Review

You Can't Take It with You

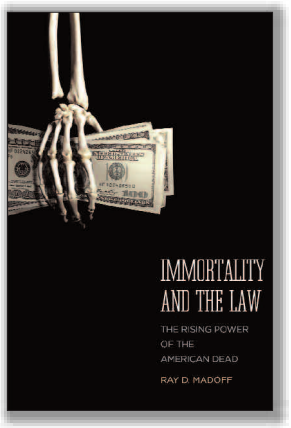
Ray Madoff believes that perpetuity undermines "broader societal values." There are good reasons to sunset, true. But why should sunsetting be legally mandated?

By Charles E. Rounds Jr.

THE THESIS OF RAY D. MADOFF'S *Immortality and the Law* is that the deference American law affords the wishes of the dead "imposes significant costs on living individuals and threatens our most fundamental societal values." The author's perspective is, in a word, statist.

There are four chapters in all. One is devoted to postmortem private restrictions on the disposition of one's body and one to safeguarding one's postmortem reputation. The remaining two chapters deal with the postmortem disposition of one's property, specifically transfers for the benefit of people (Chapter 2) and transfers in trust for charitable or other purposes (Chapter 3).

The focus of this review is on Chapter 3, in which Madoff seems to advocate the elimination, presumably by legislation, of the perpetual-duration charitable trust or corporation, while also calling for a reduction of the postmortem charitable deduction so that it falls in line with the less generous income tax deduction for lifetime charitable contributions.



IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD
by Ray D. Madoff
Yale, 2010
208 pp., $26.00

This is not the place to debate whether allowing charitable trusts or corporations to have a perpetual duration makes for good estate planning, or whether maintaining the unlimited postmortem charitable deduction makes for good public policy. Thoughtful donors may well concur with some of the author's conclusions. Many, for example, have been advocating for some time now that a charitable trust or corporation should be of limited duration so as to minimize the chances that it might be hijacked by those for whom upholding donor intent is not a concern, let alone a sacred trust. Others feel that the time has come for the politicians to cease employing the Internal Revenue Code as an instrument of behavior manipulation. What I intend to do here is question some of Madoff's core assumptions. But first, some context.

For many centuries, the trust has served as a device for circumventing the state. Frederic William Maitland, the great Cambridge University trust scholar, opined over a century ago that the trust was the greatest achievement of English jurisprudence. Because of its protean nature, it allows the private citizen, together with his trust lawyer, to play cat-and-mouse games with the state. There are few legal tasks that a trust is not capable of performing, including getting around the provisions of some statute.

Already by the time of the War of the Roses (1455–85), most of the land in England was held "to use," the "use" being a precursor to the modern trust. Holding land "to use" was a way of avoiding feudal dues. After extensive negotiations with the private landowners of the realm and their common law lawyers, Henry VIII managed to fetter somewhat—but only somewhat!—the hooves of the proto-trust. But the trust has always been an unruly horse.

Fast forward to the United States in the 1880s. By then major industries had become entrusted to a relatively few individuals. In the words of Henry Adams: "The Trusts and Corporations stood for the large part of the new power that has been created since 1840, and were obnoxious because of their vigorous and unscrupulous energy. They were rev-

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olutionary, troubling all the old conventions and values, as the screws of ocean steamers must trouble a school of herring." The Sherman Anti-Trust Act was the government's response to this concentration of private economic power.

In the last analysis, the trust, like fire, is neutral. It is just a tool. What matters is how the tool is employed. But, in a small corner of the legal academy, a debate is underway over the extent to which the creator or settlor of a trust, via its terms, may place restrictions on how the trust property should be invested. Take a direction to retain and manage the family's closely held business. What if a diversified portfolio of marketable securities and bonds would make more sense, at least from a purely economic perspective? John H. Langbein, a professor at Yale Law School, suggests that the courts should override the wishes of the settlor in such situations, that the law of trusts should have an "intent-defeating" aspect to it. Above all else, he argues, the trust should exist for the benefit of the beneficiaries.

Jeffrey A. Cooper of Quinnipiac University School of Law suggests that things are much more nuanced when it comes to trusts. Trust property, he maintains, is for the benefit of the beneficiaries as that benefit is understood and articulated *by the settlor*, the one to whom the property originally belonged. If there is to be an objective one-size-fits-all standard that is "efficiency"-driven, then ultimately it will fall to the state to define "efficiency," either by legislation or case law. One senses from Cooper's writings that he does not think this is a good thing.

