When Charity Meets Racism: The Story of Cy Pres in the United States and England

This Note examines the history of the cy pres doctrine in U.S. and English law of charitable trusts. This doctrine is the main means by which a charitable trust can be altered if it has become illegal, impracticable, or impossible to maintain it in its original form. This Note finds that, while the doctrine was essentially identical in the United States and in England until well into the twentieth century, U.S. courts are now far more willing to alter charitable trusts than they were originally, while the approach of English courts has hardly changed. This Note finds that the main reason for this divergence is the move away from discrimination in U.S. law in the 1950s and beyond. Courts were confronted with major charitable trusts—such as universities and hospitals—that had discriminatory charters. Faced with a choice between letting these trusts fail and preserving them, courts generally opted for the latter, which forced them to expand the cy pres doctrine. This development did not take place in England, because trusts can be altered without court intervention in England, and no one seemed willing to fight for racist trusts in English courts. The Note concludes with a legislative proposal that could serve to rein in the doctrine in the United States, while at the same time allowing it to alter unacceptably discriminatory trusts.

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INTRODUCTION

Cy pres doctrine allows for the alteration of a charitable trust. Even though charitable trusts have received over 100 billion in inflation-adjusted U.S. dollars a year since 1974, and no less than 358 billion U.S. dollars in 2014,¹ the way that charitable trusts can be altered has received little scholarly attention. This is particularly striking because altering trusts may at times be the only way to preserve them, or prevent them from becoming senseless, in light of changing circumstances. The most extreme example is probably the waqfs (roughly the equivalent to the trust in Islamic law) of the Medieval Islamic world, where the respect for the testator’s wishes had become so unquestioned that wells continued to be maintained in the middle of deserts along trade routes that had not been in use for over a century.² In other words, cy pres may be necessary to prevent inefficiencies—often significant ones—that may arise from trusts that

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have become outdated.

The United States took the _cy pres_ doctrine from the English common law; the early U.S. cases frequently cite to English precedents. The Restatement (Second) of Trust Law offers what has become the standard definition of the doctrine worldwide. Yet _cy pres_ has had a very different history in the United States than in England. Although U.S. courts were initially very reluctant to apply the doctrine, they have now come to apply it much more freely than English courts—that is, U.S. courts have much less concern with following the testator’s intent than do English courts. After establishing that this shift has taken place in the United States—a conclusion that is contrary to most scholarship on the subject—this Note explores why the doctrine evolved so differently and proposes that a key reason lies in the different ways in which the U.S. and English legal systems dealt with racist charitable trusts. In the United States, alterations to racist trusts frequently involved the courts, which applied _cy pres_ to alter the trusts. This, in turn, often required expanding the _cy pres_ doctrine. In England, on the other hand, racist trusts were typically altered without involving the courts, thus not affecting the _cy pres_ doctrine.

Part I of this Note offers a definition of _cy pres_ and an overview of its history. Part II analyzes a number of U.S. and English _cy pres_ cases that involve discriminatory charitable trusts, considers relevant statutory reforms in England, and shows that _cy pres_ has come to be interpreted very liberally in the United States. Finally, Part III seeks to explain the differences between the English and U.S. approaches and proposes a statutory way of reining in _cy pres_ in the United States.

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3. AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS 2735 (5th ed. 2006); see also infra Part I.A.


5. See, e.g., Alex M. Johnson, Jr. & Ross D. Taylor, Revolutionizing Judicial Interpretation of Charitable Trusts: Applying Relational Contacts and Dynamic Interpretation to _Cy Pres_ and _America’s Cup_ Litigation, 74 IOWA L. REV. 545, 561 (1989) (“The seeming inequity of the _Mercury Bay_ decision demonstrates the judicial hostility to the doctrine of _cy pres_, hostility that has resulted in the narrow treatment and use of a theoretically flexible, equitable doctrine to be used at the court’s discretion.”).
I. AN OVERVIEW

A. Definition

_Cy pres_ is short for “cy pres comme possible,” which is Norman French for “as near as possible.”\(^6\) One of the most authoritative definitions of _cy pres_, not only in the United States but also internationally,\(^7\) is offered by the Restatement (Second) of Trust Law:

If property is given in trust to be applied to a particular charitable purpose, and it is or becomes impossible or impracticable or illegal to carry out the particular purpose, and if the settlor manifested a more general intention to devote the property to charitable purposes, the trust will not fail but the court will direct the application of the property to some charitable purpose which falls within the general charitable intention of the settlor.\(^8\)

This definition can be broken down as follows: 1) the settlor must manifest a general charitable intent, rather than a specific charitable intent;\(^9\) 2) it is, or becomes, impossible, impracticable, or illegal; 3) and, if these two conditions have been met, the trust shall be applied to some charitable purpose within the general charitable intention of the settlor.

B. An Early Example from England: Attorney General v. Earl of Craven

An early English case—_Attorney General v. Earl of Craven\(^10\)_—illustrates the _cy pres_ doctrine well. In 1687, the Earl of Craven, deeply affected by the tragic consequences of the plague epidemics in 1665 and 1666, purchased a field (the Pest House Field) to be used in trust:

[T]o maintain, support and keep, in good and tenantable repair, the houses and buildings in and upon the said field erected and being . . . so supported,

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\(^7\) _Mulheron_, supra note 4.

\(^8\) _Restatement (Second) of Trusts_ § 399 (AM. LAW INST. 1959).

\(^9\) _Id._ § 399 cmt. c.

preserved and maintained, for the relief, support, comfort, use and convenience of such of the poor inhabitants of the parishes of St. Clement’s, Danes, St. Martin’s-in-the Fields, St. James, Westminster, and St. Paul’s, Covent Garden, as should thereafter, at any time, happen to be visited with the plague, as a pest house or a place set apart for their relief, and for severing them from the well and uninfected . . . and for a burying-place for the dead of the said parishes dying of such sickness, and to and for no other use, intent or purpose whatsoever.11

When this case made it to court in 1856, the plague had not been seen in England for approximately 180 years.12 The heirs (who acted as trustees) never used the grounds for the designated purposes, but rather as homes for “persons of quality,” and enjoyed the profits thereof.13 The Solicitor-General, along with the interested parishes, urged that the trust should not be “confined to the plague, but may be made available for cases of smallpox or cholera.”14

To alter the trust, the court first had to find that it was devoted to charity as a general matter rather than to a particular charitable purpose (“general” rather than “specific charitable intent” in the language of the Restatement). The court did so on the grounds that the whole of the land was devoted to charity. The court did not explicitly address the concern whether carrying out the trust had in fact become impossible (at the time, only impossibility justified *cy pres*, though the words of the Restatement—impossible, impracticable, or illegal—better capture the real practice of the courts), but referred to the fact that the “plague had not reappeared for more than 180 years.”15 The final question before the court was how the property “is to be best applied to carry into effect the objects of the founder”16 (or “some charitable purpose which falls within the general charitable intention of the settlor”17). The court chose to apply the property:

