DEACCESSION: NOT SUCH A DIRTY WORD

INTRODUCTION

In an age of increasing maintenance and preservation costs and decreasing municipal support, public and private museums must make difficult decisions when developing sources of financing for the display, maintenance, and protection of their collections.[1] When private donations and other sources fail to provide the necessary funds, some museums resort to the sale of part or all of their collections in order to raise money.[2] Such sales, known as deaccessions, present difficult legal issues for museum administrators. Problems arising from deaccession include public opposition, legal constraints on museum officers or trustees, compliance with strict professional codes of ethics, and overcoming the restrictive terms attached to a gift to the museum.[3]

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1 *See, e.g.*, Sid Smith, *Series: Fate of the Arts*, CHI. TRIB., Aug. 25, 1996, at 1 (assessing the state of fine arts in America in light of decreased funding and general financial neglect by the federal government in comparison to other Western countries); William Grimes, *Tough Line On Grants For Arts: Shape Up*, N.Y. TIMES, Aug. 5, 1996, at C15 (discussing "tough love" grant programs which force arts organizations to develop efficient long-term spending plans to avoid deficits in the face of reduced financial support); John Fleming, *Funding Cut For Fine Arts Groups*, ST. PETERSBURG TIMES, Aug. 2, 1996, at 2B (the St. Petersburg Museum of Fine Arts's public funding was cut from $50,000 to $31,000); Joe Queen, *Artful Formula Hurts the Poor*, NEWSDAY, May 29, 1996, at A02 (criticizing city arts funding plan which hurts small, neighborhood arts groups that lack significant private donations); Jon Anderson, *Vivid Financial Impression Monet Show Adds Black Accent to Art Institute Balance Sheet*, CHI. TRIB., Oct. 15, 1995, at C1 (Chicago Art Institute federal funding remains "chancy" and state funding was slashed by nearly 75%); Preston Turegano, *Entertainment: Arts & Ledgers*, SAN DIEGO UNION-TRIB., Oct. 8, 1995, at E1 (San Diego Art Museum has run at deficits four of the past eight years even with increased attendance and membership); Jacqueline Trescott, *African American Museum Is Stalled*, WASH. POST, July 30, 1995, at G01 (plans for a new museum dedicated to African American culture were abandoned in light of the budget-cutting consciousness on Capitol Hill); *see also*, Jennifer L. White, Note, *When it's OK to Sell the Monet: A Trustee-Fiduciary-Duty Framework for Analyzing the Deaccessioning of Art to Meet Museum Operating Expenses*, 94 MICH. L. REV. 1041, 1041 n.3 (1996).

2 *See, e.g.*, Carol Vogel, *The Shelburne Splurges*, N.Y. TIMES, Dec. 13, 1996, at C34 (after reaching its goal of $25 million from deaccession proceeds for their Collections Care Endowment, the Shelburne Museum purchased additional artwork); Cathy Curtis, *Outerbridge Works to Be Sold*, L.A. TIMES, Feb. 1, 1996, at F1 (93 photographs by 20th century artist to be sold at auction); Suzanne Muchnic, *Scandal or Salvation? More and more institutions are selling off artworks. Are they just cashing in, or is it part of their mission?*, L.A. TIMES, Mar. 5, 1995, at 4 (Sotheby's auction house expected to sell a record-breaking $30 million from institutional collections compared with $12 million in 1993); Jo Ann Lewis, *Baltimore Tug of War*, WASH. POST, Feb. 26, 1995, at G01 (reporting that a Baltimore art school recalled its collection from the Baltimore Museum of Art where it had been on loan for more than fifty years in order to sell it and increase their endowment).

3 Newly enacted New York State legislation in the New York State Assembly defines deaccession as "the permanent removal or disposal of an object from the collection of the museum by virtue of its sale, exchange, donation or transfer by any means to any person." Legislation passed Aug. 8, 1996, N.Y. EDUC. LAW § 233-a.1(b) (McKinney 1996).

The first recorded use of the word deaccession (defined, "[t]o remove an entry for (an exhibit, book) from the accessions register of a museum, library, etc., usu. in order to

Though art museums and other charitable institutions typically use a corporate or trust structure, they are generally considered public trusts.[4] The trustees of an art museum, those entrusted to care for and maintain a particular community's patrimony, do not owe a fiduciary duty to a particular person but to the public as a whole.[5] The deaccession of art is, in a sense, a sale of the public's property.[6] Thus, while a property owner's right to alienate his property is universally acknowledged,[7] the ethical standard imposed by various associations on museum professionals is much more stringent.[8]

In addition, a number of common law and statutory remedies ensure protection of the public interest whereby, prior to any deaccession, a jurisdiction's attorney general may assert the public's

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sell the item concerned") was on Feb. 27, 1972 in the *New York Times*: "The Museum of Art recently de-accessioned (the polite term for 'sold') one of its only four Redons." IV THE OXFORD ENGLISH DICTIONARY 281 (2d ed. 1989).

In its institutional report, the Metropolitan Museum of Art claimed, "[Deaccession] does not mean sale. It does mean that the appropriate persons at the Museum . . . have concluded with the aid of staff reports and recommendations . . . that an object may be removed from the collection and be further considered for disposal by sale or exchange." THE METROPOLITAN MUSEUM OF ART, PROCEDURES FOR DEACCESSIONING AND DISPOSAL OF WORKS OF ART (June 20, 1973) [hereinafter METROPOLITAN MUSEUM PROCEDURES FOR DEACCESSIONING AND DISPOSAL], *reprinted in* 2 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 7-146 (1979) [hereinafter MERRYMAN & ELSEN (1979)].

Marie C. Malaro, a legal scholar on the subject of museum collection administration, suggests that the failure of lexicographers to include the word in common dictionaries may represent the public's disdain for what she defines as "the permanent removal of an object that was once accessioned into a museum collection." MARIE C. MALARO, MUSEUM GOVERNANCE: MISSION, ETHICS, POLICY 50 (1994) [hereinafter MALARO, MUSEUM GOVERNANCE].

[4] *See infra* part II.

[5] *See* N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(a) (McKinney 1995) ("No disposition of property for . . . charitable . . . purposes . . . is invalid by reason of the indefiniteness or uncertainty of the persons designated as beneficiaries."); Attorney Gen. v. President and Fellows of Harvard College, 213 N.E.2d 840 (Mass. 1966) (finding the public as the ultimate beneficiary of public charitable trusts). *Compare* II WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 112 (1987) (the settlor's failure to designate a specific beneficiary, under standard trust law, constitutes grounds for failure of the trust) [hereinafter II SCOTT ON TRUST] *with* IVA WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 348 (1989) (though public trusts do not ordinarily benefit a particular person, they are enforceable at law) [hereinafter IVA SCOTT ON TRUSTS].

[6] *See* J.H. Merryman, *The Public Interest in Cultural Property*, 77 CAL. L. REV. 339 (1989). Professor Merryman discusses cultural property as having an expressive value, a political and religious value, and a utility value. *Id.* He adds, "cultural property is also valuable; it is a form of wealth." *Id.* at 354.