Madoff seems to be with Langbein on this one. "The cost of protecting donor's intent has often been gross inefficiencies," she writes, "since courts are directed to focus primarily on the donor's intent and to pay only minimal attention to current societal needs." (Replace "current societal" with "the beneficiary's" and we have a page that is directly out of the Langbein playbook.) It is passing ironic that the public policy counter-argument to such collectivist sentiments was best articulated by Mao Zedong, the quintessential statist, in the 1950s: "Letting a hundred flowers blossom and a hundred schools of thought contend is the policy for promoting progress in the arts and the sciences."

The charitable trust, which in tax parlance is referred to as a foundation, operates in a no-man's-land between the private and the public. (So does the charitable corporation, which, for all intents and purposes, is a trust.) While a charitable trust is typically created by a private citizen with his or her own property, and while it is typically administered by a private individual or corporation, the state has traditionally inserted itself into the process in two ways. The state attorney general, usually an elected politician, is charged with its oversight. The court, also an instrumentality of the state, is charged with modifying its purposes under *cy pres* doctrine, should circumstances warrant. It would be naïve in the extreme to suggest that these governmental entities do not act out of political calculation when it comes to matters charitable—and this, quite apart from questions of tax policy. The notorious *Ebitz* case in Massachusetts is a classic example.

Why is it a given that enforcing donor intent and "serving broader societal values" are mutually exclusive?

At issue in *Ebitz v. Pioneer National Bank* was the provision of a testamentary trust established "to aid and assist worthy and ambitious young men to acquire a legal education." The will was executed in 1963 and allowed in 1970. The plaintiffs were female law students who made timely applications to the trustee for assistance from the fund. The applications were rejected on the ground that the testator had intended males, not females, to be beneficiaries of his largess.

The trial judge held that "[t]o exclude females as possible recipients of financial assistance from a trust fund established for the purpose of assisting qualified students interested in the pursuit of a legal education would constitute an unreasonable and arbitrary exclusion." With that he ruled that the term "young men" meant "young men and young women." The trustee appealed. The trial judge was upheld on appeal by the Massachusetts Supreme Judicial Court, which found the reference to "young men" ambiguous in the context of the entire instrument.

Thus does the public assert its authority over private funds. But it is not enough for Madoff, who asserts: "Two defining features of the law of charitable trusts make them particularly effective in allowing a donor to achieve a form of immortality: the focus on enforcing the donor's intent, as opposed to serving broader societal values, and the ability for charitable trusts to exist in perpetuity." As a general matter—leaving aside the capricious benefactions of the occasional eccentric donor, which the courts are fully equipped to deal with under the ancient *cy pres* doctrine—why is it a given that enforcing donor intent and "serving broader societal values" are mutually exclusive? And who or what is to make these generalized determinations as to "societal value"? Is not "society" in this context really a euphemism for the state?

Madoff makes a second problematic assumption, namely that assets that are "tied up" in perpetual charitable trusts are somehow unproductive: "Real problems are not being adequately addressed. Issues of environmental degradation, war and peace, hunger, infectious diseases, education, and multi-generational cycles

of substance abuse and poverty are all problems in need of immediate resources. Yet in the pursuit of perpetuity, fewer resources are being devoted to these pressing issues."

Is the author suggesting that, say, Boston College (where she teaches) should divest itself of all its real estate and become a tenant so that its real estate can achieve its optimum market potential? It does not seem so. If the reference is to intangible personal property such as equities and bonds, some clarification is in order. Why is a working investment portfolio not a societal resource? Even a trust checking account can make it possible for someone downstream to own a home. It is not as if trust cash is hidden under some mattress. Tying up a parcel of land in perpetuity is perhaps another matter. But there is nothing in the book about college dormitories and the like "starving the known problems of today."

Her third problematic assumption is that an immediate charitable expenditure is preferable to investing charitable funds for the future: "Consider the example of a person with $1 million to commit to charity. If it is spent immediately, then society gets the immediate full value of the $1 million." I suppose it depends upon the charitable purpose. But could it be in anyone's interest for a worthy charitable educational institution whose economic viability is dependent upon tuitions not to invest at least some of its charitable benefactions in a rainy day fund? Can it really be said that "society" is benefited if all tuitions are forgiven for a year or two and then the economy tanks and the school goes under?