[F]or the real purpose of the founder, by taking the property and employing it for the erection and foundation of an hospital, in some convenient situation, for

11. *Id.* at 911.
12. *Id.*
13. *Id.*
14. *Id.* at 913.
15. *Id.* at 911.
16. *Id.* at 918.
17. *Restatement (Second) of Trusts § 399 (Am. Law Inst. 1959).*
the reception of persons who might be infected with
the plague (if ever the event should arise), and in the
meantime, for persons who are afflicted with any in-
fec tious or contagious disorder.18

This case shows well how cy pres functioned. Because courts
are generally reluctant to let charitable trusts fail, general charitable
intent is typically presumed even when it is not at all clear that there
was one.19 The usual justification is that the settlor would have
wanted the property to go to another charitable purpose if the one she
designated failed.20 As in this case, phrases such as “and to and for
no other use, intent or purpose whatsoever” are simply ignored.21
Similarly, courts do not interpret the words “impossible,” “imprac-
tical,” or “illegal” literally, but include dispositions that are senseless:
to have land for use in the event of the plague is not, strictly speak-
ing, impossible, impracticable, or illegal, but it is senseless given that
the plague is highly unlikely to recur. Finally, it is also common for
courts not to give extensive consideration to which purpose exactly
would be closest to the settlor’s stated purpose, but rather to select a
purpose that is similar to that stated by the settlor.22 Here, the court
simply asserts that the solution it has found best carries the settlor’s
wishes into effect, adopting an even broader view of that intent than
the plaintiffs had urged.

While the court may presume much, it still does evince re-
spect for the settlor’s wishes. The court is careful to note that general
charitable intent is not always present and that, if it is absent, trusts
fail: “The Court held, that it was not given to purposes of charity, but
that the whole failed. Not only do I concur in that decision, but I
have, on several occasions, expressed my approbation of that view of
the law.”23 The court may not focus its attention on the impossibility
of carrying out the Earl’s intentions, but it stresses repeatedly that the
plague is as good as gone, and has been for the better of two centu-
ries. The solution the court finds may not necessarily be the closest
to the Earl’s wishes—but it is certainly plausible that he would have
wanted the land to be used for other contagious diseases if he had

19. In re Estate of Du Pont, 663 A.2d 470, 478–79 (Del. Ch. 1994); Scott et al.,
supra note 3, at 2697. See generally Vanessa Laird, Note, Phantom Selves: The Search
for a General Charitable Intent in the Application of the Cy Pres Doctrine, 40 Stan. L. Rev.
973 (1988).
20. Scott et al., supra note 3, at 2697.
22. Id. § 399 cmt. a.
known that the plague would not recur for so long. And still, the court is careful to preserve the Earl’s intent, for the land remains available to those infected with the plague, if the plague should return after all.

The case sheds light on other aspects of *cy pres* as well. It took 180 years for *cy pres* to be applied—during which time the heirs of the Earl profited from the land without using it for charity. In theory, the Attorney General is responsible for representing the interests of charitable trusts and the testator, but in practice Attorneys General are not always very interested in charitable trusts and even less so in the testator’s intent. One explanation is that they have little incentive to be, because they have little to gain by enforcing charitable trusts true to the testator’s original intent; another explanation is that Attorneys General simply do not have the resources for the scale of the job. Further, there are often no interested parties who can or will raise the issue of whether the testator’s intent is respected. If, for instance, the Earl had not specified the location for the hospital, the parishes would not have been interested parties and could not have intervened. The issue, therefore, may never have been raised.

*Attorney General v. Earl of Craven* thus shows that *cy pres* was understood with some flexibility in terms of finding general charitable intent, impossibility, and a new disposition for the property. The case also shows, however, that such flexibility was limited and that the settlor’s wishes were certainly important to the court.

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24. See, e.g., *In re* Barnes Foundation, 24 Fiduc. Rep. 2d 94, No. 58,788, 2004 WL 1960204, at *10 (Ct. Comm. Pl. Montgomery Cty. 2004) (“The Attorney General, as parens patriae for charities, had an absolute duty to probe, challenge and question every aspect of the monumental changes now under consideration. . . . [T]he Attorney General was the only party with the authority to demand, via discovery or otherwise, information about other options. However, the Attorney General did not proceed on its authority and even indicated its full support for the petition before the hearings took place. In court in December, the Attorney General’s Office merely sat as second chair to counsel for The Foundation, cheering on its witnesses and undermining the students’ attempts to establish their issues. The course of action chosen by the Office of the Attorney General prevented the court from seeing a balanced, objective presentation of the situation, and constituted an abdication of that office’s responsibility. Indeed it was left to the court to raise questions relating to the finances of the proposed move and the plan’s financial viability.”).

25. RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF LAW 698 (8th ed. 2010).

26. Professor Steven R. Swanson conducted a survey to establish if Attorneys General had a policy relating to discriminatory trusts, and found that only three Attorneys General had such a policy. Swanson therefore concluded that “state officers charged with representing the public interest have neither the time nor the inclination to . . . rid charitable trust law of discrimination.” Steven R. Swanson, Discriminatory Charitable Trusts: Time for a Legislative Solution, 48 U. Pitt. L. Rev. 153, 155–56 (1986).
C. Early Cy Pres in the United States

In the nineteenth century, U.S. courts were reluctant to apply *cy pres*, mainly due to the abuses of this doctrine that had occurred in England.\(^{27}\) Most of these abuses took place in the context of the prerogative *cy pres* power. The prerogative power allowed the king to become the beneficiary of the failed trust and to apply the property to any charitable purpose without any consideration for the settlor’s wishes.\(^{28}\) For instance, in *Da Costa v. De Pas*,\(^ {29}\) a Jewish testator left funds to be used for the establishment of a school to read Jewish law. Christianity was the only permitted religion, and the court therefore held that this trust was illegal as promoting a religion other than the established religion. The king then redirected the funds towards teaching Christianity to children. It would be hard to find a purpose further removed from the testator’s intentions.\(^ {30}\) Although the United States never had a king, and prerogative *cy pres* power therefore never existed in the United States,\(^ {31}\) U.S. courts still applied *cy pres* with caution.

A famous example of this U.S. caution is the litigation surrounding the trust set up by Bryan Mullanphy in 1851 “to furnish relief to all poor immigrants and travelers coming to St. Louis . . . to settle in the West.”\(^ {32}\) Litigation that sought to apply *cy pres* began in 1902—but not until 1934 did a court finally agree to alter a trust.\(^ {33}\) The number of travelers dropped from an average of 1,500 annually in the period from 1879 to 1895, to 387 annually by 1896, and income far outstripped expenses. Still, the court insisted that even though “poor travelers may be outfitted in ‘Model T Fords’ rather than ‘Prairie Schooners,’ there still must be poor travelers [who come to settle in the West and] who need assistance.”\(^ {34}\) Therefore, the court reasoned, the funds from the trust should still be applied to such travelers first, and only surplus funds should be applied *cy pres* “to


\(^{28}\) SCOTT ET AL., supra note 3, at 2705.