[7] 2 THOMPSON ON REAL PROPERTY § 13.04(c) (David A. Thomas ed., 1994) (this section deals with "personal property," which is defined in section 13.02(a)(1) as all types of property not considered to be "real property").

[8] *See generally* INTERNATIONAL COUNCIL OF MUSEUMS, ICOM CODE OF PROFESSIONAL ETHICS § 4.3 (1990), *reprinted in* MALARO, MUSEUM GOVERNANCE, *supra* note 3, at 145; NEW YORK STATE ASSOCIATION OF MUSEUMS, GUIDELINES: THE ETHICS AND RESPONSIBILITIES OF MUSEUMS WITH RESPECT TO THE ACQUISITION AND DISPOSITION OF COLLECTION MATERIALS § II (Apr. 1974), *reprinted in* MARILYN PHELAN, MUSEUMS AND THE LAW 240 (1982) [hereinafter PHELAN, MUSEUMS].

right to block the sale of their interest.[9] Indeed, in the United States, where great emphasis is placed on the public's access to art and culture, and where museum deaccessions often serve to take artwork out of the public domain, one commentator suggests that public museums be prohibited from deaccessioning at all.[10]

In addition to the concern for the interests of the general public, objections to deaccessions arise in relation to the sale of art given to museums in restrictive trust. Such trusts may grant museums limited power to sell or use the *corpus* for any purpose that furthers the settlor's general intent or the mission of the museum. Still, many trust instruments restrict a museum's freedom of action.[11]

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[9] For example, N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(f) (McKinney 1995) provides in relevant part, "[t]he attorney general shall represent the beneficiaries of such dispositions for . . . charitable . . . purposes and it shall be his duty to enforce the rights of such beneficiaries by appropriate proceedings in the courts."

When protecting the public interest, the attorney general acts as the *parens patriae* which means, literally, the "parent of the country." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990); *see In re* Barnes Foundation, 672 A.2d 1364, 1369 (Pa. Super. Ct. 1996). As *parens patriae*, the attorney general gains standing on behalf of the public. *Id.* New York Attorney General Lefkowitz articulated his role as *parens patriae* to an assembled body of museum leaders, stating that "my office has been given by law, long antedating the independence of our country, the high duty of representing the people for whose benefit you hold charitable and educational assets and to ensure that their interest in those assets is not adversely affected." JAMES C. BAUGHMAN, TRUSTEES, TRUSTEESHIP, AND THE PUBLIC GOOD 104 (1987); *see also* White, *supra* note 1, at 1045 n.17.

[10] *See* Patty Gerstenblith, *The Fiduciary Duties of Museum Trustees*, 8 ART & L. 175 (1983) (arguing that the concept of the public trust does not allow a publicly held piece of art, donated in the form of a charitable gift, to return to private hands); Louis Rispoli, Letter, *Protect American Art*, N.Y. TIMES, Nov. 20, 1996, at A24 (expressing outrage at the Shelburne Museum deaccession and suggesting that rather than selling paintings to maintain financial viability, the Museum ought to close down and donate its collection to more trustworthy custodians for the public's interest); *see also* BAUGHMAN, *supra* note 9, at 93 (concluding that the United States's dedication to public art hails from the French tradition); Carol Vogel, *Inside Art: Another Raid in England by the Getty*, N.Y. TIMES, Feb. 2, 1996, at C24 (implying that a potential private English purchaser of an Italian Renaissance painting from an English dealer would only receive National Heritage approval of the sale if the successful purchaser agreed to make it accessible to the public for some years); Keith Christiansen, *Viewpoints: Putting Our Patrimony on the Block*, NEWSDAY, Dec. 7, 1994, at A30 (suggesting that the New-York Historical Society's decision to deaccession a number of works contravened the benefactor's intentions that they remain part of the patrimony of New York); Louis J. Lefkowitz, Lefkowitz Discloses Agreement to Safeguard Metropolitan Museum of Art, Press Release (June 27, 1973) [hereinafter *Lefkowitz News Release* with page references to DUBOFF, *infra*], *reprinted in* LEONARD D. DUBOFF, ART LAW: DOMESTIC AND INTERNATIONAL 577 (1975) (explaining that an investigation of the Metropolitan Museum of Art's deaccession policy was important because the policy retained important and valuable works of art in the United States).

Consider the Nazi-controlled German government's deaccession of large numbers of so-called "degenerate art" from its major public art museums. Unlike the other examples cited above, deaccessions of this sort were greeted as welcome disposals of dangerous, unwanted art from the public's hands—art painted by such "enemies of the state" as Picasso, Chagall, Ensor, and Nolde. *See* LYNN H. NICHOLAS, THE RAPE OF EUROPA 3-25 (1995).

[11] *But see* Harris v. Attorney Gen., 324 A.2d 279 (Conn. 1974) (allowing the sale of trust property despite a provision that prohibits such sales); *cf.* DEACCESSIONING PROCEDURES OF THE MUSEUM OF MODERN ART (PAINTING AND SCULPTURE), *reprinted in* MERRYMAN & ELSEN

Trust law normally forbids the defeat of the settlor's intent when it is expressed clearly and unambiguously.[12] An exception to this rule has been carved out for charitable trusts in which the intent of the settlor may be reinterpreted very narrowly in order to avoid total failure of the trust. The doctrine, known as *cy pres*,[13] allows the beneficiary or trustee to petition the court for permission to contravene the precise intent of the settlor while maintaining, as accurately as possible, the general purpose of his charitable wishes.[14] Thus, while sales or other uses permitted through freer application of *cy pres* could be criticized as contrary to the doctrinal sanctity of the intent of the testator, they allow the museum to truly benefit from the gift, even if the particular piece is not a part of, or displayed in, the museum's collection.

Deaccession has become something of a dirty word in museum circles.[15] And recently enacted legislation in New York State indicates the unpopularity of deaccessioning among some lawmakers.[16] While the arguments in favor of more stringent guidelines for proposed deaccessions are cogent and valuable,[17] they fail to acknowledge the financial dilemma that many museums have encountered in the last days of the twentieth century.[18] This Note recommends more liberal use of museum deaccessions as a means of raising op-

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(1979), *supra* note 3, at 7-153 to 7-154 (describing the terms of one major gift to the Museum of Modern Art in which the settlor urges the Museum to sell what it wishes in order to improve the quality of the collection).

12 Mercury Bay Boating Club, Inc. v. San Diego Yacht Club, 545 N.Y.S.2d 693, 698 (N.Y. App. Div. 1st Dept. 1989) *aff'd*, 557 N.E.2d 87 (N.Y. 1990); IIA WILLIAM F. FRATCHER, SCOTT ON TRUSTS § 164.1 (1987).

13 *In re* Application of Abrams, 574 N.Y.S.2d 651, 654 (N.Y. Sup. Ct. 1991) (translating *cy pres* from the Anglo-French to mean "as near as possible").

The term *cy pres* is derived from the French term, *si pres*, meaning so near, as near, or as near as practicable. BLACK'S LAW DICTIONARY 387 (6th ed. 1990); IV THE OXFORD ENGLISH DICTIONARY 198 (2d ed. 1989).

