1950s and 1960s, which founded cognitive psychology and the cognitive sciences and continues to provide the central theoretical framework for the field of psychology.

148. To be clear, we do not claim that economists actually hold these beliefs, but that the standard theoretical repertoire of economics fails to capture much of human social behavior. Recognizing these obvious limitations, "behavioral economics" revises standard models by adding in preferences about others' welfare, i.e., "other-regarding preferences." For the reasons we outline below, these attempts to band-aid rational choice models are inadequate. *See* Peter DeScioli, *Beyond Selfish and Selfless*, 67 J. ECON. BEHAV. & ORG. 524, 524-28 (2008) (reviewing MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE, *supra* note 141).

149. *See generally* COLIN F. CAMERER, BEHAVIORAL GAME THEORY: EXPERIMENTS IN STRATEGIC INTERACTION (2003); MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS FOR COOPERATION IN ECONOMIC LIFE, *supra* note 141; SMITH, *supra* note 141.

150. *See generally id.*

anonymous laboratory interactions, are not adequately described by their incentive structure.

Because people do not slavishly chase incentives, inducements do not always work and sometimes they backfire.[151] Titmuss argued that paying people to donate blood *reduces* blood donations,[152] and this argument has received empirical support.[153] For example, one recent field experiment found that people who were offered $7 to donate blood chose to do so less often than participants who were not offered compensation.[154] Another field experiment asked participants to collect money for charity, and those who received performance-based rewards collected less money than unpaid participants.[155] Generally, these results are explained in terms of "crowding out" in which rewards displace individuals' intrinsic motives to engage in a given activity.[156] A comprehensive review of 128 laboratory studies concluded that "reward contingencies undermine people's taking responsibility for motivating or regulating themselves."[157]

Just as rewards often fail, punishments, too, are frequently ineffective or counterproductive. On the simple economic model, punishment can seem like a cure-all for undesirable behavior. By attaching sufficient costs to unwanted activity, human behavior should be infinitely malleable under coercion. Indeed, the economists Fehr and Gächter argued, on the basis of their social dilemma[158] experiments, that "punishment is a key force in the establishment of human cooperation."[159] However, subsequent experiments cast considerable doubt on

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151. *See* Samuel Bowles, *Policies Designed for Self-Interested Citizens May Undermine "The Moral Sentiments": Evidence From Economic Experiments*, 320 SCIENCE 1605, 1605 (2008).

152. RICHARD M. TITMUSS, THE GIFT RELATIONSHIP: FROM HUMAN BLOOD TO SOCIAL POLICY 156-57, 198-99 (1971).

153. *See* Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 J. ECON. LITERATURE 75 (1998).

154. Carl Mellström & Magnus Johannesson, *Crowding Out in Blood Donation: Was Titmuss Right?*, 6 J. EUR. ECON. ASS'N 845, 849-50, 852-56 (2008).

155. Uri Gneezy & Aldo Rustichini, *Pay Enough or Don't Pay at All*, 115 Q. J. ECON. 791 (2000); *see also* Bruno S. Frey & Felix Oberholzer-Gee, *The Cost of Price Incentives: An Empirical Analysis of Motivation Crowding Out*, 87 AM. ECON. REV. 746, 746-48, 750-54 (1997).

156. *See, e.g.*, Frey & Oberholzer-Gee, *supra* note 155, at 746-48, 750-54.

157. Edward L. Deci et al., *A Meta-Analytic Review of Experiments Examining the Effects of Extrinsic Rewards on Intrinsic Motivations*, 125 PSYCHOL. BULLETIN 627, 659 (1999).

158. The term "social dilemma" refers to situations in which self-interested behavior leads to outcomes that are worse for everyone, relative to the outcomes achieved through cooperation. Prominent examples include the prisoner's dilemma, the tragedy of the commons, the public goods dilemma, collective action problems, and the trust game.

159. Ernst Fehr & Simon Gächter, *Altruistic Punishment in Humans*, 415 NATURE 139,

this idea. For example, when participants were given the opportunity to retaliate against punishers, many responded to punishment with retaliation rather than cooperation, and as a result, the opportunity to punish *decreased* aggregate monetary gains.[160]

Even when counter-punishment is unavailable, sanctions can backfire by undermining voluntary cooperation.[161] Gneezy and Rustichini conducted a field experiment looking at the effect of fines on parent tardiness at day-care centers.[162] After measuring tardiness for several weeks, a fine was introduced and applied to late parents. Contrary to the intended effect, the fine *increased* tardiness.[163] Late arrivals occurred twice as often as before the fine (and relative to a control group of day-care centers with no fine). Moreover, the increased lateness continued after the fine was removed.[164] Similarly, Cardenas, Stranlund, and Willis reported an experiment with rural Columbians, which involved a social dilemma resembling problems that the participants faced in everyday life.[165] They found that the presence of external sanctions for non-cooperative behavior *decreased* cooperation.[166] They concluded that "individuals confronted with the regulation began to exhibit less other-regarding behavior and made choices that were more self-interested; that is, the regulation appeared to crowd out other-regarding behavior."[167]

Fehr and Rockenbach looked at the effect of sanctions in a trust experiment.[168] Participants were randomly assigned as investors or trustees. In the basic interaction, an investor received an endowment of money and decided how much money to transfer to an trustee, given that the transferred money would be tripled (with the additional money coming from the experimenters).[169] The trustee could then send some money back to the investor. Along with the

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137-140.

160. *See, e.g.*, Matthias Cinyabuguma et al., *Can Second-Order Punishment Deter Perverse Punishment?*, 9 EXPERIMENTAL ECON. 265 (2006); Anna Dreber et al., *Winners Don't Punish*, 425 NATURE 348 (2008); Benedikt Herrmann et al., *Antisocial Punishment Across Societies*, 319 SCIENCE 1362 (2008); Nikos Nikiforakis, *Punishment and Counter-Punishment in Public Good Games: Can We Really Govern Ourselves?*, 92 J. PUB. ECON. 91 (2008).

161. *See* Bowles, *supra* note 151, at 1605-09.

162. Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1, 1-17 (2000).

163. *Id.* at 3.

164. *Id.*

165. Juan Camilo Cardenas et al., *Local Environmental Control and Institutional Crowding-Out*, 28 WORLD DEV. 1719, 1721 (2000); Juan-Camilo Cardenas, *Norms from Outside and from Inside: An Experimental Analysis on the Governance of Local Ecosystems*, 6 FOREST POLICY & ECON. 229 (2004).

166. Cardenas et al., *supra* note 165, at 1729.

167. Cardenas et al., *supra* note 165, at 1719.

168. Ernst Fehr & Bettina Rockenbach, *Detrimental Effects of Sanctions on Human Altruism*, 422 NATURE 137, 137-40 (2003).

169. *Id.* at 138.

money, the investor also sent a note indicating the desired amount he or she expected the trustee to send back. Trust between investor and trustee could allow both to earn extra money, but a trustee could gain by breaking trust (returning nothing to the investor). In this interaction, participants tended to be trustworthy: Trustees returned 48% of the tripled transfer. In the second interaction, the experimenters introduced sanctions.[170] Investors could choose whether a fixed fine would be applied if trustees sent back less than the desired amount indicated on the investor's note. Trustees knew whether they faced a fine (conditional on their transfer) before making their decision.[171] The threat of a fine *decreased* trustees' trustworthiness causing them to return 30% of the tripled transfer amount versus 48% when the fine was not in place. Nevertheless, most investors (67%) chose to use the fine. In a follow-up experiment, investors were informed that, on average, trustees returned less money when subjected to a fine, but most investors still chose to impose the fine. The authors concluded that "as our experiments indicate, sanctions intended to deter non-cooperation may backfire because they undermine altruistic cooperation."[172] These results have been replicated in other experiments showing that sanctions can undermine trust.[173]

Taken together, the experimental literature shows that rewards and sanctions do not always have singular, monotonic effects on behavior, as predicted by standard economic theory. Instead, incentive manipulations can have multiple effects, which might complement or conflict. For example, sanctions might generate not only fear and avoidance but also irritation, defiance, mistrust, or revenge. Unintended effects might displace, attenuate, or overwhelm the intended incentive effects. This has been elegantly demonstrated in experiments that use manipulations to shift which effect dominates in a given environment.[174]

How do these experimental results bear on the question of donor standing? The economic argument claims that donor standing increases the trustworthiness of charities. Does the empirical evidence support this claim? Clearly, it does not. While the opportunity to punish could, in principle, coerce charities to behave according to donors' wishes, it is also very possible that donor standing will cause charities to be *less* trustworthy. If so, then donors will be disappointed and might very well *decrease* donations as a consequence. The opportunity for donors

170. *Id.* at 138.

171. *Id.*

172. *Id.* at 140.

173. *See, e.g.*, Ernst Fehr & John A. List, *The Hidden Costs and Returns of Incentives – Trust and Trustworthiness Among CEOs*, 2 J. EUR. ECON. ASSOC. 743 (2004); Daniel Houser et al., *When Punishment Fails: Research on Sanctions, Intentions and Non-Cooperation*, 62 GAMES & ECON. BEHAV. 509 (2007).

174. *See, e.g.*, Uri Gneezy, *The W Effect of Incentives* (Oct. 13, 2003), *available at* http://www.cramton.umd.edu/workshop/papers/gneezy-W-effect-of-incentives.pdf; Ann E. Tenbrunsel & David M. Messick, *Sanctioning Systems, Decision Frames, and Cooperation*, 44 ADMIN. SCI. Q. 684 (1999).

to punish charities could foster suspicion and hostility, which is fundamentally incompatible with the mutual regard and altruistic sentiments that are crucial foundations for donor-charity transactions. In the next section, we will present the case that this outcome is not only possible but, indeed, is likely in light of evidence from experimental psychology about the mental processes and motives underlying gift-giving behavior.