\(^{29}\) Da Costa v. De Pas (1754) 27 Eng. Rep. 150; see also Laird, supra note 19, at 975.

\(^{30}\) Even at the time, this decision was not met with universal approval. Chief Justice Wilmot in a later decision stated that—had he not been bound by the law—he would have given the income to the heirs, rather than see it applied to a purpose so clearly contrary to that of the testator. Attorney General v. Downing (1766) 27 Eng. Rep. 353.

\(^{31}\) RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. h (AM. LAW INST. 1959).

\(^{32}\) Thatcher v. Lewis, 76 S.W.2d 677, 678 (Mo. 1934).

\(^{33}\) MERRILL & SMITH, supra note 27, at 801.

\(^{34}\) Id. at 681.
the relief and assistance of other poor immigrants and travelers in need who are worthy of aid."35

Although many have criticized U.S. courts for their sparing application of cy pres,36 it is worth noting that there were early applications of the doctrine too. For instance, in Jackson v. Phillips,37 a well-known abolitionist who died in 1861 left $10,000 in trust for the purpose of creating a public sentiment to end slavery in the United States and $2,000 in trust for the benefit of fugitive slaves. By 1867, when the case was decided, the Thirteenth Amendment had been adopted. The court applied cy pres to allow the funds to be used for purposes beneficial to black persons.38 This example did not present any legal difficulty, for it was a fairly straightforward application of cy pres. Cases which involved discriminatory purposes often did present legal difficulties—that is, involved application of cy pres that was less than straightforward—as the next section demonstrates.

II. CY PRES MEETS DISCRIMINATION

A. Background and the First Case: England Removes a Color Bar Without a Fight

Nineteenth-century United States has been likened to the Italian Renaissance in terms of how much the rich gave to philanthropic purposes, especially higher education.39 Although this certainly contributed to making “fantastic dreams into attainable realities,”40 it also raised difficult legal questions starting in the 1950s. As society’s views towards discrimination on the basis of race, nationality, gender, ethnicity, and religion began to change, courts were suddenly faced with a considerable number of charitable trusts that discriminated on bases that were no longer acceptable. For instance, Stephen Girard founded a college for “poor male white orphan children.”41 Paul Tulane established an educational institution for “white young

35. Id.
36. See, e.g., Johnson & Taylor, supra note 5, at 561 (“The seeming inequity of the Mercury Bay decision demonstrates the judicial hostility to the doctrine of cy pres, hostility that has resulted in the narrow treatment and use of a theoretically flexible, equitable doctrine to be used at the court’s discretion.”).
37. 96 Mass. (14 Allen) 539 (1867).
38. See Scott et al., supra note 3, at 2721.
39. Luria, supra note 6, at 45–46.
persons.  

William Marsh Rice set up an educational institution for “the white inhabitants of the City of Houston, and State of Texas.” Other bequests were even more restrictive than these. Stanford University School of Medicine, for example, had the questionable privilege of administering a fellowship for those “of the white race, protestant religion, and citizens of the United States, Canada, England, Scotland, Ireland, or Wales.”

There is a threshold question as to whether a discriminatory trust is in fact illegal so as to trigger *cy pres*. The law on this point is far from settled. It is settled law in the United States, however, that a charitable trust that is administered by the government may not discriminate on the basis of race—though it is not always clear what kind of government involvement qualifies. For instance, in *Evans v. Newton*, the City of Macon attempted to save a park by removing the city as trustee. The park, set up as a charitable trust, was officially segregated (although the city had ceased to enforce this segregation). The city hoped that by removing itself as trustee, the park would no longer be viewed as administered by the government and, therefore, would be permitted to discriminate on the basis of race. In a five-to-four decision, the U.S. Supreme Court reasoned that the park would still not be allowed to exist: “We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.” This question of when exactly discrimination is illegal and therefore triggers *cy pres* is well beyond the scope of this Note. The insight that this is far from a clear and simple area of law is, however, pertinent.

While England did not experience any renaissance of philanthropic giving in the nineteenth century, it, too, had discriminatory charitable trusts going into the second half of the twentieth century. In fact, the earliest case to apply *cy pres* to remove a discriminatory

45. SCOTT ET AL., supra note 3, at 2750.
47. *Id.* at 301.
48. Some have even argued that all charitable trusts are imbued with state action because of the grant of powers to the Attorney General, but this position has not been accepted by the courts. See, e.g., Swanson, *supra* note 26, at 175.
racial restriction from a trust was an English case. *In re Dominion Students’ Hall Trust*\(^49\) presented the court with a charity that restricted those who could live in London House, which housed students of the Inns of Court, to “students of European origin.” The court interpreted this to mean a color bar (restricting students who could live in London House to white students) and then held such a color bar to be inconsistent with the purpose of the trust, namely to promote the community of citizenship among the British Commonwealth of Nations. Before making his decision to modify the trust, however, the judge was careful to canvass the opinions of those who contributed funds to the Hall. Those who responded represented over seventy-five percent of the funds contributed to the Hall and none disagreed with the modification.\(^50\) The judge was also careful to note that there was no testator in this case and that “the court is, perhaps, not so strictly limited as in the case of a will.”\(^51\) Rather, there had been numerous contributors, and the memorandum of association contained the color bar. The court noted that “times have changed, particularly as a result of the [Second World] [W]ar,” and that the purpose of the charity would now be best achieved by admitting students of all races.\(^52\) Still, the court took care to point out that “notionally, there might be two complementary charities, one for white and one for coloured students, both of which the trust could administer and, in practice, should administer, together.”\(^53\) That is, the court pointed out that its solution was the functional equivalent to having two separate charities—the functional equivalent of not violating the memorandum of association at all.

B. The First U.S. Expansion: Courts Infer Testator’s Intent from Extrinsic Evidence

The United States waited for a decade after *Dominion Hall* to see the first racial restrictions disappear from its charitable trusts. Once racially discriminatory laws had come under serious pressure from decisions such as *Brown v. Board of Education*,\(^54\) courts were faced with a dilemma. Either they should allow racist charitable trusts to continue to discriminate, or they should terminate them. The

\(^{49}\) [1947] Ch. 183 (Eng.).

\(^{50}\) Id. at 186.

\(^{51}\) Id.

\(^{52}\) Id.

\(^{53}\) Id. at 187.