14 *Abrams*, 574 N.Y.S.2d at 654 (defining court's duty in a *cy pres* action as how to most effectively accomplish the donor's intent when circumstances have rendered it impossible or impracticable to follow the donor's intent strictly); IVA SCOTT ON TRUSTS, supra note 5, § 399.

15 *See* Carol Vogel, *Two Museums Benefit from One Sale*, N.Y. TIMES, May 17, 1996, at C20; David R. Gabor, Comment, *Deaccessioning Fine Art Works: A Proposal for Heightened Scrutiny*, 36 UCLA L. REV. 1005 (June 1989). *But see* Robert Amory, Jr., *Museum Acquisition Policies*, *in* DUBOFF, *supra* note 10, at 383-84 ("In the first place, to say that deaccessioning is *per se* evil and unethical is just plain wrong"); KEVIN M. GUTHRIE, THE NEW-YORK HISTORICAL SOCIETY: LESSONS FROM ONE NONPROFIT'S LONG STRUGGLE FOR SURVIVAL 155 (1996) ("[S]ome way must be found to destigmatize deaccessioning . . . [an] uncompromising theology has evolved that is used to attack any institution that even considers selling part of its collections.").

16 *See* N.Y. EDUC. LAW § 233-a (McKinney 1996). *See generally infra* part VII.

17 *See, e.g.*, Gabor, *supra* note 15; STEPHEN E. WEIL, A CABINET OF CURIOSITIES: INQUIRIES INTO MUSEUMS AND THEIR PROSPECTS 139-43 (1995).

18 *See* N.Y. EDUC. LAW § 233-a.5(a) (prohibiting the use of deaccession proceeds for operating expenses).

erating funds necessary for the care and maintenance of the museum's collection, programs, and physical plant.[19] Authoritarian statutes and professional codes of ethics must be revised in order to allow museum trustees and directors to make full use of their resources when trying to maintain financial solvency.

Freer judicial application of the *cy pres* doctrine will permit museums to deaccession previously restricted bequests in order to further the greater purpose of their institutions. Strict trust interpretations cripple art museums, forcing them to sell unrestricted parts of their collections or close down entirely when they are unable to finance the maintenance of their collections and buildings. Courts must consider the greater social value of artistic institutions, which make art and culture available to the public, when deciding whether to force them to adhere to restrictive art bequests that hamper compliance with the general, charitable nature of these gifts.

This Note endorses greater acceptance of deaccessioning. Part I examines several different museums' practices and studies the legal issues that arose when each institution planned a sale of part of its collection. Part II focuses on the Metropolitan Museum of Art in relation to legal relationships and duties present in art museums; it sets forth special problems of an institution in the public trust. Part III focuses on the limited disclosure requirements of a charitable organization and argues that public acceptance of deaccessioning requires greater disclosure to the public. Part IV traces the history of deaccessions among New York City museums, such as the Museum of the American Indian and the New-York Historical Society; it questions professional codes of ethics which require that deaccession proceeds be used solely for acquisitions. Part V provides background concerning the *cy pres* doctrine; it describes the judge's role in a *cy pres* proceeding and some of the prevalent views on *cy pres* reform. Part VI focuses on ways museums can use the *cy pres* doctrine, arguing that use of *cy pres* can help legitimize the deaccession process; it discusses the Barnes Foundation's use of *cy pres* during recent litigation. Part VII argues that legislation currently under consideration in New York seeking to

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19 While this Note endorses greater latitude for museum professionals when making deaccession decisions, it does not advocate a priority system that would place any museum building program or educational service above the primary goal of serving the museum's collection. Whenever this Note advocates deaccessions, it assumes that the museum board has explored every other avenue available to manage its economic resources effectively and is not merely wasting its collection.

limit deaccessions would remove judgment and control from museum professionals and therefore should not pass.

II. The Legal Structure of Museums and the Fiduciary Duties of Trustees

Proponents of freer deaccession policies focus on the role of the art museum as a corporation, equipped with a board of directors that furthers the greater purposes of the organization.[20] Critics of deaccession focus on the art museum as a trust, officiated by a board of trustees which must further the specific purpose of the trust, as defined by the settlor, for the benefit of the public.[21] Neither faction is entirely correct, leading both sides to judge the other's policies unfairly.

The art museum, a hybrid of charitable corporation and trust, presents truly singular problems for its leaders.[22] Museum trustees who misunderstand their own roles and duties necessarily lack the command of the issues needed to make responsible decisions regarding deaccessions. In order to liberalize deaccession policies, art museum trustees must confront issues of disclosure, fiduciary duty, and their overall purpose and goals as an institution in the public trust.[23]

Confusion about the legal roles and duties of museum trustees persists among art museum professionals, who often mix terms and titles from corporate and trust law to describe various leadership positions and institutional practices.[24] Indeed, legal issues concerning the two structures are somewhat similar.[25] Reasons for an organization's decision to select the corporate structure over the

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20 *See, e.g.*, 2 John Henry Merryman & Albert E. Elsen, Law, Ethics, and the Visual Arts 727 (2d ed. 1987) [hereinafter Merryman & Elsen (1987)] (discussing directors' duty of care under Cal. Corp. Code § 5231(a), which grants the board good faith discretion in furthering the corporate purposes after reasonable inquiry).

21 *See, e.g.*, Appellant's Brief, *Pasadena Art Museum*, No. C 322817, *published in* Merryman & Elsen (1987), *supra* note 20, at 726 (arguing that directors violated the trust and breached their fiduciary duties as trustees by deaccessioning artwork).

22 *See* Baughman, *supra* note 9, at 94 ("The nonprofit museum retains a distinct public character, despite its private managerial prerogatives"); *see also* Stern v. Lucy Webb Hayes Nat'l Training Sch. for Deaconesses and Missionaries, 381 F. Supp. 1003, 1013 (D.D.C. 1974) (concluding that the charitable corporation does not fit neatly into corporate or trust law).

23 *Accord*, Marie C. Malaro, A Legal Primer on Managing Museum Collections 142 (1985).

24 *See, e.g.*, Professional Practices Committee, Association of Art Museum Directors, The Structure and Organization of Art Museums: Professional Practices in Art Museums (1981), *reprinted in* Merryman & Elsen (1987), *supra* note 20, at 672-74.

25 Leonard D. DuBoff, Art Law in a Nutshell 274 (1988) [hereinafter DuBoff, Art Law].

trust form may vary from questions of liability[26] to statutory restrictions[27] to mere convenience.[28] The benefits of corporate structure prompt most museums to form charitable, not-for-profit corporations pursuant to their local laws and federal tax statutes.[29] The resulting corporate directors, commonly known as trustees, owe their fiduciary duties to the public.[30] The structure of leadership,

[26] *Trustees* expose themselves to personal liability in the event of legal action against the trust. Corporate *directors* enjoy limited liability to the same extent as directors of public corporations would have. LUIS KUTNER, LEGAL ASPECTS OF CHARITABLE TRUSTS AND FOUNDATIONS 191-93, 291-99 (1970).