While in this Article we draw on insights from experimental psychology, we recognize that the field of law and economics is a leading approach to policy analysis among legal scholars.[175] Although economic approaches offer many advantages, they often assume an extremely simple and impoverished model of human behavior. Even many economists now recognize that standard economic models closely describe human behavior in only a small set of institutional environments, especially impersonal double-auction commodity markets.[176] Outside of these environments, economic assumptions about "rational" incentive-seeking should be approached with caution. Most relevant here, donors and charities do not interact in an impersonal commodity market. The standard economic argument that enforceable contracts will increase transactions and promote aggregate welfare is most defensible in the context of commodity markets. Applied to personal interactions, this simple economic argument is speculative and quite possibly in error. Psychology can offer a much more complete picture of the personal interactions between donors and charities. We now turn to the psychology of trade and gift-giving to help better understand the problem of mistrust between donor and charity.

C. *Psychology Explains Incentive-Seeking and Incentive-Ignoring*

Like other organisms, humans are exquisitely well-designed to capture benefits and to avoid costs. Indeed, any given individual's persistence as a physically intact object crucially depends on these capacities. Even the least competent person (or for that matter a housefly) is an engineering marvel that far outstrips the abilities of the most advanced artificial intelligence systems. But too often economic approaches invoke psychology only to explain why incentives fail, as though self-interested behavior requires no psychological explanation.[177] Cosmides and Tooby identified a fundamental flaw in this tendency: "Rational behavior is not, in any sense, the state of nature. Not behaving *at all* is the state of

175. *See generally* RICHARD A. POSNER, FRONTIERS OF LEGAL THEORY 32 (2001); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 3 (6th ed. 2003).

176. Smith, *supra* note 141.

177. We refer here to the field of "behavioral economics" which seeks to undermine and qualify standard economic assumptions about "rational" human behavior, but in our view this approach far *understates* the role of psychology in explaining behavior.

nature in a universe that includes lifeless planets, prebiotic soup, mountains, trees, and tables. All departures from this state of inaction require explanation."[178]

How does the mind successfully capture benefits and avoid costs? The human mind is a product of evolution by natural selection.[179] Evolution continually incorporates functional improvements, causing organisms' devices or *adaptations* to reflect the principles of good engineering.[180] One important engineering principle is the tradeoff between breadth and efficiency. Specialized mechanisms tend to be extremely good at solving one problem, but poor at solving other problems. To reap efficiency gains, organisms consist of bundles of specialized mechanisms.[181] For example, rather than having a single type of cell that performs multiple functions, humans have skin cells, nerve cells, red blood cells, white blood cells, and so on, each with a particular function.[182] Computational devices—such as brains—are no different: Animals' brains are bundles of programs specialized to solve specific problems associated with their lifestyle.[183] In short, human minds navigate the environment by applying specialized computational mechanisms.[184]

The evolutionary origin of the mind explains not only why people try to capture benefits and avoid costs, but also why humans are "better than rational" at solving so many problems.[185] Male fruit flies not only seek females as "benefits," but they also know precisely which courtship behaviors females prefer in a mate; this information is embodied in specialized computational mechanisms.[186] Similarly, humans not only recognize, for example, depth

178. Leda Cosmides & John Tooby, *Better than Rational: Evolutionary Psychology and the Invisible Hand*, 84 AM. ECON. REV. 327 (1994).

179. *Id.* at 328.

180. *See generally* STEVEN VOGEL, CATS' PAWS AND CATAPULTS: MECHANICAL WORLDS OF NATURE AND PEOPLE (1998); Peter DeScioli, *Heavy Hearts and Heads Held High – A Review of Glimpses of Creatures in Their Physical Worlds*, EVOLUTION AND HUMAN BEHAVIOR (forthcoming).

181. VOGEL, *supra* note 180, at 22.

182. *Id.* at 26-7, 232-33.

183. *See* NOAM CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX 30-37 (1965) (describing a computational system in the human brain that is specialized for acquiring language, the "language acquisition device"); DAVID MARR, VISION: A COMPUTATIONAL INVESTIGATION INTO THE HUMAN REPRESENTATION AND PROCESSING OF VISUAL INFORMATION 8-38 (1982) (describing computational systems in the brain that process visual information and produce visual perception). *See generally* MARVIN MINSKY, THE SOCIETY OF MIND (1988) (arguing that the mind is a large collection of specialized computational mechanisms); John Tooby & Leda Cosmides, *The Psychological Foundations of Culture, in* THE ADAPTED MIND 19, 93-114 (Jerome H. Barkow, Leda Cosmides & John Tooby eds., 1992).

184. PINKER, HOW THE MIND WORKS, *supra* note 143, at 21; Tooby & Cosmides, *supra* note 183.

185. Cosmides & Tooby, *supra* note 178, at 329.

186. Barry J. Dickson, *Wired for Sex: The Neurobiology of* Drosophila *Mating Decisions*,

perception or language as "benefits," they also apply mechanisms that are specially designed for computing depth and for acquiring language.[187] Specialization allows adaptations to exploit regularities in adaptive problems and to thereby perform feats that merely "rational" general-purpose mechanisms could not possibly accomplish.

The explanation for the human mind's performance can also explain, broadly, why simple economic inducements do not always work. First, specialization allows computational mechanisms to concentrate on the most relevant dimensions of a problem while ignoring less pertinent information.[188] For certain problems, immediate material incentives are simply not the most relevant information and therefore might be ignored. Courting a mate, for example, is a complex problem in which monetary cost minimization plays a minor role (indeed, females can use male inattention to cost as one indicator of courtship effort, thus preferring extravagant males). Second, the incentives themselves might alter an individual's perception of the problem ("framing"), thereby shifting which specialized mechanisms are applied.[189] For instance, the possibility of punishment might transform a cooperative interaction into a hostile one that activates behavioral routines surrounding defiance or revenge. Third, solving certain problems specifically requires that some incentives be ignored. For example, incentive-seeking renders individuals vulnerable to manipulation. Frogs reliably chase wriggling worms, a fact that is exploited by several dozen species of vipers, which lure prey by wiggling their tails like worms.[190] Avoiding manipulation requires insulation from incentives, which might explain why prospective mates do not accept cash for romance and children resist the inducements from their parents. In line with this idea, psychological research shows that incentives are especially likely to backfire when people feel that they are being controlled or manipulated by others.[191]

We will argue that all three of these explanations—irrelevance, framing, and insulation—potentially apply to the effect of donor standing on donor-charity transactions. But first we turn to how people think about the social world in general and transactions like exchange and gift-giving in particular.

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322 SCIENCE 904, 905, 907 (2008).

187. *See, e.g.*, CHOMSKY, *supra* note 183, at 30-37.

188. Cosmides & Tooby, *supra* note 178, at 329.

189. *See* Bowles, *supra* note 151, at 1606-07.

190. M. Hagman et al., *Tails of enticement: caudal luring by an ambush-foraging snake (Acanthophis praelongus, Elapidae)*, 22 FUNCTIONAL ECOLOGY 1134-1139 (2008).

191. *See generally* Deci et al., *supra* note 157, at 627; Armin Falk & Michael Kosfeld, *The Hidden Costs of Control*, 96 AM. ECON. REV. 1611 (2006).

D. *How People Think About the Social World*

Humans are highly adapted to life in the social world, just as woodpeckers are equipped for life in the trees and camels are specialized for life in the desert. For *Homo sapiens*, the biologically relevant environment, i.e., the distribution of fitness costs and benefits, is concentrated in other people. Unsurprisingly then, humans have evolved a variety of computational mechanisms for mining the benefits and avoiding the costs associated with social interactions. These include mental processes for helping genetic relatives,[192] avoiding incest,[193] choosing a mate,[194] guarding mates from competitors,[195] forming friendships,[196] avoiding unreliable friends,[197] neutralizing enemies,[198] engaging in mutually beneficial trade,[199] avoiding traders who cheat,[200] group cooperation,[201] helping the ingroup,[202] attacking outgroups,[203] learning from skilled teachers,[204] and so on.

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192. Eugene Burnstein et al., *Some Neo-Darwinian Decision Rules for Altruism: Weighing Cues for Inclusive Fitness as a Function of the Biological Importance of the Decision*, 67 J. PERSONALITY & SOC. PSYCHOL. 773, 774-76 (1994).

193. Debra Lieberman et al., *The Architecture of Human Kin Detection*, 445 NATURE 727, 727-31 (2007).

194. DAVID M. BUSS, THE EVOLUTION OF DESIRE: STRATEGIES OF HUMAN MATING 1-7 (1994).

195. DAVID M. BUSS, THE DANGEROUS PASSION: WHY JEALOUSY IS AS NECESSARY AS LOVE AND SEX 40-42 (2000).

196. *See generally* Joan B. Silk, *Cooperation Without Counting: The Puzzle of Friendship*, *in* GENETIC AND CULTURAL EVOLUTION OF COOPERATION 37, 37, 46 (Peter Hammerstein ed., 2003); Peter DeScioli & Robert Kurzban, *The Alliance Hypothesis for Human Friendship*, 4 PLoS One 4(6): e5802, 1-8 (2009).

197. *See* John Tooby & Leda Cosmides, *Friendship and the Banker's Paradox: Other Pathways to the Evolution of Adaptations for Altruism*, 88 PROC. OF THE BRIT. ACA. 119, 134-41 (1996).

198. DAVID M. BUSS, THE MURDERER NEXT DOOR: WHY THE MIND IS DESIGNED TO KILL 34-36 (2005).

199. *See* Robert L. Trivers, *The Evolution of Reciprocal Altruism*, 46 Q. REV. OF BIO. 35, 49 (1971). Trivers, *supra* note 198, at 36-37, 39, 49, 53.