\(^{54}\) 347 U.S. 483 (1954).
first option was often legally (and, at least to some courts, ethically) unthinkable; the second option would make for a huge loss to society: scores of universities, hospitals, parks, and others public service providers would have to disappear. Historically unwilling to let established trusts fail, courts largely avoided these undesirable options by expanding the *cy pres* doctrine. In the case of the Girard Trust, for example, the initial proceedings applied a more traditional notion of *cy pres* by focusing on a literal reading of the will, whereas on appeal, the federal courts turned to extrinsic evidence to interpret the will, thus expanding *cy pres* doctrine. The will provided for a college for “poor white male orphans,” and the Pennsylvania state courts judged these words to be “clear, plain, certain, unambiguous and unmistakable.” They considered extrinsic evidence only to confirm that the will was in fact the result of “careful and protracted thought and planning by the testator.” Girard and his lawyer had locked themselves in a room for five weeks to create the will. The dissenting Justice Musmanno—whose views were subsequently embraced by federal judges—however, turned to Girard’s biography. He observed that Girard loved Philadelphia and would want to better it; that he was an avid reader of Voltaire and other French philosophers, and hence likely harbored a progressive position on racial discrimination; and that he included the discriminatory clause only as a “result of his passive acceptance of conditions as they then existed.”

The outcome—that black students gained admission to Girard College—is plainly good. Yet it is unclear that Girard’s intent was not racist. Given the elaborate deliberations that went into the drafting of the will, it seems unlikely that he would have inserted a dis-

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55. Though this is not to say that courts always welcomed the expansion. The litigation surrounding the Girard Trust, for instance, took fourteen years of litigation, and ten separate opinions in the state courts, federal courts, and the Supreme Court. See Luria, *supra* note 6. Of note, the original bequest was upheld by the Supreme Court against a challenge that it was against the Christian faith, because “no ecclesiastic, missionary, or minister of any sect whatsoever shall ever hold or exercise any station or duty whatever in said college.” Vidal v. Girard’s Ex’rs, 43 U.S. 127, 133 (1844).


58. Luria, *supra* note 6, at 60.

59. Pennsylvania v. Brown, 392 F.2d 120, 125 (3d Cir. 1968), *cert. denied*, 391 U.S. 921 (1968) (“Given everything that we know of Mr. Girard, it is inconceivable that in this changed world he would not be quietly happy that his cherished project had raised its sights with the times and joyfully recognized that all human beings are created equal.”).


61. *Id.*
criminatory clause unless he had wanted it. The fact that he read French philosophers does not mean he agreed with them in all respects, nor is it clear that these philosophers were not racist themselves. The mere fact that his biography suggests a progressive man for his time does not mean that his ideas about race would match those of a progressive man at the time the court reached its decision. In _Evans v. Abney_, U.S. Senator A. O. Bacon’s life also suggested that he was a very thoughtful and progressive individual—dedicated, in fact, to increasing racial equality—yet this did not prevent him from stating “I am, however, without hesitation in the opinion that in their social relations the two races should be forever separate.” Moreover, Girard created a charity only for boys, but not a corresponding one for girls—which suggests that he was not quite as progressive as the courts attempted to present him.

Earlier U.S. cases, and English cases to this day, did not resort to extrinsic evidence to establish the testator’s intent. The difference between the _Girard_ litigation and _Dominion Hall_ is striking. In _Dominion Hall_, the judge, acting on a petition from the trust itself, placed first the stated primary purpose of the trust—to promote the community of citizenship among the British Commonwealth of Nations at the Inns of Court—and then showed great caution in ensuring that removing the color bar promoted that purpose and did not violate anyone’s intent. In the _Girard_ litigation, however, the courts went directly against the stated purpose of the trust and testator—to set up a college for “poor male white orphans”—and against the wishes of the current trust. Whereas in _Dominion Hall_, the building housed students of the Inns of Court, and the racial composition of those students had changed with time, in the _Girard_ litigation, the College housed orphans of Philadelphia and their racial composition had not changed much over time.

62. Luria, _supra_ note 6, at 62.

63. _Evans v. Abney_, 224 Ga. 826, 830 (1968). The clarity of the language in Bacon’s will forced the Georgia court to conclude that “the language of the will clearly indicates that the limitation [as to race] was an essential and indispensable part of the testator’s plan for Baconsfield.” _Id._ at 829. The trust therefore failed and reverted to Bacon’s heirs.

64. It is not entirely clear whether the courts are thinking what Girard would have wanted had he still been alive in the 1950s, or what he would have wanted had he grown up in the twentieth century and created his college in the 1950s. If the former, it is not at all clear that he would not still have racial views that differ from society at the time the case was decided. If the latter, he would simply have been a different person, and the thought experiment is meaningless and highly speculative.
C. The Second U.S. Expansion: Courts Infer Donor’s Intent from Her Generosity

U.S. courts also became willing to infer the donor’s intent from the extent of her generosity. For instance, in *In re Estate of Hawley*, a New York school wanted to lift racial and religious requirements from a gift it had received in 1938. The New York County Surrogate’s Court permitted this, and reasoned that because the testator left his entire residuary estate to the school, the school’s continued existence, rather than the nature of the school, was the testator’s main concern. This is a very questionable interpretation, for the testator left the gift in 1938 to a school that was Protestant Episcopal and imposed a strict racial and religious requirement with his gift. The mere fact that the testator left the bulk of his estate to the school can just as easily mean that he was dedicated to the Protestant Episcopal faith and to educating primarily white children as it can mean that he was dedicated to the school. Indeed, because the grant was made in 1938, the testator was not merely passively accepting the values of his time, as Girard perhaps was. Rather, he imposed a religious and racial restriction at a time when he easily could have done otherwise. This court went a step further than the *Girard* cases not only because the evidence it considers for the donor’s intent is weaker, but also because, here, the court’s outcome does not prevent the failure of an institution. In the *Girard* cases, letting the trust fail would mean closing the College. In *Hawley*, it would mean that the school would lose a particular source of funding (which would revert to the heirs), but the school would continue to exist. Of course, on the one hand there is an argument to be made that society has an interest in keeping money that is given to charity in charity. On the other hand, the argument has also been made that private parties are better at employing funds than charities are and, therefore, the revertor ought not to be viewed as a loss to society. The argument here is simply that a school losing part of its funding is not the same as a school ceasing to exist.

In an even more questionable interpretation of testator’s intent, the court in *In re Van Bomel* concluded that New York University could disregard a restriction for “white Christian students” in a scholarship because the testator had an impressive history of generous donations to the university, fund-raising activity, and service to

66. *Id.* at 627.
the university’s board of trustees. 69 The gift, however, was made in 1979, and it would be hard to imagine anyone in 1979 making a racially and religiously restricted gift unless that person was committed to such a restriction. Given the testator’s involvement with the university, he was surely aware that scholarships need not carry racial or religious restrictions. This decision to disregard the testator’s intent goes a step beyond Hawley in two senses. First, in Hawley, the gift imposed a condition that the entire school had to follow; here, the condition applied only to the scholarship. Second, the Episcopalian school in Hawley stood to lose a substantial part of its funding; in Van Bomel, a major university stood to lose a relatively small amount. Furthermore, given the wealth of funds available at New York University, it is likely that the restricted scholarship could be applied in such a way that the restriction would have no impact on others deserving of scholarship funds.