[27] In Massachusetts, for instance, a charitable organization may be formed by seven *incorporators* who must then satisfy the formal filing requirements of a corporation. However, Massachusetts has no laws which provide for the creation of a charitable trust. *Id.* at 293.

[28] While the corporate structure requires substantial amounts of local filings with the secretary of state before actual formation, it also allows for greater liberalness when making decisions. And while trust formation is a private process with no filing requirements or need for court approval, deviations from the strictures of the trust require court action. *Id.* at 294.

[29] *See* PHELAN, MUSEUMS, supra note 8, at 6. In addition to corporate law derivations and concepts, American charities owe much of their formal definition to the Internal Revenue Code ("I.R.C."), which grants tax-exempt status to a limited number of organizations satisfying a number of qualifications. The typical museum would achieve exempt status under I.R.C. § 501(c)(3) (1995), which grants such status to, among other organizations, those "[c]orporations . . . operated exclusively for . . . educational purposes [and where] . . . no part of the net earnings . . . inures to the benefit of any private shareholder or individual."

The statute has yielded a two-pronged test that must be satisfied in order for an organization to qualify for § 501(c)(3) status. The *Organizational Test* requires that public charities have a very narrow and clearly defined purpose; activities which fall outside this definition may serve to disqualify an organization from exempt status. The *Operational Test* requires that charitable organizations' activities serve the precise purposes of the organization. Beyond the obvious benefits of tax-exempt income, organizations that qualify as "exempt" under the I.R.C. become particularly attractive beneficiaries of philanthropic patronage, since donors may claim a charitable deduction for some portion of the value of their contributions.

Upon initial satisfaction of the I.R.C. § 501(c)(3) qualifications, the I.R.C. demands one more formal requirement from a charitable organization to distinguish it as a public charity in the broadest sense as opposed to a private foundation, which normally functions in a narrow, more limited context. Not-for-profit organizations must qualify under I.R.C. § 509(a)(1), (2), or (3) in order to receive the more favorable tax treatment of a public charity. Organizations that (1) receive a substantial portion of their operating expenses from the general public, or (2) receive a substantial part of their operating expenses from any combination gifts, grants, contributions, and fees charged for services rendered to the general public, or (3) help support such organizations described in items 1 and 2 above, qualify as public charities. I.R.C. §§ 170, 501, 508, 509 (1995); MARILYN PHELAN, MUSEUM LAW: A GUIDE FOR OFFICERS, DIRECTORS, AND COUNSEL §§ 4:02 to 4:19 (1994) [hereinafter PHELAN, MUSEUM LAW GUIDE].

[30] *Lucy Webb Hayes*, 381 F. Supp. at 1015. In *Lucy Webb Hayes*, a landmark not-for-profit case in the United States District Court for the District of Columbia, Judge Gesell outlined the fiduciary duties of hospital trustees. Scholars have applied these duties to all trustee/directors of not-for-profit corporations. A trustee was seen in breach of his fiduciary duty if:

> (1) while assigned to a particular committee of the Board having general financial or investment responsibility under the by-laws of the corporation, he has failed to use due diligence in supervising [those people he is charged with supervising] . . .

accountability, and duty inherent in the not-for-profit corporate structure will help explicate critical questions concerning deaccession issues, namely, who makes the decision to deaccession a piece of art, where do trustees receive the power to make a deaccession decision, and to whom are they accountable after the deaccession?[31]

Widespread misunderstanding of the role of the not-for-profit corporation in relation to the public led to a much-debated scandal for the Metropolitan Museum of Art, one of the preeminent artistic institutions in both New York City and the world.[32] In one of the earliest and perhaps most renowned incidents of deaccession, the Metropolitan Museum, through a series of private deals, sold a number of paintings donated by Adelaide Milton de Groot and other philanthropists.[33] The Museum director, Thomas P.F. Hoving, defended this sale by pointing to the inferior quality of the paintings[34] and to the fact that since the Museum was a private corporation, "every work of art is entirely owned by the trustees."[35]

> (2) he knowingly permitted the hospital to enter into a business transaction with himself or with any [entity] . . . in which he . . . had a substantial interest . . . without having previously informed the persons charged with approving that transaction of his interest or position or of any significant reasons . . . why the transaction might not be in the best interests of the hospital . . .
> (3) he actively participated in or voted in favor of a decision by the Board . . . to transact business with himself or [an entity] . . . in which he then had a substantial interest . . .
> (4) he otherwise failed to perform his duties honestly, in good faith, and with a reasonable amount of diligence and care.

Id.; *see also* MALARO, MUSEUM GOVERNANCE, *supra* note 3, at 10-11 (arguing that since there are very few cases against not-for-profit trustees, a standard such as that defined in *Lucy Webb Hayes*, 381 F.Supp. 1003, offers valuable guidance to all charitable trustees).

[31] *See, e.g.*, Grace Glueck, *Power and Esthetics: The Trustee*, ART IN AMERICA 78-83 (July-Aug. 1971), *in* MERRYMAN & ELSEN (1979), supra note 3, at 7-61 (quoting from the constitution of the Metropolitan Museum, which "provides that the board of trustees 'shall manage, preserve and protect the property of the Corporation [*i.e.* the Museum] and shall have full and exclusive power to conduct its own affairs'" and "[t]he more detailed bylaws of the Museum of Fine Arts, Boston, state that the board of trustees 'shall have the entire charge, control and management of the Corporation, its property and affairs and of the carrying out of all or any of its purposes and may exercise all of its powers'"); *cf. id.* at 7-61 (quoting former Metropolitan Museum President and past trustee, Roland L. Redmond, who said, "[a] board's primary object is to keep the museum open and running").

[32] *See* THE ENCYCLOPEDIA OF NEW YORK CITY 757 (Kenneth T. Jackson ed., 1995) ("The Metropolitan is the largest and most comprehensive art museum in the Western hemisphere."). *See generally* MERRYMAN & ELSEN (1979), supra note 3, at 7-107 to 7-154 (concerning the de Groot scandal).

[33] For a discussion of the construction of the bequest, *see infra* note 138.

[34] Hoving wrote, "[m]y chief worry was that few art dealers or bidders at auction would be all that entranced by the de Groot sludge and that the return would be low." THOMAS HOVING, MAKING THE MUMMIES DANCE: INSIDE THE METROPOLITAN MUSEUM OF ART 291 (1993).

[35] John L. Hess, *Secret Art Trade Cost Metropolitan 6 Pictures, Not 2, as First Reported*, N.Y. TIMES, Jan. 14, 1973, at 55; *cf.* KARL E. MEYER, THE ART MUSEUM: POWER, MONEY, ETHICS 211 (1979), quoted in BAUGHMAN, *supra* note 9, at 17 ("A museum does not 'own' but, rather, is the steward of the art it possesses."). Interestingly, in the introduction to his memoir,

Hoving's belief that he was leading a corporation, free from public scrutiny, led him to orchestrate a series of deaccessions which took on a particularly clandestine character.[36] According to the Metropolitan Museum's *Report on Art Transactions 1971-1973*,[37] the museum trustees followed a deaccession policy in existence since 1887. The Board's procedure required the curator, the Director, the Curator in Chief, or the Museum's President to recommend to the Executive Committee[38] that a work be deaccessioned and then call for its approval.[39] The Museum's practice, while undoubtedly prudent and reasonable for a public corporation, smacked of impropriety and a mishandling of the public trust.[40]

Hoving wrote, "[t]oday the Museum 'owns' some three million works of art." His decision to put the word *owns* in quotation marks may indicate that the de Groot controversy made Hoving more aware of just exactly who *owns* the Metropolitan's collection. *See* HOVING, *supra* note 34, at 13.