200. Tooby & Cosmides, *supra* note 183, at 175, 181, 193-95, 205; Leda Cosmides & John Tooby, *Neurocognitive Adaptations Designed for Social Exchange*, *in* THE HANDBOOK OF EVOLUTIONARY PSYCHOLOGY 584 (David M. Buss ed., 2005); Trivers, *supra* note 12, at 36, 48-52.

201. Robert Kurzban & Peter DeScioli, *Reciprocity in Groups: Information-seeking in a Public Goods Game*, 38 EUR. J. OF SOC. PSYCHOL. 139, 140-41, 152-53 (2007).

202. ELLIOT SOBER & DAVID SLOAN WILSON, UNTO OTHERS: THE EVOLUTION AND PSYCHOLOGY OF UNSELFISH BEHAVIOR 9, 150-53 (1998).

203. RICHARD WRANGHAM & DALE PETERSON, DEMONIC MALES: APES AND THE ORIGINS OF HUMAN VIOLENCE 194-97 (1996).

204. Joseph Henrich & Francisco J. Gil-White, *The Evolution of Prestige: Freely Conferred Deference as a Mechanism for Enhancing the Benefits of Cultural Transmission*, 22

These social tasks were recurrent adaptive problems over the species' evolutionary history, and humans are equipped with specialized cognitive mechanisms for handling them.

Specialized cognitive processes are organized into "mental models," which represent different aspects of the environment.[205] Mental models function as organizational frameworks for transforming sensory data into behavioral routines aimed at solving adaptive problems.[206] Researchers have identified a number of mental models for organizing the social world.[207] For example, Fiske proposed that humans understand social relationships with several different cognitive frameworks.[208] These models include: communal relationships, which are characterized by sharing and generosity; exchange relationships, which are characterized by reciprocation and bargaining; and authority relationships, which are characterized by hierarchy and obedience.[209] Some other relationship forms might include romantic, competitive, and teacher-student relationships.

Here we focus on two forms of social interaction that are potentially relevant for understanding donor-charity transactions. First, in exchange or trade relationships, people offer benefits to others in order to extract benefits in return. A key feature of this relationship form is the importance of monitoring mechanisms for detecting and deterring cheaters. Second, in communal relationships, people deliver benefits to others primarily to meet the needs of those individuals. The main challenge is not detecting cheaters but correctly evaluating the needs and desires of the target individual.

E. *How People Think About Exchange*

The potential for gains in trade implies that evolution favors mechanisms that can successfully reap these benefits. Evolutionary biologists refer to this idea as the theory of *reciprocal altruism.*[210] However, exchange poses difficult problems because although trade is beneficial, cheating can yield even greater benefits.[211] Hence, successful trade requires the ability to avoid cheaters. Furthermore, if a species evolves cheater avoidance mechanisms, then evolution should favor

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EVOLUTION & HUM. BEHAV. 165, 167-68, 173-74 (2001).

205. STEVEN PINKER, THE STUFF OF THOUGHT: LANGUAGE AS A WINDOW INTO HUMAN NATURE 439 (2007).

206. *Id.* at 51-52.

207. *See, e.g.*, Alan Page Fiske, *The Four Elementary Forms of Sociality: Framework for a Unified Theory of Social Relations*, 99 PSYCHOL. REV. 689, 690 (1992). *See generally* PINKER, *supra* note 205.

208. Fiske, *supra* note 207, at 690-93.

209. *Id.* at 700-02.

210. Robert Axelrod & William D. Hamilton, *The Evolution of Cooperation*, 211 SCIENCE 1390, 1390-91 (1981); Trivers, *supra* note 199, at 38-39.

211. Axelrod & Hamilton, *supra* note 210, at 1390-91; Trivers, *supra* note 199, at 46-47.

mechanisms in cheaters for evading detection, including "subtle cheating" in which traders return some but less than the expected amount.[212] Theorists have argued that this can generate an arms race of increasingly subtle forms of cheating and detection.[213]

Some animals solve the cheater problem by using specialized mechanisms for individual recognition, memory for interaction histories, cheater detection, and other processes that aid cheater avoidance.[214] Other organisms implement simpler solutions. For example, yucca moths pollinate yucca flowers and in return the yucca fruit provides nourishment for moth larvae, which are deposited in the flowers.[215] However, moths sometimes selfishly deposit too many larvae. The yucca plant is able to detect this "cheating" and in response aborts flowers with too many larvae. Across a wide variety of species, a signature feature of exchange is the presence of mechanisms for avoiding the costs imposed by cheaters.

A large body of evidence from cognitive psychology, developmental psychology, and cognitive neuroscience supports the idea that humans have cognitive mechanisms specialized for social exchange, cheater detection, and cheater avoidance.[216] A key component of this literature is research showing that participants excel at conditional reasoning when the task involves potential cheaters, even though participants perform poorly on logically equivalent tasks that do not involve cheating.[217] This ability develops early (by age 3) and reliably across cultures, including tribal societies without formal schooling.[218] Further, brain damage can undermine cheater detection without impairing reasoning about logically equivalent problems dealing with social rules that do not involve exchange.[219]

Detection of cheating activates the mental state of mistrust in which individuals cease cooperation with cheaters. Consistent with theories surrounding reciprocity,[220] participants in experimental social dilemmas tend to match cooperation with cooperation and defection with defection.[221] Beyond gross cheating, people are also able to detect and deter subtle cheating.[222] This issue has

212. Trivers, *supra* note 199, at 46-47.

213. *Id.* at 48-49.

214. Axelrod & Hamilton, *supra* note 210, at 1395; Joel L. Sachs et al., *The Evolution of Cooperation*, 79 Q. REV. OF BIO. 135, 142 (2004). .

215. Sachs et al., *supra* note 214, at 150.

216. *See, e.g.*, PINKER, *supra* note 205; Tooby & Cosmides, *supra* note 183, at 175, 181, 193-95, 205; Cosmides & Tooby, *supra* note 200; Fiske, *supra* note 207.

217. Cosmides & Tooby, *supra* note 200.

218. *See id.* at 587.

219. *See id.* at 611-12.

220. *See* Robert L. Trivers, *supra* note 198.

221. *See, e.g.*, Kurzban & DeScioli, *supra* note 201, at 140.

222. *See id.* at 153.

been investigated in an experimental bargaining interaction termed the "ultimatum game."[223] In this interaction, a proposer chooses how much of a monetary endowment to offer to a receiver. The receiver can accept or reject the offer, with rejection yielding both participants zero. The interaction is designed to resemble the final stage of a bargaining process in which one trader makes a final offer about how to divide the surplus and the other trader takes or leaves the offer. Standard economic theory predicts that receivers should choose any positive amount over zero, and therefore, proposers should maximize their gains by offering the smallest possible positive amount.[224] This is incorrect. Hundreds of studies have used this game, and the basic finding is that proposers typically offer 40 to 50% of the endowment, and receivers reject offers under 20% about half of the time.[225] This result has been replicated in cultures worldwide and with very high stakes (up to several month's wages).[226] One plausible interpretation of these results is that receiver rejections are caused by mental processes designed to detect, mistrust, and punish subtle cheating. Such mechanisms would have to insulate individuals against the temptation of immediate gains in order to resist manipulation.

Mechanisms designed to avoid being cheated by others might be responsible for individuals' exquisite sensitivity to material incentives in the context of exchange. This might help explain why standard economic theory often works well in trade environments. Perhaps ironically, the same sensitivity can lead receivers in the ultimatum game to forgo gains to prevent a proposer from taking too much of the surplus. These capacities for trade and bargaining have been enhanced by human inventions and institutions such as markets, accounting practices, formal contracts, and contract enforcement. For example, experiments show that double auction mechanisms, when used in commodity markets, reliably maximize the total surplus among a group of traders and the trading prices are extremely well-described by standard economic theory.[227]

In sum, humans have specialized mechanisms for extracting gains in trade while avoiding cheaters. These information-processing routines are organized as a mental model of exchange situations. Once an environment is identified as a trade interaction, the relevant mental processes are engaged to facilitate performance in exchange. The mental states of trust and mistrust play a crucial role in trade by allowing individuals to direct exchange toward cooperative partners rather than cheaters.

223. COLIN CAMERER, BEHAVIORAL GAME THEORY 43 (2003).
224. *Id.*
225. *Id.* at 49.
226. *Id.* at 60-61.
227. SMITH, *supra* note 141, at 64-65.

F. *How People Think About Gift-Giving*

Intuitively, the key distinction between exchange and gift-giving is that the former is primarily aimed at inducing reciprocation whereas the latter is primarily aimed at meeting the needs or desires of the target individual. Standard economic theory implies that gift-giving should not exist because people should not forgo material resources to benefit others. This is, of course, incorrect. In fact, people give money away even in anonymous laboratory experiments.[228] In a standard experimental interaction, the "dictator game," dictators choose how much of an endowment to give to other participants and how much to keep for themselves.[229] The standard economic prediction is that dictators will give nothing. Hundreds of studies have used this method and the basic result is that dictators freely give away 20% of their endowment on average.[230] Here we describe several explanations for why people and other organisms transfer resources to others without expecting reciprocity.

The most important explanation for cooperation in the natural world is the theory of *kin selection*, first proposed by William Hamilton.[231] The theory shows that evolution favors mechanisms for helping genetic relatives when the benefit to the recipient (B) times the probability that the recipient shares the genes for altruism (r, termed "relatedness") is greater than the cost to the helper (C), giving the condition, $B * r > C$, referred to as Hamilton's rule.[232] When this condition is satisfied, the underlying genes gain an advantage by efficiently reallocating resources across carrier organisms (i.e., "selfish" genes can explain altruistic individuals).[233] Kin selection explains countless forms of altruism such as the foundations of multicellularity, [234,235] cooperation in insect societies,[236] and parental care.[237] Importantly, devices shaped by kin selection, such as mammary glands or parental affection, are not designed to induce reciprocating behavior in the recipient but rather to increase their welfare.