One might argue that when testators do not provide for an alternative disposition of the funds and do not create a reversionary clause, 70 they invite judicial action if the original disposition turns out to be “impossible or impracticable or illegal.”71 After all, a testator who wants her property used in one way can specify the alternative use of her property in her will if that fails. The reality may very well be that testators simply do not think through the matter carefully enough, 72 which is suggested by the fact that reversionary clauses are very rare.

What one would expect to be clear, however, is that if a testator does specify an alternative disposition or provide a reversionary clause, the testator has made her intent clear. This had always been the position of the law: “The authorities are universally in accord that the doctrine of cy pres is simply inapplicable if there is a reversionary clause or valid gift over in the event a charitable gift fails for any reason.”73 Yet this position of the law has since shifted. The testators in Home for the Incurables of Baltimore City v. University of Maryland Medical System Corp. 74 sought to create “additional housing accommodations to be known as the ‘Coggins Building,’ to house

69. Id. at 1069–70.
70. An alternative disposition is a clause that specifies another way of disposing of the property if the first way is not possible. A reversionary clause is one that states that if the original disposition fails, the trust does, too, and hence reverts to the heirs. Note that some states have a reversionary clause as their default, so there is no need to insert it into the will.
71. RESTATEMENT (SECOND) OF TRUSTS § 399 (AM. LAW INST. 1959).
72. Luria, supra note 6, at 66.
74. 369 Md. 67 (2002).
white patients who need physical rehabilitation. *If not acceptable to the Keswick Home, then this bequest shall go to the University of Maryland Hospital to be used for physical rehabilitation.*

The Keswick Home refused to accept the gift with the racial restriction. The court did not reason, however, that the gift should therefore go to the University of Maryland Hospital, but rather held the racial provision to be unacceptable on public policy grounds, for “[T]oday in Maryland, there are few if any public policies stronger than the policy against discrimination based on race or color.” The court did not contest the claim that the settlor’s intent was for the bequest to go to the University of Maryland if Keswick Home refused it, but argued that to enforce the condition would be to recognize the racially discriminatory provision, which would be against public policy. In other words, the settlor’s intent was irrelevant in this case.

**D. England’s Modest Cy Pres Reform After Dominion Hall**

While the *Girard Trust* and *Rice University* litigations were making headlines in the United States, such cases were absent in England after *Dominion Hall*. Before asking why the English courts remained silent on the matter, this Note first examines the changes that took place in England in the field of charitable trusts. In 1952, the Nathan Report, commissioned by the U.K. government, found that the doctrine had remained largely unaltered since 1860, but that hundreds—or perhaps thousands—of trusts were not managed efficiently and needed revision. Specifically, the Report recommended (i) relaxation of the need for impossibility, and (ii) relaxation of the rule that the application must be to a purpose as near as possible to the one originally intended by the testators. The government adopted these reforms in Sections 13 and 14 of the Charities Act of 1960. However, these reforms were not meaningful because, as *Earl of Craven* shows, the courts already took an expansive view of impossibility and were not concerned with finding the nearest possible pur-

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75. *Id.* at 70 (emphasis added).
76. *Id.* at 84.
77. *Id.* at 75.
78. See supra notes 41, 43, 56–61 and accompanying text (discussing *Girard Trust* and *Rice University* litigations).
80. Charities Act 1960, 8 & 9 Eliz. 2 c. 58 (Eng.).
pose. Unsurprisingly, the Woodfield Report,\(^\text{81}\) which evaluated the effects of the Charities Act of 1960, found that this law had not loosened the *cy pres* doctrine in practice and recommended that the government consider doing so. The government, however, concluded that “legislation would not be appropriate”—that it was, in fact, “undesirable”—and that the evolution of the doctrine under common law was preferable.\(^\text{82}\)

While *cy pres* therefore remains unreformed in England, it is worth noting that the need for this reform in issues surrounding racially discriminatory trusts was addressed in the 1976 Race Relations Act Section 34(1), which is still in force today:

(1) A provision which is contained in a charitable instrument (whenever that instrument took or takes effect) and which provides for conferring benefits on persons of a class defined by reference to colour shall have effect for all purposes as if it provided for conferring the like benefits—

(a) on persons of the class which results if the restriction by reference to colour is disregarded; or
(b) where the original class is defined by reference to colour only, on persons generally;

but nothing in this subsection shall be taken to alter the effect of any provision as regards any time before the coming into operation of this subsection.\(^\text{83}\)

This provision eliminates all references to color, even retroactively. That is, the statute applies to all charitable trusts, regardless of when they were created, though it does not apply to the administration of a trust prior to the enactment of the statute.\(^\text{84}\) The provision has so far been applied only once. In *In re Harding*,\(^\text{85}\) the court had to interpret the following provision: “I give everything I possess to the Diocese of Westminster and it is my wish that they should hold it on trust for the black community of Hackney, Haringey, Islington and Tower Hamlets . . . .” Applying Section 34(1) of the Race Relations Act, the court ruled that the word “black” was to be stricken


\(^{83}\) Race Relations Act 1976, c. 74 (UK).

\(^{84}\) Swanson, *supra* note 26, at 189.

\(^{85}\) [2008] 2 WLR 361 (Ch) (Eng.).
from the trust, but that it was otherwise valid.

England’s statutory approach has the benefit of efficiency. For instance, if the statute had been in place in the United States, the Girard Trust would have been reformed in one simple proceeding (if even that much would have been necessary) rather than over the course of fourteen years. The court would simply have struck “white” from “poor male white orphans,” to arrive at “poor male orphans.”

Yet the statute is poorly drafted. First, it strikes only color from the trust, leaving other forms of discrimination untouched. It also is not clear whether defining a class without reference to color, but still intending color, is permitted. Would In re Harding have come out differently if the testatrix had left her money to those “of African descent” rather than those who are “black”? On a literal reading of the statute, the answer should be in the affirmative. Second, the statute also eliminates all discrimination, without regard for the kind of discrimination that is permitted, or even favored, such as discrimination for remedial purposes. Whatever one’s opinion of discrimination for remedial purposes, the law permits it under certain circumstances, and so it is strange to eliminate it from charitable trusts. In addition, various forms of discrimination are permitted because they are valid expressions of a testator’s preferences. Indeed, much charity would probably never come into place if people were no longer permitted to give for the benefit of their own communities.