Such misconceptions are not isolated in the world of art museums. One author cites a Harvard University publication which states that the [Harvard] corporation "owns and operates Harvard," while an official of a different private university explained that trustees merely administer the resources which belong to the public. *See* BAUGHMAN, *supra* note 9, at 15.

36 The Metropolitan Museum squarely denied deaccessioning in early *New York Times* stories by John Canaday which reported that the Metropolitan Museum was on a selling spree. Hoving called the reports "99 percent inaccurate," and seemed confused over how one could think that the Metropolitan would be involved in "equivocal, clandestine, and even possibly unethical practices." He promised full disclosure if the museum should decide to deaccession any works. KARL MEYER, THE PLUNDERED PAST 51-52 (1973).

37 METROPOLITAN MUSEUM OF ART, REPORT ON ART TRANSACTIONS 1971-1973 (June 20, 1973), *reprinted in* MERRYMAN & ELSEN (1979), supra note 3, at 7-116, 7-132 [hereinafter METROPOLITAN MUSEUM REPORT ON ART TRANSACTIONS, with page number references to MERRYMAN & ELSEN (1979)].

The Metropolitan Museum's report detailed the relevant deaccession practices and dealings of the Museum throughout its entire history. It revealed previously undisclosed amounts received for pieces of art and a substantial list of paintings which had been sold by the Museum in its most recent past. Paintings by Jan van der Heyden, Max Beckmann, Auguste Renoir, Toulouse-Lautrec, Henri Rousseau, and Vincent Van Gogh were among those sold. The report traced the decision-making process that prompted the de Groot deaccessions as well as details regarding the trustees' professional consultations about the international art market and prices. Among Lefkowitz's chief concerns was whether the Museum received fair prices for their deaccessioned art. *New York Times* reporter John Canaday wondered if Hoving's decisions about price were similar to those of "a small boy setting up his first lemonade stand." METROPOLITAN MUSEUM REPORT ON ART TRANSACTIONS, *supra*, at 7-114 to 7-150; *see* MEYER, *supra* note 36, at 53.

38 The Executive Committee, along with the Acquisitions Committee, represents the locus of power at the Metropolitan. Quarterly board meetings of the full slate of directors are normally concerned with ratifying decisions that have been made by smaller committees of the board and are generally considered less important. *See* HOVING, *supra* note 34, at 18.

39 *See supra* note 37.

40 The deaccession process was not sufficiently prudent and reasonable for Attorney General Lefkowitz, who recommended "a more detailed [deaccessioning] procedure within the Museum which will provide additional protection to the public interest." *Lefkowitz News Release*, *supra* note 10, at 577.

Other museum professionals have avoided such scandalous results. In 1979, the Director of the Corcoran Gallery of Art in Washington, D.C., led the deaccessioning of approximately 100 works. At the public auction, each participant received a catalog which

The Metropolitan's procedure did not call for any public disclosure or notice to the attorney general.

Immediately following the revelation that the Metropolitan had sold numerous paintings, New York State Attorney General Louis J. Lefkowitz began an investigation in order to ensure that "the sales were provident, prudent and reasonable."[41] At the end of Lefkowitz's investigation of the de Groot controversy, Hoving was undoubtedly clear that the public's interests were paramount at the Metropolitan Museum of Art. Subsequently, the directors agreed to a revised deaccession policy requiring greater public disclosure and public auctions following future deaccessions.[42]

Questions of board accountability also arose in Massachusetts concerning the Peabody Institute Library's collection of folio edition prints of John J. Audubon's *The Birds of America*.[43] After a series of thefts, the public and the Attorney General began to express doubts about the Library's ability to maintain and protect the collection. Offers of financial and professional support from the Peabody Museum of Salem to finance and oversee the restoration of the collection were rejected by the Library trustees. The trustees planned to sell fifty prints, the proceeds of which would finance the restoration of the remaining works as well as the refurbishment of the reference room in which they were displayed.[44]

The Massachusetts Attorney General favored the museum's plan to avoid deaccession. The Attorney General argued that the Library trustees had not demonstrated good faith in exercising their duty of care by failing to consider all possible sources of income and other means of maintaining the collection while avoid-

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included a Director's statement explaining that each work was subjected to thorough analysis before being included in the sale. The catalog demonstrated the Board's concern for maintaining the public trust, and clearly disclosed the planned use for the sale proceeds. *See* Peter C. Marzio, *Director's Statement (1979)*, *reprinted in* MALARO, MUSEUM GOVERNANCE, *supra* note 3, at 142-43.

41 MERRYMAN & ELSEN (1987), *supra* note 20, at 721.

42 The freedom of the Metropolitan Museum's board to control the future of the museum may have seemed somewhat in jeopardy after the Attorney General strong-armed them into articulating a new deaccession policy and issuing a full report on the de Groot controversy within months following his investigation. Though the new deaccession policy and report seemingly gave the board the freedom to draft whatever provisions they saw fit, Lefkowitz's June 1973 press release read, "if experience shows that voluntary and cooperative understandings of this nature relating to deaccessioning and disposition of works do not fully serve their purpose, the Attorney General will consider the desirability of suggesting corrective legislative action." *Lefkowitz News Release*, *supra* note 10, at 580; *see infra* part VII.

43 Marie C. Malaro, *Current Problems in Collection Management*, *in* Legal Problems of Museum Administration 1990, at 66 (ALI-ABA Course of Study, Materials) (concerning Trustees of the Peabody Inst. Library v. Attorney Gen., No. 84-E0137-GL, Consent Decree Oct. 6, 1989 (Prob. & Fam. Ct., Essex Div., Mass. Commw. Ct.)).

44 *Id.*

ing deaccessionment.[45] This Note argues that museum trustees must be able to demonstrate that they have acted in good faith and exercised due care before planning a deaccession.

The historical and legal assessments of the Metropolitan/de Groot controversy reflect the general disdain for deaccessions. When considered in light of the *Peabody* case, *Lucy Webb Hayes*, and other authorities, the Metropolitan Board clearly demonstrated the required standard of care and diligence expected of charitable organizations' trustees.[46] Still, to many scholars, the de Groot incident remains an exemplar of a complete failure of fiduciary duty.[47] Even after thorough investigation, the Attorney General failed to find any litigable issue.[48]

Another troubling aspect of the academic assessments of the de Groot incident is that unlike the current requirement of disclosure of planned deaccessions and public auctions by museum boards,[49] the Metropolitan's trustees were clearly pioneers in virtually untested waters and merely followed the standard of *nondisclo-*

45 The Attorney General prevailed pursuant to a Consent Decree dated Oct. 6, 1989. *See Trustee of the Peabody Inst. Library*, No. 84-E0137-GL, *in* Malaro, *Current Problems in Collection Managment*, *supra* note 43, at 66.