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228. CAMERER, *supra* note 223, at 48.

229. *Id.* at 56.

230. *Id.*

231. W. D. Hamilton, *The Genetical Evolution of Social Behaviour I*, 7 J. OF THEORETICAL BIOLOGY 1 (1964).

232. *See id.*

233. RICHARD DAWKINS, THE SELFISH GENE 180-82 (1976).

234. In multi-cellular organisms such as animals and plants, all cells contain the same exact genome and they therefore have identical genetic interests. This explains, for instance, why the 100 trillion cells of the human body cooperate so efficiently and harmoniously.

235. David C. Queller, *Relatedness and the Fraternal Major Transitions*, 355 PHIL. TRANSACTIONS OF THE ROYAL SOC'Y OF LONDON B 1647, 1648 (2000).

236. ROSS H. CROZIER & PEKKA PAMILO, EVOLUTION OF SOCIAL INSECT COLONIES: SEX ALLOCATION AND KIN SELECTION 33-36 (1996).

237. T. H. CLUTTON-BROCK, THE EVOLUTION OF PARENTAL CARE 261 (1991).

A second important explanation for unconditional transfers of resources is *mutualism*, in which helping others simultaneously benefits the helper.[238] For example, if organism A's activities produces positive externalities for organism B, then organism B can gain by promoting A's welfare because this supports A's capacity to continue to generate positive externalities. Importantly, B's helping is not aimed at inducing A's reciprocation, but to increase A's welfare. Monitoring mechanisms are not useful for this function because neither party stands to gain by cheating.

A third explanation for altruism is *costly signaling*, in which individuals engage in costly behavior in order to signal an underlying trait (e.g., mate value, expertise, cooperative disposition) to observers.[239] The male peacock's elaborate tail is a standard example, but these signals also include other behaviors such as birdsong or, more relevant here, displays of altruism.[240] Again, this form of altruism does not require monitoring; in fact, if recipients return the favor, then the costliness and thus effectiveness of the signal is undermined.[241]

In short, there are several explanations for gift-giving or altruism in which monitoring, cheater detection, and trust/mistrust do not play a central role. Research shows that much of human gift-giving is well-explained by kin selection, mutualism, and costly signaling.[242] First and perhaps most obvious is kinship. Human females possess the typical mammalian parental care devices (uterus, umbilical cord, mammary glands, mother-offspring attachment, nursing behavior, etc.), and human males, unusual among mammals, also show parental care. Further, research shows that relatedness explains human helping behavior in a variety of circumstances.[243] Second, humans appear to have mutualism mechanisms, particularly the cognitive systems underlying friendship.[244] Third, humans use altruism as a costly signal to enhance their reputation for productivity and generosity.[245] This conclusion is based on ethnographic evidence from

238. Sachs et al., *supra* note 214, at 145.

239. AMOTZ ZAHAVI & AVISHAG ZAHAVI, THE HANDICAP PRINCIPLE: A MISSING PIECE OF DARWIN'S PUZZLE 144, 226-27 (1997).

240. *Id.* at 144.

241. Roland Bénabou & Jean Tirole, *Incentives and Prosocial Behavior*, 96 AM. ECON. REV. 1652, 1654-59 (2006).

242. *Id.* at 1652-55.

243. Burnstein et al., *supra* note 192, at 773-74; Susan M. Essock-Vitale & Michael T. McGuire, *Women's Lives Viewed from an Evolutionary Perspective. II. Patterns of Helping* 6 ETHOLOGY AND SOCIOBIOLOGY 155, 155, 170 (1985); Lieberman et al., *supra* note 193, at 727; Martin S. Smith et al., *Inheritance of Wealth as Human Kin Investment*, 8 ETHOLOGY AND SOCIOBIOLOGY 171, 171-82 (1987).

244. Margaret S. Clark & Judson Mills, *Interpersonal Attraction in Exchange and Communal Relationships*, 37 J. PERSONALITY & SOC. PSYCHOL. 12, 12-24 (1979); Tooby & Cosmides, *supra* note 197, at 131.

245. Eric A. Smith & Rebecca Bliege Bird, *Costly Signaling and Cooperative Behavior*,

various cultures[246] as well as laboratory experiments in which altruism increases when signaling is possible.[247]

Gift-giving and exchange are processed by different types of specialized cognitive systems, and human relationships are organized according to which mechanisms dominate the relationship. Clark and Mills have shown that one key distinction is between *exchange relationships*, in which individuals give benefits and expect repayment, and *communal relationships*, in which individuals give benefits according to the recipient's needs, without expecting repayment.[248] Their studies showed that individuals seeking an exchange relationship preferred partners who returned favors, whereas individuals seeking a communal relationship preferred partners who *did not* give benefits in return.[249] In another experiment, pairs of participants (strangers or friends) performed a joint task for a reward that could be divided equally or in proportion to their respective contributions.[250] Pairs of strangers usually tracked individual contributions by using different color pens, whereas friends generally selected the same color pens to avoid monitoring inputs.[251] In a similar experiment, they showed that strangers frequently monitored a light that indicated their partner's contributions, but friends did so much less often.[252]

Another line of research also distinguishes exchange and communal relationships. Fiske's relational models theory holds that exchange and communal relationships are two of the most basic psychological models used to manage human social life.[253] This theory is supported by multiple lines of evidence, including ethnographic fieldwork[254] and a series of experiments

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in MORAL SENTIMENTS AND MATERIAL INTERESTS: THE FOUNDATIONS OF COOPERATION IN ECONOMIC LIFE 115, 125, 130-31 (Herbert Gintis et al., eds., 2005).

246. *See generally id.* (discussing ethnographic examples).

247. Pat Barclay, *Trustworthiness and Competitive Altruism Can also Solve the "Tragedy of the Commons"*, 24 EVOLUTION AND HUM. BEHAV. 209, 217 (2003); Pat Barclay & Robb Willer, *Partner Choice Creates Competitive Altruism in Humans*, 274 PROC. OF THE ROYAL SOCIETY B 749, 752 (2007); Vladas Griskevicius et al., *Blatant Benevolence and Conspicious Consumption: When Romantic Motives Elicit Strategic Costly Signals*, 93 J. PERSONALITY & SOC. PSYCHOL. 85, 95 (2007); Charlie L. Hardy & Mark Van Vugt, *Nice Guys Finish First: The Competitive Altruism Hypothesis*, 32 PERSONALITY & SOC. PSYCHOL. BULL. 1402, 1411-12 (2006).

248. Clark & Mills, *supra* note 244, at 12-13.

249. *Id.* at 22-23.

250. Margaret S. Clark, *Record Keeping in Two Types of Relationships*, 47 J. PERSONALITY & SOC. PSYCHOL. 549, 551-52 (1984).

251. *Id.* at 555.

252. Margaret S. Clark et al., *Keeping Track of Needs and Inputs of Friends and Strangers*, 15 PERSONALITY & SOC. PSYCHOL. BULL. 533, 539 (1989).

253. Fiske, *supra* note 207, at 689-91.

254. See ALAN PAGE FISKE, STRUCTURES OF SOCIAL LIFE, THE FOUR ELEMENTARY FORMS OF HUMAN RELATIONS: COMMUNAL SHARING, AUTHORITY RANKING, EQUAL

demonstrating that relationship type explains how people categorize,[255] recall,[256] substitute,[257] and misidentify[258] the people with whom they have relationships. Researchers have also used Fiske's theory to better understand taboo thinking[259] and indirect speech, such as veiled threats and sexual innuendo.[260]

In conclusion, the problem-solving structure of gift-giving differs from exchange, and these problems are handled by distinct specialized mental processes. Giving benefits to others poses difficult challenges, beyond the costs of giving. Helpers must correctly assess the needs and desires of the recipient in order to give effectively. This problem is vivid in the context of childcare: A crying infant might be hungry, tired, cold, hot, etc., and satisfying these needs requires correctly evaluating them. The same is true of courtship gifts, holiday presents, and other forms of gift-giving. In these contexts, cost minimization plays a minor role relative to the evaluation of needs and desires. In fact, this pattern is sufficiently robust that recipients can use the presence of cost minimization to infer how their partner understands their relationship (exchange vs. communal). Hence, when an individual is too focused on cost minimization in the context of communal relationships, others infer that the individual is operating within an exchange model, which is often judged inappropriate, stingy, and insulting.[261]

Similarly, the problem of cheater avoidance is minimal or absent in gift-giving interactions. Consider, for example, a hunter who contributes a large kill to the group in order to send a costly signal of their hunting prowess.[262] The gift is aimed at enhancing reputation rather than inducing reciprocation. If the audience

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MATCHING, MARKET PRICING 31(1991).

255. *See* Nick Haslam & Alan Page Fiske, *Implicit Relationship Prototypes: Investigation Five Theories of the Cognitive Organization of Social Relationships*, 28 J. EXERIMENTAL SOC. PSYCHOL. 441, 441 (1992).

256. *See generally* Alan Page Fiske, *Social Schemata for Remembering People: Relationships and Person Attributes in Free Recall of Acquaintances*, 5 J. OF QUANTITIVE ANTHROPOLOGY 305 (1995) (demonstrating a connection between memory recall and relationship categories).

257. Alan P. Fiske & Nick Haslam, *The Structure of Social Substitutions: A Test of Relational Models Theory*, 27 EUR. J. SOC. PSYCHOL. 725, 725-29 (1997).