E. The Barnes Foundation Litigation: The Death of the Donor’s Intent in the United States

The litigation surrounding the Barnes Foundation presents an excellent example in which the testator’s intent was ignored. While technically not *cy pres*, the doctrine of deviation was employed in this litigation. The two doctrines are virtually identical, however—and indeed often used interchangeably by the courts—and, in the present case, functionally equivalent. Heinrich Schweizer, *Settlor’s Intent vs. Trustee’s Will: The Barnes Foundation Case*, 29 COLUM. J.L. & ARTS 63, 75 n.81 (2005).

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86. See, e.g., RESTATEMENT (THIRD) OF TRUSTS § 28 cmt. f (AM. LAW INST. 2003) (“This does not mean that a criterion such as gender, religion, or national origin may not be used in a charitable trust when it is a reasonable element of a settlor’s purpose and charitable motivation.”).

87. While technically not *cy pres*, the doctrine of deviation was employed in this litigation. The two doctrines are virtually identical, however—and indeed often used interchangeably by the courts—and, in the present case, functionally equivalent. Heinrich Schweizer, *Settlor’s Intent vs. Trustee’s Will: The Barnes Foundation Case*, 29 COLUM. J.L. & ARTS 63, 75 n.81 (2005).

88. See generally id.; Jonathan Scott Goldman, *Just What the Doctor Ordered? The Doctrine of Deviation, the Case of Dr. Barnes’s Trust, and the Future Location of the
and has even been the subject of the documentary *The Art of the Steal.*

The purpose is rather to show that the final stage of the litigation—which permitted the Barnes Collection to be moved from its original location to downtown Philadelphia—attached little, if any, value to Dr. Albert C. Barnes’ intent, in a way that would have been unthinkable before the *cy pres* doctrine was relaxed.

Dr. Barnes started from humble beginnings and made a fortune by patenting the medicines he invented. He used much of this money to amass one of the greatest art collections in the world, which includes 69 paintings by Cézanne, 181 by Renoir, 60 by Matisse, 44 by Picasso, and 8 by van Gogh—among them, many of the greatest works of these painters. Estimates of the monetary value of the collection have ranged from six billion to seventy billion dollars and to “simply impossible to say.” Dr. Barnes set up a Foundation to house all these works in a gallery especially constructed for the purpose. The Foundation was not a museum, but an educational institution. Dr. Barnes founded it on the ideas of philosopher John Dewey, who believed that society could only be perfected through the introduction of new educational methods. These methods included hiring workers of both sexes and all races and offering education to the workers as well as the students. Some have criticized, even ridiculed, the Foundation as the creation of an eccentric millionaire, especially because Dr. Barnes placed all the art on the walls himself in an unusual way and insisted it never be moved. Matisse, on the other hand, called it “the only sane place to see art in America.”

When the Foundation faced financial difficulties, the court ruled that the art should be relocated to a new museum in downtown Philadelphia, for which several charitable foundations offered to raise $150 million. The court authorized the relocation because it saw it

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90. Schweizer, *supra* note 87, at 63.
91. *Id.* at 63 n.3.
92. *The Art of the Steal, supra* note 89.
94. *The Art of the Steal, supra* note 89.
95. According to *The Art of the Steal*, the financial difficulties were caused by those
as the only way to save the Barnes Foundation from financial ruin (the other option the court considered was the one provided for by Barnes himself, namely the selling of the works not on display, but the court concluded that this would not raise sufficient funds). Because this was the only way to save the Foundation, the court could override the testator’s intent to create an educational institution and replace it with a museum.96

Such reasoning may have been sound if not for the fact that there were almost certainly other ways to save the Barnes Foundation. The court had indeed been showered with suggestions on how to save the foundation by “politicians, art scholars, financial experts, and former students,” but dismissed these out of hand as mere “public opinion.”97 This is an unusual course of action, for U.S. courts have a long tradition of proposing schemes of their own or else referring the matter to a master whose task it becomes to come up with a scheme for an alternative disposition of the property.98 Recall that the court in *Earl of Craven* did not hesitate to propose its own way of using the property. In this case in particular, the idea that the move to Philadelphia was the only possible solution has been described as “nonsensical,” primarily because it would have been easy to raise money from charities and private donors to restore the endowment of the Foundation.99 The court’s acceptance of the move is even more ironic given that the court criticized the Attorney General for not representing the interests of the Foundation.100

The court’s reasoning is particularly questionable because it does not look for the solution nearest to Dr. Barnes’ intent—and in fact seems to have found the one furthest from it. Dr. Barnes chose the location for his school—Lower Merion—in large part because he sought to avoid downtown Philadelphia, the elite of which he des-
Placing the collection in downtown Philadelphia and in the hands of that very elite is therefore likely the very last thing Dr. Barnes would have wanted. Dr. Barnes was in fact far ahead of his time, and not only opened his school to African Americans, but also had elected for the trustees to come from Lincoln University, a small African American college. Through a strange twist of fate, a doctrine that evolved to eliminate discrimination has led to the undoing of a trust that, from its inception, fought discrimination.102

III. THE DIFFERENCE BETWEEN THE UNITED STATES AND ENGLAND—AND HOW TO FIX IT

A. England Applies Cy Pres Without Courts, While Americans Fight for Racist Trusts in Court

Such disregard for the donor’s intent as in Barnes is nowhere to be found in England. As argued in Part II, cy pres in the United States expanded in large part due to the need to deal with discriminatory charitable trusts. Yet such trusts existed in England as well, so why did they not lead to an expansion of cy pres there?

Part of the answer lies in the fact that in England, cy pres can be applied without resorting to the courts. Depending on the nature of the trust, the Charity Commissioner, the Chancery Division, or the Ministry of Education may apply cy pres.103 In other words, cy pres may be applied without setting a precedent and thus without affecting the doctrine. In the United States, on the other hand, cy pres may be applied only by a court, thus necessarily setting a precedent.

The applications of cy pres by the Charity Commissioner, the Chancery Division, and the Ministry of Education are subject to appeal, however. Legally speaking, therefore, there was nothing preventing an English racist trust that wished to remain racist from fighting for this in court.

It may seem strange to suggest that a charity would fight for racism, but that is exactly what happened in the Girard litigation. The Girard Trust argued in state court, and initially prevailed on this theory, that running a school for white persons only was neither im-

101. THE ART OF THE STEAL, supra note 89.

102. The case Trustees of the Corcoran Gallery of Art v. District of Columbia, 2014 D.C. Super. LEXIS 17 (D.C. Super. Ct. Aug. 18, 2014), which cites to In re Barnes and reaches a similar result, confirms that the Barnes Foundation group of cases is not an isolated incident.

103. Rudko, supra note 82, at 480.
It was willing to fight for this position in litigation that spanned fourteen years. This willingness cannot have been due to a religious adherence to Girard’s will, for the administrators of Girard College had interpreted “orphan” to mean not only a child without parents, but also a fatherless child, even if the mother was still alive. Justice Musmanno, in a dissent later adopted by federal judges, commented on these conflicting attitudes of the trust. Once the willingness to fight for discriminatory provisions abated, however, discriminatory provisions could be removed without much of a fight—after only the bare minimum of litigation, Girard College now admits girls as well as boys.