46 The Metropolitan Museum deaccessioned the de Groot paintings, along with other parts of its collection, in a number of separate transactions over the course of two years. The *Metropolitan Museum Report on Art Transactions*, from which this information has been extracted, was issued in 1973 by a special committee of the board in response to Attorney General Lefkowitz's inquiry. It contains details of offering prices, selling prices, and negotiations.

The board's general practice was to offer the paintings, which had been approved for deaccessionment by the Acquisitions Committee, to several art dealers. The selected dealers would then submit bids to the board for either the individual paintings or the entire lot as a whole. In one case, where the bids fell below the museum's expectations, the board chose not to accept any one bid and instead entered into negotiations in an effort to improve the return for the museum.

The paintings offered for sale were generally considered of lesser aesthetic and historical value. While the report characterizes many of the decisions to deaccession as somewhat elementary, the decision to deaccession Henri Rousseau's *The Tropics* and Vincent Van Gogh's *The Olive Pickers* proved to be very difficult. The board favored the deaccession since the expected return would far outweigh their aesthetic and collection value.

In a number of instances, the board management broke from their practice of private sales and offered a number of paintings at public auction. The report notes that the high cost of auction house commissions probably outweighs any gain in selling price.

The report also shed light on one case in which a particular painting attributed to Ingres was deaccessioned, that is removed from the museum's catalog, but not sold or exchanged. The work was withheld from sale after questions of its authenticity were brought to light by curators at the Metropolitan Museum. METROPOLITAN MUSEUM REPORT ON ART TRANSACTIONS, *supra* note 37, at 7-114 to 7-146.

47 *See* Gabor, *supra* note 15, at 1005-06 (offering a full gamut of descriptions for the de Groot controversy, such as "Museum Gate," "disturbing," and "cover-up").

48 Attorney General Lefkowitz conducted several months of testimony and hearings. Still, Director Hoving reports, Lefkowitz found "[n]o wrongdoing. No cheating or bilking of Adelaide Milton de Groot or anybody else. No harmful collusion with art dealers. . . . No evidence of mismanagement or hanky-panky." HOVING, *supra* note 34, at 306.

49 *See infra* text accompanying notes 103-15.

sure for not-for-profit institutions.[50] Calls for greater disclosure in the practice of deaccessioning have evolved only recently.[51] Codified standards of disclosure rarely seek to remove the power of the museum board to make the decision to deaccession, but merely require certain notifications prior to sale.[52] Disclosure will help to demystify deaccessions.[53]

Finally, while museums and ethical boards reject the practice of using deaccession proceeds as a source of operating and maintenance funds,[54] the Metropolitan utilized the proceeds from deaccessioning to plan and pay for its accessions, a far less controversial concept.[55] Karl Meyer, a scholar who has written extensively on the

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50 *See infra* part III.

51 *See, e.g.*, Gabor, *supra* note 15, at 1022-23 (advocating disclosure as a key element to monitoring art museums' deaccession procedures). *But see* Elaine L. Johnston, *Deaccessioning to Raise Operating Funds: Recent Cases, in* Legal Problems of Museum Administration 1993 (ALI-ABA Course of Study, Materials), *available in* WESTLAW, at C794 ALI-ABA 165 (explaining that the unsettled nature of the law, due to numerous out-of-court settlements and opinionless decisions, makes it difficult to articulate a standard of conduct when planning a deaccessionment).

52 *See* N.C. GEN. STAT. § 140-5.14(9) (1995). Before the sale of any part of its collection, the board of the North Carolina Museum of Art must consult with the State Secretary for Cultural Resources. *Id. But see infra* part VII, discussing current New York legislative efforts to restrict museum boards.

Cf. Wis. Stat. Ann. § 229.11, 229.18 (West 1994). The Wisconsin statute calls for annual disclosures of all elements of a museum's financial year. While this serves to reveal any deaccessions, it still obscures the public's ability to discover and oppose a deaccession, since disclosure may not occur until several months after the fact. Furthermore, while Gabor, *supra* note 15, hails this statute as an important step towards rewarding the public with a greater ability to scrutinize museum action, the statute may only have limited value due to its own defined scope of power. The statute deals mainly with the "public museum," defined in section 229.11 as a natural history, anthropology, or history museum. Only in section 229.18 does the statute abandon the defined "public museum" and substitute "museum" in its place. While this may indicate legislative intent to enforce this statute among all "museums," only the sloppy drafting indicates such an expanded scope.

53 Attorney General Lefkowitz noted, "[w]hen aspects of certain transactions were revealed in the press it would have been better for the Museum and better for the public interest if the museum had revealed the full facts." *Lefkowitz News Release, supra* note 10, at 579. One scholar adds, "instead of forthrightly explaining this legitimate and often beneficial practice by which an accessioned object may be deaccessioned and disposed of, museums hid it and foolishly let its discovery explode upon them." Harry Weintraub, *Museums With Walls: Public Regulation of Deaccessioning and Disposal*, ART & L., Fall 1975, at 1.

54 *See, e.g.*, ICOM CODE OF PROFESSIONAL ETHICS, *supra* note 8, § 4.5 ("Any moneys received by a governing body from the disposal of specimens or works of art should be applied solely for the purchase of additions to the museum collection"); MERRYMAN & ELSEN (1987), *supra* note 20, at 718 ("Throughout the museum world, one universally accepted rule is that a museum should never sell works from its permanent collection in order to pay for additions to the physical plant.").

55 The Metropolitan Museum made three acquisitions in the 1960's that depleted restricted acquisition funds. The purchases of Rembrandt's *Aristotle Contemplating the Bust of Homer* for $2.3 million, Monet's *Terrace at Sainte-Addresse* for $1.4 million, and Velazquez's *Portrait of Juan de Pareja* for $5.6 million required the use of trust principal and left the Museum with a huge debt. According to the Museum's report, the sale of the de Groot paintings represented an opportunity to replenish those depleted acquisition funds and constituted a necessary step in building the museum's collection. *See generally* METROPOLITAN MUSEUM REPORT ON ART TRANSACTIONS, *supra* note 37, at 7-122 to 7-123.

de Groot scandal, wrote "[the Metropolitan incident] raised so many issues of importance that the underlying question—the priority given acquisition—was obscured in the smoke."[56] The public and professional communities refuse to accord the phenomenal expense and importance of art maintenance[57] the same deference given to acquisitions;[58] greater understanding of these costs would help to educate those groups who oppose the use of deaccession funds for maintenance costs.

Few deaccession controversies have erupted over a museum's use of proceeds from the sale of paintings to purchase new works.[59] Even ethics codes and statutes generally hostile to deaccessions normally contain a provision that allows deaccessions culminating in the use of proceeds for acquisitions.[60] These ethics codes and statutes may lead one to conclude that maintenance does not deserve the same status as acquisitions. True satisfaction of the public trust demands no less than equating the importance of collection maintenance with collection building. If the *ICOM Code of Ethics* declares "one of the key functions of almost every kind of museum is to acquire objects and keep them for posterity,"[61] then how can the same code of ethics *forbid* the use of deaccession proceeds for

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[56] MEYER, *supra* note 36, at 51.