258. *See generally* Alan P. Fiske, *Social Errors in Four Cultures: Evidence About Universal Forms of Social Relations*, 24 J. CROSS-CULTURAL PSYCHOL. 463 (1993) (discussing misidentification based on relationship categories); Alan Page Fiske & Nick Haslam, *Confusing One Person with Another: What Errors Reveal About the Elementary Forms of Social Relations*, 60 J. PERSONALITY & SOC. PSYCHOL. 656 (1991) (discussing confusion based on relationship categories).

259. Alan Page Fiske & Philip E. Tetlock, *Taboo Trade-Offs: Reactions to Transactions that Transgress the Spheres of Justice*, 18 POL. PSYCHOL. 255, 256-60 (1997).

260. PINKER, *supra* note 205, at 412-14.

261. Fiske & Tetlock, *supra* note 259, at 256.

262. Smith & Bird, *supra* note 245, at 123, 130-31.

consumes the gift without being impressed by the hunter, then the signal is ineffective but the audience's reaction is not "cheating." Monitoring and sanctioning of audience reactions would be ineffective because audience perceptions of the hunter are intangible, difficult to assess, and cannot be easily coerced. In general, because giving is not aimed at inducing direct reciprocation, monitoring is not crucial like it is in trade interactions. Hence, the mental states of trust and mistrust do not play a central role in gift-giving behavior.

G. *Will Donor Standing Increase Donations?*

A simple economic argument has been advanced to support the idea that donor standing increases donations.[263] Here we consider the alternative possibility that this incentive manipulation is ineffective or counterproductive. This could occur if the incentives are irrelevant, if they alter the framing of the situation, or if they provoke insulation responses.

How do people understand donor-charity transfers? Casual observation suggests that donor-charity transfers can be understood as either gift-giving interactions or exchange interactions. For example, these two interpretations occur in the legal literature, where some have regarded donations as gifts but others view donations as contracts.[264] Psychologically, these two views profoundly differ. Gift-giving focuses on the recipient's needs, whereas exchange focuses on inducing reciprocation. Gift-giving is praised and esteemed, whereas exchange is not. For gifts, focusing on cost minimization is judged improper (stingy), but for exchange, cost minimization is expected and appropriate (frugal). Psychologically, gift-giving transfers ownership immediately, but exchange transfers ownership only after both sides have fulfilled the terms of the exchange.

The effects of donor standing depend on whether donor-charity transfers are understood as gifts or exchanges. The simple economic argument assumes, implicitly, that people represent donations as exchanges. This is a bold assumption, particularly given that donors are *giving money away*, an activity that is quite out of line with standard economic models. Here we consider an alternative view that people often view donations not as exchanges but as gifts and, further, that legal policy might influence donors' perceptions.

First, when donations are understood as gifts, the presence of donor standing can be expected to be largely irrelevant to donation decisions. Donors will tend to be focused on meeting the needs or desires of recipients, rather than the possibility of cheating. For the same reasons, men should not be more willing to

263. *See supra* Part II.

264. *See infra* Part V.A; Brody, *supra* note 127, at 1225 (discussing the distinction and concluding "the traditional view is that a restricted gift is not a contract").

give engagement rings in states where they can sue to recover the ring.[265] In general, gift-givers are not focused on the possibility of cheating, and therefore donor standing is largely irrelevant to gift-giving decisions.

Second, the presence of donor standing might have "framing" effects, shifting interpretations toward an exchange model of donations. Given that donor-charity transfers can readily be interpreted as gifts or as exchanges, context cues might tip interpretation in one direction or the other. Such context effects on cooperation have been demonstrated in laboratory experiments.[266] For example, recall that in daycare centers introducing a fine for late parents *increased* tardiness.[267] The researchers argued that the fine shifted parents' understanding toward an exchange model of the interaction, and many parents decided that tardiness was worth the price of the fine.[268] Exchange interpretations generally undermine voluntary cooperation. This could potentially be disastrous for donor-charity transfers, which crucially depend on voluntary cooperation. To the extent that donors understand themselves to be engaged in an exchange, they are expected to bargain relentlessly to get the most for their money; indeed, to fail to do so would mean that the donor could be judged a "sucker" who was "ripped off" by the charity. Through context effects, donor standing should cause donors to bargain for more self-serving gift restrictions. Further, donors might give less money than before, having judged that certain donations are not "worth it," just as blood donors give less blood when payments shift attention to whether the reward is sufficient rather than helping recipients.[269] More indirectly, to the extent that donors succeed in bargaining with charities for self-interested restrictions, charitable donation becomes less altruistic and hence less praiseworthy. Benabout and Tirole developed an economic model showing that this should decrease the reputation benefits of giving, thereby decreasing donations.[270]

Third, donor standing might cause charities to specifically disregard the prospect of sanctions in order to insulate against manipulation. As reviewed above, the possibility of sanctions often *decreases* cooperation.[271] If sanctions signal an exchange interpretation of donations, then donors should become appropriately skeptical and suspicious of their exchange partner. The results of experiments with the "ultimatum game" (see above) show that people forgo benefits in order to avoid manipulation and aggregate welfare can decrease as a result.[272] To the extent that donor and charity perceive themselves to be engaged

265. *See supra* note 138.
266. *See generally* Bowles, *supra* note 151 (discussing effects on cooperation).
267. Gneezy & Rustichini, *supra* note 162, at 3.
268. *Id.* at 10, 14.
269. Bénabou & Tirole, *supra* note 241, at 1652.
270. *Id.* at 1674.
271. *See supra* note 267
272. *See supra* notes 221-225.

in exchange-style bargaining, they will be mutually suspicious and willing to decline beneficial arrangements when viewed, reasonably or unreasonably, as unfair. This adversarial environment should decrease total donations.

In sum, the idea that donor standing will increase donations is supported by a simple economic model.[273] But the implicit assumption of the economic model is that donors and charities perceive themselves to be engaged in an exchange interaction.[274] This assumption seems particularly out of place for charitable donations, which by standard economic reasoning should not even exist. The psychology of gift-giving is quite different from exchange because it is performed by different mental processes and follows a different intuitive logic.[275] We described three effects that seem likely to render donor standing ineffective or counterproductive: irrelevance, framing, and insulation. That is, donor standing might be ignored as irrelevant, it might shift interpretation toward an exchange and bargaining mentality and/or it could create an environment of mutual suspicion and defiance.

H. *Potential Side-Effects of Donor Standing*

We have argued that donor standing is unlikely to increase donations and might even decrease donations. This section describes several potential side-effects of donor standing that should also be considered.

First, whether donations are modeled as exchanges or as gifts has important implications for people's perceptions of who owns the transferred resource. Uncertainty about ownership is a crucial determinant of dispute resolution and aggression.[276] People who feel a sense of ownership over a resource are more willing to fight for it, and the most costly fights occur when ownership is ambiguous. Any ambiguity created or allowed by legal policies can directly increase aggression in disputes by conferring a sense of entitlement to both sides. Donor standing strongly suggests an exchange model of donations and thereby encourages donors to feel ownership over their gifts until the charity has satisfied the terms of the gift. The implication is that a charity's use of a gift might seem reasonable to a donor who thought of the transfer as a gift, but the same behavior could seem like an outrage if the donor feels entitled to control the gift. In short, donor standing itself might foster outrage among donors about how "their" donations are used.

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273. *See supra* Part II.A.3.

274. *See supra* Part II.A.3.

275. *See supra* Part II.A.3.

276. Herbert Gintis, *The Evolution of Private Property*, 64 J. ECON. BEHAV. & ORG. 1, 1-16 (2007); *see also* Jeffrey Evans Stake, *The Property 'Instinct'*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B 1763, 1763-67 (2004).

Second, the simple economic model of donor standing assumes that donors will enforce only those restrictions that benefit the beneficiaries.[277] However, when disagreement arises about whether enforcement of a restriction will, in fact, benefit the beneficiaries, donors are sometimes willing to punish a charity for departing from the donor's point of view. When donors and beneficiaries have diverging interests, charities can play a key role in mediating those conflicts by convincing the donor of what is actually best for the beneficiaries' welfare. However, charity mediation is impaired if donors can use the threat of litigation as retribution for the charity's disagreement with, or perceived disloyalty to, the donor. We expect that when donors use litigation to punish a charity, they are primarily motivated by their own interests rather than those of the beneficiaries.[278] Research shows that revenge is much more common than punishment on behalf of others.[279] Thus, it seems relatively unlikely that donors will go to the expense of bringing suit against a charity unless they have a personal interest in the matter, which might well conflict with the interests of beneficiaries.

Third, donor standing might impair the role of charity expertise in promoting the welfare of beneficiaries. Long-term acquaintance with a set of problems tends to lead to improved performance and expertise at solving those problems. Charities can act as autonomous organizations specialized for meeting the needs of their beneficiaries. However, donor standing can undermine this autonomy and the benefits of expertise. Charitable organizations have no bargaining power in dealing with donors. This fact is ignored in the argument that charities could simply decline donations with unfavorable terms. Market competition for donations implies that the most accommodating charities will outcompete more autonomous organizations. Donor standing increases the control donors have over charity activities, potentially undermining the benefits of specialization and expertise.

I. *Increasing Donor-Charity Trust: Alternatives to Donor Standing*

We have argued that donor standing is unlikely to increase donations and might produce undesirable side-effects. Were no alternatives available, our arguments would have to be carefully weighed against any opposing considerations. As it stands, however, we think there are superior, non-legal alternatives that would increase donor-charity trust.

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277. *See supra* note 30.

278. *See supra* Part II.A.2.

279. Robert Kurzban & Peter DeScioli, *Adaptationist Punishment in Humans* 6 (Working Paper Series, Mar. 26, 2009), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1368784.