The difference in willingness to fight for racist trusts is evident if one compares In re Dominion Students’ Hall Trust to Rice University. The cases are analogous in that both are related to an institution that could only admit white persons—but where that racial restriction was very plausibly not part of the primary intention of the donor. In Dominion Hall, for instance, this intention was “to promote the community of citizenship among the British Commonwealth of Nations.” In Rice University, the donor’s purpose was to establish:

[A] Library, Reading Room, Scientific Departments, and Polytechnic School, and the instruction, benefits and enjoyments to be derived from the Institute to be free and open to all; to be non-sectarian and non-partisan, and subject to such restrictions only, as in the judgment of the Board of Trustees will conduce to the good order and honor of the said Institute.

The provision that the institution should be open only to “white inhabitants of the city of Houston and the State of Texas” could therefore be taken to be secondary, especially because it occurred only once in the indenture, whereas the words “free and open

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105. Luria, supra note 6, at 48 n.33.
106. Girard, 386 Pa. at 635.
107. Luria, supra note 6, at 48 n.35.
108. [1947] Ch 183 (Eng.).
111. Coffee v. William Marsh Rice Univ., 408 S.W.2d 269, 272 (Tex. Civ. App. 1966) (The decision of the Court of Civil Appeals of Texas cites the original language of the instrument at length.).
to all” were repeated throughout. Now if the attitude of all involved had been the same as in Dominion Hall—contributors who favored removal of the provision, in particular—the case would almost certainly have been resolved easily. The reality was, however, that two alumni (who apparently represented a larger class of contributors) vigorously supported the color bar and were willing to fight for it extensively. They appealed from the district court opinion that removed the color bar and went to the Supreme Court of Texas merely on the question of their standing to appeal. They won on that question, only to lose on the merits upon remand. It was such willingness to fight, however, that forced the court to substantiate its interpretation of the donor’s intent more thoroughly and thus to resort to examining William Marsh Rice’s life—much like the willingness of the trustees of the Girard Trust to fight for the racist provision in their trust forced the courts to examine Girard’s life. In Dominion Hall, there was no such need, as nobody contested that the racist provision should be removed.

It is worth noting that the often disinterested Attorneys General—who are frequently the only ones representing the donor’s intent—facilitate the spreading of a looser cy pres doctrine. As the Barnes litigation shows, once a looser interpretation of the doctrine is acceptable, if there is no effective representation of the donor in court, the donor’s intent is easily set aside.

B. Proposal for a Legislative Solution

This Note has highlighted how the donor’s intent has come to mean less, and in some cases nothing, in the application of cy pres. Perhaps there are those who would argue that this is good, but the purpose of this Note is not to engage in a normative evaluation of the cy pres doctrine. Rather, the purpose is to suggest a way of restoring the cy pres doctrine as it has been articulated in, for instance, the Second Restatement of Trusts—and the proposal is to do so through a statute. A discussion of the merits of cy pres is left for another time, except to note that it seems to be a necessary doctrine to balance between the absurdity of completely unalterable trusts and

112. Id.
113. Rice University, 403 S.W.2d at 348 (decision of Supreme Court of Texas).
114. Rice University, 408 S.W.2d at 269 (decision of Texas Court of Civil Appeals).
115. See supra notes 56–64 and accompanying text.
116. See supra note 24 and accompanying text.
117. RESTATEMENT (SECOND) OF TRUSTS § 399 (AM. LAW INST. 1959).
the arbitrariness of completely, freely alterable ones.

As a preliminary point, the proposed statute should reiterate that if the donor’s discriminatory purpose is legal (and not impracticable or impossible), then cy pres does not apply. This is more in line with other law, which, however complicated, does permit discrimination under certain circumstances. This will also likely safeguard or even encourage giving, for much giving is motivated by considerations of benefitting a particular community: for instance, “63% of high net worth donors cite ‘giving back to the community’ as a chief motivation for giving,” and in 2014 “the majority of charitable dollars went to religion (32%).” After cases such as In re Estate of Hawley and Home for the Incurables of Baltimore City v. University of Maryland Medical System Corp., potential donors may be wary of giving on a discriminatory basis and, therefore, refrain from giving altogether.

Second, the statute should stipulate that if there is an alternative disposition or a reversionary clause, that clause shows the donor’s intent and, therefore, should govern when the primary disposition fails. This would have several benefits and, in fact, had actually been the law until such cases as Home for the Incurables. On one level, it is a very clear statement of what the donor wanted if the primary purpose fails—and the very point of cy pres is to establish what the donor would have wanted in such a case. On another level, this adds clarity for those who are setting up a trust: if they are giving thought to whether or not the primary purpose will fail, they can be sure that, by specifying an alternative purpose, their assets will be used as they want them to be used. This, too, may stimulate giving.

Third, the statute should include a provision that limits the search for the donor’s intent to the text of the charitable instrument. Although it may appear that seeking the donor’s intent outside the text will better allow her to establish her intent (or what would be closest to that intent), cases such as In re Estate of Girard and In

119. 32 Misc. 2d 624 (N.Y. 1961).
121. It is speculative to consider the motivations of donors, especially as there is no data to show that giving decreased as a consequence of any legal decisions. Still, it is reasonable to assume that at least some donors are legally sophisticated and rational actors, and therefore respond to changes in the law.
122. 386 Pa. 548, 551 (1956); see also Pennsylvania v. Bd. of Dirs. of City Trs. of Phila., 353 U.S. 230 (1957) (per curiam).
In re Van Bomel\textsuperscript{123} demonstrate that, in practice, extrinsic evidence leads to very questionable interpretations of donors’ intent.\textsuperscript{124} This provision also has the benefit of predictability, since the space in which extrinsic evidence is to be sought is nearly infinite (including, for instance, the donor’s biography, the historical circumstances in which the gift was made, as well as the magnitude of the gift).\textsuperscript{125}