There is considerable dismissive commentary and speculation in *Immortality and the Law* about what motivates someone to make a postmortem gift in trust to charity:

> First, many people have a general desire to benefit society. Charitable transfers at death enable people to fulfill those desires at a time when they know they no longer need the resources for their own support. In addition, donating to charity is a way of expressing one's identity. Finally, some charitable bequests are inspired by a desire to secure a form of immortality. For some religious believers, this can come in the form of preserving their souls (by financing good deeds or the saying of Masses). . . . The desire to make—or remake—one's identity has no doubt provided a strong inspiration for much charitable giving.

Whether this amounts to good psychology or bad psycho-babble, or something in between, is outside my area of expertise. But whatever the case, what is lacking is some explanation of why a donor's personal religious or quasi-religious or existential motivations should be relevant to the issue of whether a perpetual charitable trust has social utility. Also lacking is a discussion of what could be the societal consequences of driving frustrated immortality-seeking prospective donors offshore, or causing them to eschew charitable giving altogether in favor of immediate non-charitable gratification.

In the last analysis, one's view as to whether a perpetual charitable trust, with its attendant tax benefits, has social utility will likely depend upon how much faith one has in the state and its ability to solve problems and protect our freedoms and individuality. Those who feel that the less economic power concentrated in the state, the better, will not find Madoff's statist arguments particularly compelling. Having said that, the oversight of charitable trusts or corporations by the attorneys general of the states and by the courts of the states is, and always has been, politicized.

Thus, a prospective benefactor is well-advised to consult an experienced trust lawyer about what countermeasures may be available and appropriate in a given instance to reduce the chances of a "societal" trust-jacking. And it may well be that counsel will advise: "Stay away from the perpetual charitable trust. A sunset provision is the way to go." This is not too different from what Madoff advocates—but for radically different reasons. P

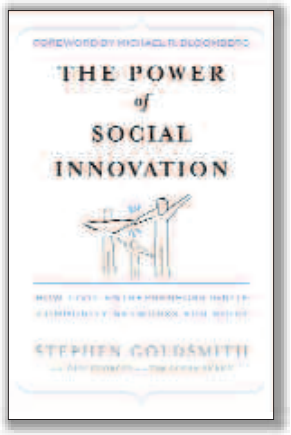
Review

Bubbling Up

Stephen Goldsmith wants to replace the top-down service delivery model with bottom-up civic entrepreneurship.

By Perla Ni

IT'S A TALE OF TWO CARICATURES. In liberal imaginations, conservatives think that government programs don't pull people out of poverty but that people pull themselves up out of poverty, Horatio Alger–style. To a conservative mind, liberals appear to believe that all poor people are structurally unable to advance, and that only sweeping government intervention can work. Of course, most people, conservative or liberal, sit somewhere between these two extremes. In his new book, *The Power of Social Innovation*, Stephen Goldsmith stakes out this broad middle ground.



THE POWER OF SOCIAL INNOVATION: HOW CIVIC ENTREPRENEURS IGNITE COMMUNITY NETWORKS FOR GOOD
by Stephen Goldsmith, with Gigi Georges and Tim Glynn Burke
Jossey-Bass, 2010
304 pp., $35.00

"Social innovation," as Goldsmith uses the term, simply refers to how social service providers (nonprofit and governmental) can solve social problems by providing clients (the poor, for instance) with positive incentives and treating them as active agents in the process. The traditional, top-down, service-delivery model has created "entrenched underperforming social safety net systems of providers, government and philanthropic funders, advocates, and interest groups," Goldsmith writes. Thus, he says, we need "civic entrepreneurs" to shift the power dynamic and make real change possible on an individual and community level. "Transformation occurs as these social risk-takers help change residents from passive recipients of government services to productive, tax-paying members of society," he adds.

Stephen Goldsmith is the right man to write this book. He served two terms as Mayor of Indianapolis, advised President George W. Bush on faith-based and nonprofit issues, and chaired the Corporation for National and Community Service under Presidents Bush and Obama. Shortly after he published this volume, he was appointed by Michael Bloomberg to serve as Deputy Mayor of Operations for New York City—overseeing many of Gotham's biggest service agencies.

For a politician, Goldsmith is candid about the shortcomings in how nonprofits relate to government, and he cites his own experience along with other national and local examples. Many nonprofits refuse to let go of ineffective programs, because these programs are their lifeblood and to do so would jeopardize their existence. This, argues Goldsmith, prevents people with new ideas from entering the market. "The comfort of long-term relationships often undermines entrepreneurial opportunity," he writes. Incumbent nonprofit service providers are therefore skilled at nurturing the "political and philanthropic contacts necessary to sustain their model, regardless of performance." Meanwhile, clients do not have choices, nor is their feedback solicited; and service providers do not have incentives to do better.