First, donors can give to charities that have reputations for meeting the non-binding terms of their donations. In general it is reputation, and not legal enforcement, that creates the trust underpinning much of our everyday economic transactions. Reputation-based cooperation has also been shown to promote trust and altruism both in theoretical models and in laboratory experiments.[280] Clearly, such mechanisms as reputation and gossip are already active in shaping donation decisions. Perhaps these mechanisms could be improved by better data collection and availability of information about charity performance and donor satisfaction.

Second, a common solution to trust problems is *parceling*, in which benefits are given in increments as recipients satisfy the conditions of each parcel. This solution is used in the natural world. For example, the black hamlet fish is a simultaneous hermaphrodite and during spawning, two individuals will fertilize each other's eggs.[281] However, eggs are more costly to produce than sperm so the fish have an incentive to cheat by fertilizing the others' eggs without laying their own. Black hamlet fish solve this problem with parceling, laying just a few eggs at a time and waiting until their partner has laid eggs before continuing. Among humans, experiments have shown that parceling can increase trust and cooperation.[282] In the context of philanthropy, charitable foundations commonly use "milestone payments," a parceling mechanism, to solve the trust problem. Parceling allows donors to impose *de facto* restrictions without relying on legal enforcement, thus alleviating the problem of trust without creating the potential for vexatious litigation or donor manipulation.

Third, donor-charity trust can be increased through the enforcement of gift restrictions by disinterested parties. The problems associated with donor standing are commonly observed among donors who have a personal connection with their gift. Institutional donors and foundations that employ professional grant makers rarely become involved in costly litigation over gift usage. From a psychological perspective, this might be explicable in terms of the greater entitlement over gifts felt by individual donors, causing them to seek retribution in response to perceived misuse. By allowing enforcement only from

280. *See* Manfred Milinski et al., *Reputation Helps Solve the 'Tragedy of the Commons'*, 415 NATURE 424, 424-26 (2002); *see also* Martin A. Nowak & Karl Sigmund, *Evolution of Indirect Reciprocity by Image Scoring*, 393 NATURE 573, 573 (1998).

281. J.R. KREBS & N.B. DAVIES, AN INTRODUCTION TO BEHAVIOURAL ECOLOGY 285 (3d ed. 1993) (1981).

282. *See generally* Robert Kurzban et al., *Incremental Commitment and Reciprocity in a Real-Time Public Goods Game*, 27 PERSONALITY & SOC. PSYCHOL. BULL. 1662, 1662 (2001). *See also* Robert Kurzban et al., *Incremental Approaches to Establishing Trust*, 11 EXPERIMENTAL ECON. 370, 372, 385-86 (2008). ("When given the choice, people seem inclined toward building trust incrementally—starting relatively small with more than half of the participants offering $1 to $3 in the initial period and respond, at least in the second period, by increasing trust that was previously reciprocated, but not increasing trust that was not reciprocated. This adds to previous evidence suggesting that people have a preference for trust to be built gradually.").

disinterested parties, such as the attorneys general and those who have no personal interest in the gift (such as professional grant makers), potentially vengeful donor litigation is eliminated while preserving accountability for charities.

Donor standing introduces many potential problems into donor-charity transfers, but simple, proven alternatives are available. Reputation-based giving, parceling, and disinterested enforcement can support donor-charity trust without creating the problems associated with donor standing.

VI. REVISITING DONOR STANDING

Research from experimental psychology casts considerable doubt on the common assumption underlying standard justifications for donor standing—that granting donor enforcement rights induces charitable giving.[283] Because we doubt the absence of donor standing reduces charitable giving, we argue the law should not compromise the public's interest in charitable assets by allowing donors to enforce the terms of taxpayer-subsidized restricted charitable gifts. This view is consistent with other commentators who are skeptical of the alleged chilling effect.[284] In this Part, we return to our discussion of the two doctrinal justifications for donor standing and offer an argument against the grant of donor enforcement rights.

A. *Principles of Contract Law*

The contractarian view of restricted charitable gifts, a theory premised on preserving the expectations of charitable donors, potentially misconstrues the relative importance of donor enforcement rights by assuming that reciprocity is the determining motivation for charitable giving. We suggest that other motivations, including the donor's desire for communal participation and reputation enhancement, often dominate the decision to contribute. Knowledge of the right to impose and enforce a gift restriction, however, could alter the donor's decision-making process by drawing attention and forethought to the reciprocal aspects of charitable giving to the exclusion of otherwise relevant motivations. When donors perceive charitable giving as an exchange rather than as a donation, their profit-seeking motives are emphasized. The law forbids donors from acting on these motives by extracting monetary or legal consideration from tax-deductible charitable transactions.[285] So instead of money, the currency

283. *See supra* note 282.

284. John K. Eason, *Private Motive and Perpetual Conditions in Charitable Naming Gifts: When Good Names Go Bad*, 38 U.C. DAVIS L. REV. 375, 460 (2005) ("Perpetual naming conditions are, thus, *only* defensible as a facilitator of charitable contributions.").

285. *See supra* note 10.

exchanged by donors in philanthropic transactions takes the form of restrictive covenants governing the use of charitable contributions. If enforcement rights psychologically induce profit-seeking motives, then the grant of donor standing will heighten donors' desire for reciprocity and inhibit socially beneficial contributions induced by other motivations, such as the desire for communal participation. A donor motivated by profit and reciprocity would choose to impose restrictive terms that lessen the public's enjoyment of the gift or pursue costly enforcement litigation that depletes the charitable asset even if doing so diminished the social benefits. Absent regulation, we expect profit-seeking motives will render the right to impose and enforce restrictions susceptible to abuse.

Charitable contributions are often influenced by expressions of recognition offered to donors by nonprofit organizations. However, this does not imply that tokens of appreciation must be enforceable in court to maintain a system of philanthropy. The grant of enforcement rights is only one of several ways to manage the expectations of donors. Alternatively, the law can manage donor expectations by creating a bright line rule that gift restrictions are *never* enforceable by the donor unless the donor claims a beneficial interest in the gift (as at common law). The law could manage donor expectations by providing clear notice that: (1) restrictions are enforceable at the sole discretion of the attorney general and not by the donor; and (2) the attorney general has no duty to bring an enforcement action unless he or she determines it would further the public interest.

The better approach to managing donor expectations will not only create predictable outcomes, but also further the social objectives underlying government subsidies for the nonprofit sector. As Professor Brody explains, "although a restricted gift constitutes an agreement between the donor and the charity, it is not merely a contract in the private law sense—rather, an unascertainable group constitutes the true beneficiaries:"[286]

> Contract law generally allows competent parties to agree to any terms they negotiate. But is such a laissez-faire view of private ordering appropriate for charities? What if the parties contract to grant standing to the donor to enforce the restriction and not just to sue for forfeiture? Are there public policy limits that should be invoked to protect charities from agreeing to waive the donor's traditional lack of standing? Can (should) the law take the view that the parties representing the charity have little incentive to act in the charity's best long-term interests, and thus lack the capacity to enter into such a provision? Moreover, 'rewarding' parties who insert specific terms in what are essentially gift instruments puts a premium on drafting, and

286. Brody, *supra* note 127, at 1258-59.

> ratchets up the level of lawyering and negotiating for too many major restricted gifts.[287]

Hence, Professor Brody argues that "a gift once made is no longer the donor's property."[288] Denying donor enforcement rights would discourage donors from profit-seeking behavior in charitable transactions, protect donor goals only when they are consistent with the public interest, and prevent donors from using litigation to exact a costly revenge against a charitable recipient. While free from the threat of litigation brought by donors, misconduct by managers of charitable organizations would be constrained by attorney general oversight, civil and criminal statutes prohibiting the misuse of institutional funds, and the desire to maintain a positive institutional reputation for good organizational governance.

Our view that donor standing is undesirable in the context of restricted charitable gifts departs from Professor Sitkoff's theory of settlor primacy (endorsing donor standing in the context of private donative transfers). As Sitkoff explained, the allocation of enforcement rights reflects society's view of whose interests should be protected:

> If the aim of trust law were simply to maximize the welfare of the beneficiaries, then settlor standing should be qualified so as to require that any claim brought by the settlor be resolved from the perspective of the beneficiaries. Our model of the trust, however, is one in which the trustee should maximize the welfare of the beneficiaries subject to the initial constraints of the settlor.[289]

In private donative transfers, society protects the interests of settlors to increase the aggregate value of private wealth. Sitkoff's theory posits that private donative transfers are encouraged when donors enjoy flexibility to control the terms and conditions under which private property is transferred or alienated. By contrast, society encourages philanthropic transfers not merely to maximize the volume of charitable giving (or the value of private wealth, for that matter), but to maximize aggregate social welfare by channeling resources to particular charitable beneficiaries. Thus, in philanthropic transfers, the goal is to protect the interests of beneficiaries while maintaining a climate hospitable to charitable giving.

Sitkoff largely confined his observations to private donative transfers, but in a footnote, he suggested that principles of agency theory imply that donor standing would encourage stricter compliance with the terms of restricted charitable gifts.[290] The psychological research we review above raises questions

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287. *Id.* at 1192.

288. *Id.* at 1260.

289. Sitkoff, *supra* note 84, at 669.

290. *Id.* at 669 n. 248. Professor Robert A. Katz endorses donor standing in the charitable trust context, but would grant incorporated charities (i.e., charities not held in trust)

about this suggestion, but even if true, it is not clear that increasing compliance with gift restrictions through private enforcement is socially desirable. As we have described, enforcement litigation is often socially harmful and the grant of donor enforcement rights may encourage donors to impose restrictions at odds with the public interest. Because the psychology of gift-giving suggests that granting donor standing is unlikely to increase charitable giving, the implications of Sitkoff's theory of settlor primacy do not extend to publicly-subsidized, charitable donative transfers. The purpose of philanthropy is not to reward donors for making charitable contributions, but to promote social objectives that yield benefits to the community. This implies that the public, not the donor, should have the right to decide whether to enforce the terms of a restricted charitable gift.