[57] *See, e.g.*, Merle English, *Brooklyn Museum Art Up for Adoption*, NEWSDAY, Jan. 16, 1996, at A23 (announcing plans by Brooklyn Museum trustees to allow patrons to "adopt" contemporary paintings in the collection by helping to pay for their maintenance); Mary Voelz Chandler, *Invention, Intrigue Color Denver's Fall Artscape*, ROCKY MOUNTAIN NEWS, Aug. 27, 1995, at 60A (estimating the cost of maintenance and repair for one piece of outdoor sculpture at $248,640).

[58] One incident in San Francisco pitted the public's and trustees' love of acquisition against the very real need for maintenance and operating funds. Even though the Fine Arts Museum of San Francisco had suffered a number of embarrassing incidents as a result of poor collection management (including theft and loss due to poor accounting of art inventory), the 1987 fund drive for the museum made no mention of the museum's need for better registration of inventory and adequate storage. One scholar concludes that the San Francisco story indicates that "trustees are more enamored of big exhibitions and important art acquisitions than good housekeeping, hence funds are not allocated for adequate protection and inventory of the collection." MERRYMAN & ELSEN (1987), *supra* note 20, at 719.

[59] *But see* MERRYMAN & ELSEN (1987), *supra* note 20, at 728 (discussing an unreported California case, *Rowan v. Pasadena*, in which plaintiffs seeking injunctive relief to stop the sale of art were denied relief after defendant art museum trustees demonstrated that funds were to be used for purchasing new artwork).

[60] *See, e.g.*, ICOM CODE OF ETHICS, *supra* note 8, § 4.5; *see also* MALARO, MUSEUM GOVERNANCE, *supra* note 3, at 58-59 (discussing a newly revised code of ethics for the American Association of Museums, adopted in 1993, which carves out a very narrow exception for using deaccessionment funds: "Proceeds from the sale of non-living collections are to be used consistent with the established standards of the museum's discipline, but in no event shall they be used for anything other than acquisition *or direct care of collections*" (emphasis added)); *cf.* Kyle MacMillan, *Sheldon Considers Removing Some Pieces from Collection*, OMAHA WORLD HERALD, Feb. 5, 1997, at 41SF (announcing plans by museum officials to use deaccession proceeds for the purchase of paintings consistent with the museum's mission).

[61] ICOM CODE OF ETHICS, *supra* note 8, § 4.1.

maintenance?[62]

Even when sale proceeds have been earmarked for acquisitions, museums have kept news of such deaccessions from donors for fear that it will discourage giving.[63] They have also kept the news from the public for fear of heightening the level of scrutiny to which the trustees would be subject.[64] An art museum's failure to disclose its deaccession policies and practices only serves to perpetuate the idea that donors and the public are being deceived when artworks are sold.[65] While donors are to be cherished by museums and given the utmost respect and gratitude, trustees must be wary of sacrificing their duty of loyalty to the public to run the museum and preserve its collections to the best of their abilities in favor of an imagined duty to donors to retain their donations for perpetuity.

In most instances, trust agreements should use plain language to stipulate that donations become the property of the museum for serving the public trust. The trustees' duties of care and loyalty may require the sale of a gift made to the museum and the use of those proceeds for acquisition or maintenance. Furthermore, museums should invite public scrutiny by making full disclosure of all deaccession activity. Upon receiving trust and respect for the museum's decisions from the public, deaccessioning will not be viewed as "selling out" the public trust, but building it.

Deaccession of the de Groot collection became a necessary step in the Metropolitan Museum's management of its own collection, ultimately allowing the museum to acquire more important and worthier works. At the time of the deaccession, the Metropolitan Museum faced three problems: (1) lack of money to acquire new works; (2) lack of space in which to display new works; and (3) storage shortages for other works. While the influx of cash contributed directly to acquisition funds, the impact of the sale on spatial constraints was somewhat less direct.

Though the early 1970s signaled an era of extensive building and gallery expansions, it became clear to the Metropolitan's direc-

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62 *Id.* § 4.5.

63 Donors who have reason to believe, based on the donee's past practice, that their gifts will not remain on display or even part of the museum's collection, may seek out a beneficiary who will ascribe greater value to the gift. *Cf.* N.Y. EDUC. LAW § 233-a (McKinney 1996) (protecting donor's interests by requiring museum to disclose its deaccession policies at time bequest is made); Gabor, *supra* note 15, at 1012 (endorsing museum disclosure of deaccession policies to donors before receipt of gift).

64 Weintraub, *supra* note 53, at 1.

65 Museums could avoid undesirable characterizations for this secrecy, such as "cover up," if they followed disclosure policies such as those outlined in Gabor, *supra* note 15, at 1034-36.

tor and board that the physical scope of the museum had reached its limit.[66] Museum trustees believed that deaccession was necessary in order to free up storage space. Storage shortages, they believed, hindered their ability to make additional acquisitions.[67] Furthermore, the expense of storing and maintaining works that would never be shown became prohibitive.[68] Without the influx of cash from the sale, future acquisitions would have been threatened by a depleted acquisition fund and an overcrowded storage area. The Metropolitan trustees' diligent efforts to formulate a plan that best served the public's interest and the Museum's future were overshadowed by their failure to make sale information public.

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66 In the late 1960s, Hoving oversaw the development of an architectural Master Plan by Kevin Roche/John Dinkeloo and Associates, one of the most innovative architectural firms of the time. The Plan included an expansion to accommodate the recently acquired Temple of Dendur from Egypt and the Robert Lehman Collection. Public hearings for the Museum's planned expansion westward into Central Park, allowing the Museum to utilize the full scope of the land leased by the city when the Museum was first chartered, were contentious. The New York City Council proposed a decentralization of the Metropolitan Museum with a distribution of the collection throughout New York City's five boroughs. Director Hoving resisted such a plan. He also faced criticism of his plan from those who feared that the Museum would continue to grow and move to take over more and more space. Hoving knew he needed to placate the city officials if the Metropolitan's building plan was to be approved. In response, he stated that "the Comprehensive Architectural Plan, by defining forever the termination of the building, also demands that the era of massive collecting be over and that a period of disposal and refinement commence." METROPOLITAN MUSEUM REPORT ON ART TRANSACTIONS, *supra* note 37, at 7-121, 1971-73. Parks Commissioner August Heckscher signaled his approval for Hoving's resolve, approving the expansion with this caveat, "[t]he permit . . . is . . . to be issued with the express understanding that future building not take place outside the limits of the plan . . . . [T]he Museum will not seek to expand the overall size . . . of its collections, but will continue its acquisitions in the future to increasing their excellence and representative quality." *Id.* The de Groot sale represented a critical step, both financially and spatially, in controlling the growth of the museum's collection. The de Groot deaccession enabled the museum to foster the aesthetic and cultural breadth of the museum within the physical boundaries set by the city. *See* THE METROPOLITAN MUSEUM OF ART, BULLETIN 66-77 (Summer 1995).