For an example of nonprofits more attuned to political patronage than service provision, Goldsmith turns to United Way CEO Brian Gallagher, whom he quotes as saying: "Columbus [Ohio] had a deep, rich history of settlement houses, and we were trying to move away from this program funding. . . . [T]hey had learned to become the best program funding recipients ever. They knew politics: how to get to a city council member. I went to the godfather of the seven or eight settlement houses in the city and said, 'I will go to my board and get a guarantee that you will get $750,000 or $850,000 and it will not be at risk over the next three years.'" The result? The settlement houses were not interested in funding that might force them to change their top-down delivery system.

When nonprofits seek the support (both financial and moral) of citizens, however, they are in a stronger position to tackle social problems. One of the most enlightening chap-

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ters of *The Power of Social Innovation* is about "Building a Public"—how civic entrepreneurs build a movement by creating citizen demand for change. "Civic progress requires that those who advocate for new interventions build a community of engaged citizens to demand change in social-political systems," Goldsmith writes. He cites the example of Sara Horowitz, who founded a national membership organization called Working Today. Horowitz asked freelancers what they wanted and provided them with what they identified as their top need: health insurance. (Working Today is now aligned with a 501(c)(4) called the Freelancers Union, which provides health insurance and a retirement plan to 120,000 independent workers.)

One reason social innovators need to invest in building a public is that choice—real, informed choice—requires a public aware of its needs and its options. Goldsmith strongly supports client choice, whether that client is a homeless man or a public school student. He makes a convincing case, based on his and others' experience, that when clients are trusted with responsibility, offered options to choose where to get help, and allowed to advocate for what is in the best interests of their communities, they achieve "the transformative power of personal responsibility, which can lead to a cultural shift toward higher expectations among individuals and within a community."

This is the heart of Goldsmith's middle ground between left and right. Meeting clients' needs addresses the left's *cri de coeur*, and building an ethos of personal responsibility addresses the right's concerns about moral hazard. A social innovation model compares favorably with the traditional, top-down model. "It's a perverse incentive system that is focused on needs and reinforces the negative," he explains.

Goldsmith enthuses about alternatives like Maurice Miller's Asian Neighborhood Design. Miller created a program in which individual households report on positive behaviors, such as taking a class or getting a good grade—each of which earns them $25. Participants learn from each other about positive behaviors, and as they learn more from each other, they collect more money. "Gradually the power dynamic changes, and the participants are no longer asking the staff, 'What do you want us to do?' as the traditional service model has programmed them to do," Goldsmith writes. In two years, the program increased household income by an average of 20 percent and new families asked to join the program.

One reason social innovators need to invest in building a public is that choice requires a public aware of its needs and its options.

Where Asian Neighborhood Design has been successful, a similar program—Mayor Bloomberg's Opportunity NYC Family Rewards pilot program, which offers small cash payments for basic tasks like going to the doctor or getting good grades—has not. Students who participated made no achievement gains vis-à-vis those who did not, although school attendance and dentist visits went up for some . Bloomberg recently announced that the city would not adopt the until-now privately financed program, and that cash payments would cease in August. "If you never fail, I can tell you, you've never tried new, innovative things," he insisted.

Like his new boss, Goldsmith emphasizes that social innovation requires a high tolerance for failure and a low tolerance for perpetuating those failures. "Governments must be pushed to allow more open competition—even if it results in failure—as long as poorly performing entities can be closed and their funds repurposed," he writes.

This book's shortcomings? Apart from discussion of the well-known examples of City Year and New Profit, there is too much ink applying the social innovation framework to choice in public education and too little on how to apply these ideas to sectors such as environment, healthcare, and civil rights issues. As a practical matter, the section on how civic entrepreneurs can find start-up or growth capital is very short: there is a mere page and a half listing tax credits, program-related investments, and community development funds as potential sources of capital. The lack of capital for innovative approaches is the Achilles' heel of the nonprofit sector. Goldsmith also gives short shrift to the for-profit private sector and its role in civic innovation.

The Power of Social Innovation confirms what you may already have suspected about the barriers that governments and entrenched nonprofits throw up against effective programs. By staking out a middle ground on a politically charged topic, Goldsmith offers practitioners, policymakers, and donors worthy ideas about the potential of private and neighborhood initiatives to help governments find better solutions to social problems. P