B. *Donor Supervision of Nonprofit Organizations*

We find several weaknesses in the argument that donor standing will restore the confidence of donors in the governance of nonprofit organizations.[291] Most importantly, research from experimental psychology suggests that donors are unlikely to elevate the public interest above their own.[292] Studies show humans are more likely to impose punishment on their own behalf than for the benefit of others.[293] Thus, donors who fund litigation at their own expense are not impartial champions of the public interest because their success in litigation will often come at the beneficiaries' (or the public's) expense. In many cases of alleged breach, the public interest would be better served if the donor were to allocate

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more leeway in exercising independence and discretion regarding their mission and objectives. Katz, endorsing donor standing in the charitable trust context because more legal vehicles are better than fewer, agrees with Sitkoff on the issue of settlor primacy:

> Sitkoff claims that settlor primacy in private trust law will make both settlors and beneficiaries better off and in this way increase social wealth. This claim reasonably assumes: (a) by increasing the confidence of grantors that their trust instructions will be followed, we increase the willingness of grantors to create a trust in the first place; and (b) at the macro level, more trusts will be advantageous to potential beneficiaries as a class, even if each trust benefits its particular beneficiaries less than it could, i.e., if its assets were used for what they really want (e.g., fancy sports cars or drugs), rather than what the settlor wants them to consume (e.g., education, food, and clothing).

Katz, *supra* note 29, at 707-08 (internal quotation marks and footnotes omitted).

291. Reid Kress Weisbord, *Reservations About Donor Standing: Should the Law Allow Chritable Donors to Reserve the Right to Enforce a Gift Restriction?*, 42 REAL PROP. PROB. TRUST J. 245, 251 (2007) (recognizing the need for oversight of charitable organizations, but noting that donors themselves are not always inculpable in the self-serving application, oversight, and enforcement of restrictions).

292. *See supra* note 282.

293. Kurzban & DeScioli, *supra* note 279, at 6.

resources to a new charitable contribution rather than to the expense of civil litigation to remedy violation of the restriction. The donor's decision to litigate a prior donation rather than donate anew suggests a conflict of interest incompatible with the notion of the donor as private attorney general.[294] Granting donors with standing to enforce their own restrictions is unlikely to make them more inclined to investigate, discover, and litigate general matters of charitable governance that do not directly pertain to their gifts.

Attorney general supervision of public charities is structurally superior to donor supervision because it gives members of the public a voice in the process. If the purpose of enforcement litigation is to protect the public interest, then it is important to represent that interest democratically. An attorney general, whether chosen by election or appointment by an elected governor, has an affirmative duty to act in the best interests of the public. Political incentives lessen the likelihood that an attorney general will pursue enforcement litigation detrimental to the public interest. If an attorney general intends to run for re-election or higher office, he or she has an incentive to satisfy the majority of the voting public.

We acknowledge the shortcomings of attorney general supervision. The most common complaint is that state governments appropriate inadequate resources for effective enforcement, and even when adequately funded, attorneys general place a low priority on charitable supervision.[295] When attorneys general exercise discretion in deciding whether to bring an enforcement action, their conduct is often viewed as politically self-serving: "The incentives of this nearly universally elective office impel the incumbent to ignore cases that are politically dangerous and to jump into matters that are politically irresistible but implicate only 'business' decisions of charity managers."[296] While mindful of these criticisms, we draw attention to an important tradeoff between the political conflicts of interest faced by attorneys general and the personal conflicts of interest faced by donors.

Consider, for example, the Pennsylvania Attorney General's controversial intervention in the sale of the Hershey Foods Corporation by its controlling shareholder, the Milton Hershey School Trust, a Pennsylvania charitable trust.[297] Milton Hershey, the famous candy maker, created the trust for the benefit of the Milton Hershey School, "a boarding school that enrolls, feeds, and clothes about

294. *See, e.g.*, Associated Indus. of N.Y. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943) (coining the term "private Attorney General" in legal parlance).

295. *See* Evelyn Brody, *Whose Public? Parochialism and Paternalism in State Charity Law Enforcement*, 79 IND. L.J. 937, 947 (2004).

296. *Id.* at 947-48; *see also* Jonathan Klick & Robert H. Sitkoff, *Agency Costs, Charitable Trusts, and Corporate Control: Evidence from Hershey's Kiss-Off*, 108 COLUM. L. REV. 749, 781 (2008) ("[I]t is the politically salient, egregious cases that 'trigger investigations,' not 'reviews of annual reports.'").

297. Klick & Sitkoff, *supra* note 297, at 753-55.

1,700 needy students whose families have an average income of just under $14,000."[298] The corporation maintains substantial corporate and manufacturing operations in Hershey, Pennsylvania.[299] The corporation and trust have retained the close relationship established by their founder. The trust's assets are heavily invested in the corporation and, as a result, the corporation is controlled by the trust (which holds 75% of the corporation's voting shares).[300] Concerned by the trust's lack of diversification, the trustees explored the possibility of selling its majority stake in the corporation and investing the proceeds in a diversified portfolio.[301]

The Pennsylvania Attorney General, responding to public outrage about the perceived threat to the local economy, successfully petitioned the state court to enjoin the sale.[302] In a recent empirical study, Professors Jonathan Klick and Robert H. Sitkoff determined that, had the trust sold its majority stake and relinquished control, the corporation would have been worth an additional $2.7 billion on the open market.[303] Because the trust was heavily invested in the corporation, the aborted sale had an enormous negative impact on the value of the trust's corpus: "Without any offsetting financial benefit to the Trust, the Attorney General forced the Trust to retain an asset that was worth $ 850 million more on the open market than in the hands of the trustees."[304] Moreover, had the sale gone through, the proceeds, representing more than half of the trust's assets, would have been invested in a diversified, less risky portfolio of investments. The injunction obtained by the Attorney General represented a victory for local constituents, but rendered the agency costs created by the trust's control of the corporation permanent at the expense of the beneficiaries.

The Attorney General's intervention in the sale of the Hershey Foods Corporation has been criticized as detrimental to the charitable beneficiaries and motivated by political ambition.[305] But even assuming the litigation were

298. *Id.* at 753.

299. *Id.* at 752.

300. *Id.* at 766 ("Of the Trust's $ 8.8 billion corpus, $ 4.7 billion (54%) is in Company stock (representing 31% of all outstanding shares of the Company). Close to half of the Trust's income from interest and dividends comes from its Hershey shares. What is more, these figures understate the Trust's diversification problem because the Trust's other assets include, among other local holdings, the Hershey Entertainment & Resorts Company.") (footnotes omitted).

301. *Id.* at 755.

302. *Id.* at 755-56.

303. *Id.* at 815 (measuring the market's initial positive reaction to the proposed sale and subsequent negative reaction to the aborted sale).

304. *Id.* at 815.

305. *See id.* at 817. Klick & Sitkoff wrote that:

> As we have seen, even if the attorney general does intervene, the attorney general's political interests might not be congruent with the best interests of the trust or social welfare—here to the tune of $850 million and $ 2.7 billion respectively. More

politically motivated, the two opposing interests at stake were matters of public concern. On the one hand, beneficiaries of the trust had a compelling interest in reducing agency costs and market risk through portfolio diversification. Likewise, the public had an interest in ensuring the long-term financial viability of the school, which, while wealthy, was overly dependent on the operation of the corporation for survival. On the other hand, residents of Hershey, Pennsylvania and employees of the corporation had a compelling, although perhaps unreasonable, interest in preventing an acquirer from relocating Hershey's corporate and manufacturing operations elsewhere. Under the circumstances, the Attorney General could not satisfy both constituencies; his favoring one side over the other for political reasons would not change the fact that both constituencies presented legitimate social concerns.

Even if the attorneys general are sometimes motivated by political ambition, at least they are ultimately accountable to the public. If an attorney general's political calculations are subsequently proven incorrect, then the political process would allow members of the public to register their disagreement. In contrast, litigation brought by donors gives the public no voice in decisions about whether to pursue enforcement litigation and what relief to seek. Because donors are most likely to pursue their own interests and not the public's, we expect donors will often request relief inconsistent with the needs of society. Accordingly, attorney general enforcement may not be ideal, but should not be replaced by donor supervision of nonprofit organizations.[306]

Other commentators have noted that donors often lack access to or interest in the information necessary to undertake effective supervision of nonprofit organizations. Professor Carter Bishop explains:

> [E]ven if donors are granted standing, there is reason to question whether they will adequately police nonprofit governance. After all, unlike shareholders [of for-profit corporations], charitable nonprofit donors make a gift and generally expect no return of or on their investment, other than reasonable advancement of charitable goals. Indeed, the primary expected return is in the form of an existing tax deduction and that return generally exists regardless of lackluster nonprofit corporate governance. While various charitable watchdog groups do analyze nonprofit governance and publish the effectiveness of the charity in implementing the charitable gift,

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> broadly, no amount of additional funding or increased disclosure will ameliorate the underlying structural problem that the attorney general is typically a political officer whose ambition toward higher office provides either little incentive to supervise charitable trusts or, as in the case of the Hershey Trust, perverse incentives to impose local political preferences.

Id.; *see also* Brody, *supra* note 296, at 998 ("The attorney general practically treated the Hershey assets as his election campaign funds.").

306. *See generally id.*; Klick & Sitkoff, *supra* note 299.

> most donors pay little attention or are simply not aware of this information. Major news scandals may, however, affect donor generosity toward a scandal-heavy nonprofit organization because of the public's lack of trust in the organization.[307]

If it is true that donors choose not to heed information about the governance of nonprofit organizations even when others have acquired it, then donors do not view their role as that of supervisor. Rather than investing resources to monitor charitable governance, donors apparently prefer to presume good governance until given a reason not to.