Fourth, the statute should contain a provision to instruct the courts to find a purpose similar to the donor’s intent—and therefore to scrutinize any proposals for a new use of the assets. Essentially, this is a return from the logic of In re Barnes Foundation\textsuperscript{126} to that of Thatcher v. Lewis.\textsuperscript{127} In Barnes, the court accepted that the only option was to move Dr. Barnes’ collection to downtown Philadelphia—not only was this exactly the last thing Dr. Barnes had wanted, but there were also other options as well. In Thatcher, on the other hand, the court refused to accept that there were no longer any poor travelers in St. Louis moving to settle in the West (even though the trustees had presented evidence to this effect), but accepted only that there were fewer such travelers in 1934 (when the case was argued) than in 1851 (when the trust was created) and that, therefore, any excess funds could be used for other purposes.\textsuperscript{128} The court was still careful to limit these purposes to aiding other poor travelers and refused to allow the funds to be used “to erect a building for the administration of the relief [because] [w]e do not think that this is within the probable intent of Judge Mullanphy.”\textsuperscript{129} Such an approach not only protects the donor’s intent in general, but also helps prevent fraud. Whether or not the narrative presented in The Art of the Steal is correct (that the financial problems of the Barnes Foundation were created so as to get a court to apply cy pres to move the art collection to Philadelphia\textsuperscript{130}), it is a plausible narrative, and an analogous one could befall another charitable trust. The more flexible the cy pres doctrine is, the greater the incentive for those who are trying to gain control of the assets. In the case of the Barnes Collection, had cy

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\item \textsuperscript{123} In re Van Bomel, 110 Misc. 2d 1068 (N.Y. Sup. Ct. 1981).
\item \textsuperscript{124} See supra Part II.B.
\item \textsuperscript{125} This provision is not intended to eliminate extrinsic evidence completely. For instance, such evidence may still be appropriate when the court attempts to find the meaning of a particular word in the charitable instrument, if that meaning is unclear.
\item \textsuperscript{127} Thatcher v. Lewis, 335 Mo. 1130 (1934).
\item \textsuperscript{128} See supra notes 32–35 and accompanying text.
\item \textsuperscript{129} Thatcher, 335 Mo. at 1146.
\item \textsuperscript{130} The Art of the Steal, supra note 89.
\end{itemize}
been less flexible, it would not have been possible to move the artworks to downtown Philadelphia, because the court would have insisted on staying closer to Dr. Barnes’ intent and, therefore, the Philadelphia charitable organizations would have had limited means of relocating the Barnes Foundation.

Fifth, and finally, the question remains what to do with trusts that are discriminatory even after all these provisions—if, for instance, Girard College had been created today, with its provision for “poor male white orphans,” with no alternative disposition or reversionary clause, and with the assumption that it is indeed an illegal (or else impracticable) form of discrimination. Under the present proposal, the court would be forced to seek the intent of the testator in the testament. However, this may have the unfortunate consequence that the court would be forced to find that the intent was indeed discriminatory (something courts are unwilling to do, as shown above) and to seek another discriminatory use for the assets or else to let the trust fail. This Note proposes, therefore, to borrow from the English statute and simply to strike out the discriminatory language. Unlike the English statute, however, the proposal here entails striking out all discriminatory terms—not only those relating to color, but also to race more generally, nationality, ethnicity, gender, religion, sexual orientation, or any form of discrimination that may be prohibited by law.

Of course, this simple approach can have the effect of defeating the donor’s intent, as it did in In re Harding (where a gift to the black community of a certain parish became simply a gift to that parish). Other elements of the proposed statute protect from such defeat of the donor’s intent, however. First, if the discrimination is legal (and not impracticable), then cy pres does not apply and the gift is left unaltered; second, the donor could specify an alternative disposition, thus making sure that if the primary one fails, the court will look to the alternative one. While this borrowing from the English stat-
ute remains imperfect, it has the benefit of efficiency and clarity, and will only need to be applied in a small number of cases.

CONCLUSION

Although this Note hardly attempts to hide its author’s disappointment at the outcome of \textit{Barnes}, the purpose of this Note is not to argue for or against the outcomes in any of the cases cited here. Rather, the purpose is to show that the doctrine of \textit{cy pres} has become more and more liberal, to identify a cause of this change, and to propose a way of making \textit{cy pres} closer to what it was meant to be.

\textit{Cy pres} in the United States has loosened very much since the 1950s—especially in the importance given to the donor’s intent. This does not mean, of course, that donor intent is no longer relevant and that any alteration to a trust will be allowed by the courts. It does mean, however, that, when the testator’s intent is weighed against impracticability or illegality, the intent is given less weight than it used to receive.

A major reason that the doctrine has become more expansive is that it was used—and often stretched—to remove racial restrictions from trusts while otherwise preserving the trusts. Whether by inferring the donor’s intent from her life or the size of her donation, or by disregarding it entirely, U.S. courts moved away from their previous commitment to preserve this intent rigidly. There was no separate \textit{cy pres} for racial provisions, however, and therefore the liberalization of the doctrine in the racial sphere led to its liberalization in general.

The comparison with England reveals that there was more at work than the clash between racial trusts and changing values alone. After all, such a clash existed in England as well, but there, the doctrine has hardly been altered. The U.S. system makes every \textit{cy pres} petition go through the courts—thus setting a precedent every time; in England, \textit{cy pres} does not require the court, although one has the right to appeal to the courts. In the United States, parties have been willing to go to court to fight for racism—that is, fighting to preserve the racist provisions of their trusts—thus drawing out the litigation and forcing both the other parties and the courts to produce more and more elaborate opinions. In England, there is not a single case that appeals from a grant of \textit{cy pres} that removes a racial provision—it appears that no one was willing to go to court to defend racist trusts.

This Note does not claim to have found all the causes of the differences between \textit{cy pres} in England and the United States. Indeed, \textit{Dominion Hall} suggests that an element of legal culture was also at play—the court there showed a caution not seen in any of the
U.S. *cy pres* cases. The English court made a concerted effort to seek the opinions of the contributors; it stressed that it was not dealing with a will and therefore had more liberty; and it stressed that its solution was the functional equivalent of having two trusts—one racist, one not—operate side by side (which would not violate the terms of the memorandum of association), so it would be more sensible to have just one trust. This suggests that English courts are less willing than U.S. courts to depart from the written law, at least insofar as respect for the donor’s intent is concerned.

This Note offers a statutory solution. The statute should have five parts. First, it should clarify that discrimination that is legal (for instance, remedial discrimination under certain circumstances) does not trigger *cy pres*. Second, the statute should provide that if the donor provided an alternative disposition or a reversionary clause, then that clause should govern if the primary intent fails. After all, such a clause is a clear statement of the donor’s intent. Third, the statute should include a provision that limits the search for the testator’s intent to the four corners of the charitable instrument. Although it may appear that looking to such things as biography may aid in finding the donor’s true intent, experience shows that such extrinsic evidence only makes the result less predictable. Fourth, the statute should instruct courts to seek an alternative use of the funds that is similar to that originally intended by the donor. This provision serves at once to prevent any excessive scrutiny in finding the alternative that would be the closest to the original intent—and, more importantly, to ensure that courts scrutinize any proposals before them and accept only proposals that are indeed similar. Finally, if after all of this the trust is still in place and is discriminatory, then the proposed statute would simply remove all discriminatory provisions from the trust. Such an approach is mechanical and therefore may disregard the donor’s intent—but that is preferable to the other options, namely leaving a discriminatory trust in place or causing it to fail.

*Anton Chaevitch*