We find support for Professor Bishop's observation even in examples of fiduciary misconduct cited by proponents of donors standing. In his article endorsing donor supervision of charitable assets, Joshua Nix cited the conviction of former United Way of America ("UWA") president William Aramony as exemplary of the problems that donor enforcement rights would prevent.[308] However a close analysis of the facts reveals that at least one major donor was unaware of Aramony's misuse of contributed funds and other misconduct for which he was ultimately convicted.[309]

After years of misusing UWA's funds for personal gain, Aramony was convicted of numerous federal offenses, including wire fraud and interstate transportation of fraudulently acquired property.[310] However, in 1987, before allegations of misconduct began to surface, the Mutual of America Life Insurance Company donated $1,000,000 to UWA in honor of Aramony's leadership and

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307. Carter G. Bishop, *The Deontological Significance of Nonprofit Corporate Governance Standards: A Fiduciary Duty of Care Without a Remedy*, 57 CATH. U. L. REV. 701, 711 (2008) (concluding that stricter regulation of self-dealing by fiduciaries coupled with heightened financial penalties for improper conduct is the best framework to deter abuse by insiders).

308. Nix, *supra* note 107, at 160.

309. United States v. Aramony, 88 F.3d 1369, 1374 (4th Cir. 1996).

310. *Id.* at 1372-73 (affirming conviction). As stated by the court:

> From the mid-1980s to the early 1990s, the appellants improperly used UWA money for personal gain.
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> [T]he government's case at trial basically focused on Aramony's use of UWA funds to further his relationships with various women, especially Lori Villasor and Anita Terranova. From December 1986 to July 1990, Aramony had a personal relationship with Lori Villasor. From late 1988 to mid-1990, Aramony travelled to Gainesville, Florida, Villasor's hometown, at least once a month to visit Villasor, and he had UWA pay for these trips. On some of his trips to Gainesville, Aramony used UWA money to pay for rental cars. The billing of Aramony's flights to Gainesville to UWA and the billing of his rental cars in Gainesville to UWA formed the basis of two of Aramony's convictions for mail fraud.

Id. at 1373-74.

UWA's centennial anniversary.[311] Mutual of America instructed UWA "to use interest from the endowment to 'foster entrepreneurial spirit' in expanding the voluntary sector."[312] Aramony appointed his son president of Voluntary Initiatives America, an entity formed to implement the gift.[313] Violating the terms of the gift, Voluntary Initiatives America spent interest from the donation to purchase a residential condominium in Coral Gables, Florida "featuring a rooftop swimming pool and an expensive French restaurant in its lobby."[314] When questioned by the press, Aramony defended the purchase and stated that the unit was used as an office by Anita Terranova, a longtime friend who worked part-time for the United Way.[315] But according to the court,

> Terranova lived in Florida and had a long history with Aramony. As with Villasor, Aramony often traveled to Florida at UWA expense to visit her . . . The acquisition, furnishing, and sale of the Florida condominium formed the basis of Aramony's and Merlo's convictions for one count of mail fraud, two counts of engaging in the interstate transportation of fraudulently acquired property, and one count of engaging in monetary transactions in the proceeds of specified unlawful activity.[316]

Mutual of America, however, did not know how the contribution had been spent despite Aramony's longstanding membership on its board of directors. When interviewed by the Washington Post, "a Mutual of America spokesman said he was unaware of the condo purchase."[317] The spokesman explained, "The donation we have made is a donation to the United Way. . . . Our belief with any donation that is made to the United Way is that it is used properly."[318] It is difficult to see how the availability of donor enforcement rights would have prevented Aramony's misconduct. Given the donor's close relationship with Aramony and its immense trust in his leadership of UWA, it is understandable that the donor chose not to scrutinize and monitor Aramony's activities. We expect most donors place trust in their chosen nonprofit organizations until given reason not to, regardless of the right to file a civil action in court. As with Aramony's misconduct at UWA, fiduciary misconduct is more likely to be

311. Charles E. Shepard, *Endowment Funds Bought Florida Condo; $ 1 Million Centennial Gift, Honoring Aramony, Is Intended to Expand Volunteerism*, WASHINGTON POST, Feb. 24, 1992, at A9.

312. *Id.*

313. *Id.*

314. *Id.*

315. *Id.*

316. United States v. Aramony, 88 F.3d 1369, 1374, 1375 (4th Cir. 1996).

317. Shepard, *supra* note 312, at A9.

318. *Id.*

discovered by employees within a charitable organization than by donors outside the organization.

Although the creation of donor enforcement rights is a recent development in the law, there is little evidence that donor supervision of nonprofit organizations is an effective deterrent against managerial misconduct. The criminal code protects the public from fiduciary misconduct involving fraud, embezzlement and other forms of misappropriation. Federal and state law enforcement officials routinely prosecute such crimes and defendants often receive sentences of imprisonment, a penalty far more severe than a judgment imposing civil liability.[319] Allowing donors to enforce their gift restrictions in court would contribute little to advancing the policy goal of good nonprofit governance.

VII. CONCLUSION

Departing from long-standing common law precedent, a recent statutory and common law trend creates donor standing to enforce the terms of restricted charitable gifts.[320] The primary reasons for this new grant of enforcement rights, according to case law and academic commentary, are to induce charitable giving and protect charitable assets from nonprofit managerial malfeasance.[321] This Article is an interdisciplinary effort to better understand the consequences of donor standing by reviewing and comparing economic and psychological models of gift-giving behavior. Contrary to the standard assumptions about donor standing, we propose the novel hypothesis that the grant of donor enforcement rights: (1) is unlikely to increase, and might actually decrease, charitable giving; and (2) is unlikely to protect the public's interest in charitable assets.

Research from experimental psychology offers four key insights into the effects of donor standing. First, litigation rights might be largely irrelevant to donors' gift-giving decisions and thus unlikely to induce charitable giving.[322] Second, the presence of enforcement rights could cause donors to frame charitable donations as economic exchanges rather than as gifts, encouraging them to bargain for self-serving restrictions without regard for (and perhaps contrary to) the public interest.[323] Third, the specter of litigation could foster

319. *See* Aramony, 88 F.3d at 1373 (affirming in part conviction for defrauding the United Way); United States v. Carter, No. 07-295, 2009 WL 8400585, at **1 (3d Cir. Apr. 1, 2009) (affirming waiver of appeal and sentence of fifteen years imprisonment for defrauding the Independence Seaport Museum); United States v. Fumo, Crim. No. 06-319, 2009 WL 1896028 (E.D. Pa. Mar. 17, 2009) (defendant convicted for defrauding Citizens Alliance for Better Neighborhoods, a nonprofit established by the defendant, and the Independence Seaport Museum).

320. *See supra* Part II.

321. *See supra* Part III.A–B.

322. *See supra* Part V.G.

323. *See supra* Part V.G.

suspicion and mistrust between donors and charities, potentially undermining voluntary cooperation and decreasing charitable giving.[324] Fourth, if granted standing, donors are more likely to bring an enforcement action to protect their own interests in their gift restriction than the public's interest in charitable assets.[325]

There is little evidence supporting the claim that donor standing provides social benefits, but the social costs that accompany enforcement rights create cause for concern. Donor enforcement litigation can waste vast sums of charitable assets on litigation costs and consume scarce judicial resources to adjudicate gift disputes. In *Robertson v. Princeton University*, for example, the parties settled when Princeton, having spent $40 million to defend itself, agreed to reimburse $40 million of the plaintiffs' litigation costs from funds that would otherwise have flowed to charitable beneficiaries (after the court issued hundreds of pages of judicial opinions deciding cross-motions for summary judgment).[326] The creation of donor enforcement rights can also frustrate efforts by nonprofit organizations to serve the community when donors pursue personal objectives contrary to the public interest. In *Howard v. Administrators of the Tulane Education Fund*, for example, the plaintiffs attempted to unravel Tulane's post-Katrina recovery plan, undermining the public's substantial stake in an educational institution of critical importance to a community plagued by natural disaster.[327]

Long before recent reform in this area, the modern system of philanthropy functioned successfully without donor standing because litigation rights are not an essential element of charitable giving. Alternative protections for donor intent remain preferable. For example, donations subject to parceling or milestone payments allow donors to exert control over the use of charitable contributions without binding the entire intended gift from the outset of the project. Each milestone affords an opportunity to reconsider the necessity of the donor's restrictions with the benefit of hindsight but without the burden of civil litigation or the possibility of dead-hand control. If the law continues to allow donor standing, the social costs might be lessened by limiting enforcement rights to disinterested parties. Professional grant makers employed by institutional donors (such as grant officers at the Ford Foundation, for example) are less likely than individual donors to impose and enforce self-serving restrictions because institutional donors often establish neutral criteria in their grant policies and prohibit approval of grants by employees with conflicts of interest.

While mindful of criticisms of state attorneys general, we argue that the state remains the most appropriate party to supervise the administration of charitable

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324. *See supra* Part V.G.

325. *See supra* Part V.H.

326. *See supra* Part II.A.2.

327. *See supra* Part II.A.1.

assets by way of legal enforcement. It might be that attorneys general rarely bring suit to enforce donor-imposed restrictions, but this omission itself has benefits: attorneys general are unlikely to enforce donor-imposed restrictions that are contrary to the public interest whereas donors have shown a willingness to pursue litigation against charitable donees regardless of the potential adverse social consequences. The under-enforcement of gift restrictions by the state might also discourage donors from imposing limitations governing the use of charitable assets, thereby enabling the flexible use and management of the public's scarce collective resources. Even if imperfect, minimal enforcement by the state is preferable to vigorous enforcement by donors.