67 *Cf.* Carol Vogel, *Its Art Squeezed, the Modern Buys Growing Room,* N.Y. TIMES, Feb. 5, 1996, at A1, C16 (reporting the Museum of Modern Art's plans to expand in order to display their ever-growing permanent collection; less than 10% of the collection is ever on display at one time); White, *supra* note 1, at 1041 n.4; GUTHRIE, *supra* note 15, at 136-37.

68 Germain Bazin, the former Chief Curator of the Louvre Museum in Paris, while expressing his wonder over American deaccession practices, said, "[e]ndeavoring to create more space, several American museums went to the extreme of selling less popular works—an adventurous practice, because a revolution in taste might very well restore to fashion works formerly considered *demode.*" MEYER, *supra* note 36, 51. A special committee of the Metropolitan Museum's trustees noted that the Louvre's practices may be reserved for only the richest public institutions. *See* METROPOLITAN MUSEUM REPORT ON ART TRANSACTIONS, *supra* note 37, at 7-115; *see also In re* Johnson Estate, 51 Pa. D. & C.2d 147, 156 (Pa. Ct. C.P., Phila. County 1970) (allowing for the sale of paintings and works of art from a restrictive trust in light of the fact that the works would never be displayed in the museum and the cost of storing them had become prohibitive); GUTHRIE, *supra* note 15, at 137 (detailing the cost of the New-York Historical Society's high-tech storage facility—nearly 10% of its operating budget).

III. Disclosure and the Not-for-Profit Corporation

Accountability, public scrutiny, and regulation of charitable institutions are difficult issues in an area which normally enjoys great freedom from scrutiny.[69] Formal disclosure requirements for charitable trustees to their principals, the public, pale in comparison to those demanded from publicly traded corporations.[70] Since not-for-profit corporations are not required to make public disclosures of income, ongoing projects, property holdings, or participation in legal proceedings in the same manner as public corporations,[71] governments seemingly condone the cloak of privacy that surrounds such charitable institutions.[72]

Courts have participated in this "hands off" approach to not-for-profit corporations with a variation of the business judgment rule,[73] stating that "[i]f the trustees act within the bounds of reasonable judgment in the exercise of the discretion conferred upon them, the court will not interfere."[74] Thus, while the statutory and judicial checks on a not-for-profit corporation board are relatively few, perhaps making such boards feel they are free to act in any manner they please, the duties of care and loyalty as enforced by the attorney general of the jurisdiction benefit the public good.[75] Strict adherence to a practice of non-disclosure, while permitted by law, breeds mistrust of trustees who seek to make bold managerial

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69 *See generally* BAUGHMAN, *supra* note 9, at 2-4; MALARO, MUSEUM GOVERNANCE, *supra* note 3, at 22.

70 *See, e.g.*, Form 10-K for Annual and Transition Reports Pursuant to Sections 13 or 15(d) of the Securities Exchange Act of 1934, 15 U.S.C.A. § 78a (1934) (requiring all annual reports to include, among other things, a narrative description of the business done and intended to be done by the reporting corporation, a general description of business development, financial information about industry segments, a description of the principal property of the corporation, and a description of any pending legal proceedings).

71 Pursuant to the I.R.C., charitable organizations claiming tax-exempt status under I.R.C. § 501(c)(3) are required to disclose receipts, expenditures, and current financial status on Form 990 (or 990EZ). The Internal Revenue Service uses this information to ensure that the organization still meets the requirements of a charitable institution. *See* PHELAN, MUSEUM LAW GUIDE, *supra* note 29, § 4:21. These records are not available to the public pursuant to I.R.C. § 6103, which provides for confidentiality of any tax information revealed through tax return disclosures. I.R.C. § 6103 (1995).

72 BAUGHMAN, *supra* note 9, at 3. Baughman concludes that this condoned secrecy serves to separate "trustees from the people they are mandated to serve. The public's right to know is seriously blighted because even the press is denied access to charitable trustees' activities. This reduces trustee accountability to the public." *Id.*

73 *See generally Dennis J. Block et al.*, THE BUSINESS JUDGMENT RULE 3 (4th ed. 1993) (defining the business judgment rule in corporate situations, "[s]hould the directors be sued by shareholders because of their decision, the court will examine the decision only to the extent necessary to verify the presence of a business decision, disinterestedness and independence, due care, good faith, and the absence of an abuse of discretion").

74 *Harris*, 324 A.2d at 283 (citing 4 SCOTT, TRUSTS § 382 (3d ed.)).

75 *See generally* DANIEL L. KURTZ, BOARD LIABILITY: GUIDE FOR NONPROFIT DIRECTORS 92-96 (1988).

decisions in a particularly sensitive area without informing their beneficiaries.[76]

In light of the minimal disclosure requirements of a charitable institution, it is easy to see how the decision by Hoving and the Board of Trustees at the Metropolitan Museum to deaccession a number of paintings went unnoticed. Still, Hoving's attitude and desire for secrecy lead one to conclude that he was not merely failing to report to the public, but rather, failing to consider the public good.[77] Still, failure to disclose does not constitute a punishable offense, and therefore, nothing exists to stop Hoving and others in his situation from acting against an unaware public.

The Attorney General's denunciation of Hoving's conduct and obfuscation of the facts prompted numerous calls for greater disclosure in the area of museum deaccession policies. Greater public access to museum policy-making serves to remove the air of mystery the public associates with deaccessions. Harvard Law Professor Paul M. Bator observed that "it is absolutely fantastic that we should live in an atmosphere where people who sell potatoes and stocks and bonds have rules about disclosure which do not apply to the buying and selling of Rembrandts and Picassos by our public museums."[78] Proponents of freer deaccession policies must work to remove the secrecy that breeds mistrust. Only when full disclosure is achieved will the public truly support and comprehend a museum's effort to deaccession a part or all of their collection.

IV. Professional Ethics and the Use of Deaccession Proceeds—The Museum of the American Indian and New-York Historical Society Deaccessions

The case law regarding deaccessions remains scant.[79] Only a

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[76] In *Lucy Webb Hayes*, which dealt specifically with self-dealing among the trustees of a charitable hospital board, Judge Gesell found it particularly problematic that the hospital, "is not closely regulated by any public authority, it has no responsibility to file financial reports, and its Board is self-perpetuating." 381 F. Supp. at 1019. His offered solution was to require future boards of the hospital in question to issue annual reports. He expected that public disclosure would help avoid the self-dealing that had brought the parties into court. *Id.*; *see also* Commonwealth v. Barnes Found., 159 A.2d 500, 505 (Pa. 1960) ("It would be an inadequate form of government which would allow organizations to declare themselves charitable trusts without requiring them to submit to supervision and inspection.").

[77] Paul M. Bator, *Letter to the Editor*, N.Y. TIMES, Jan. 23, 1973, at 38 ("if the trustees sold or traded the de Groot paintings on terms which are unfair to the museum, they have violated their public trust, and the public has every right to complain").

[78] Paul M. Bator, *Regulation and Deregulation of International Trade*, *reprinted in* DUBOFF, *supra* note 10, at 307.

[79] *See Johnson Estate*, 51 Pa. D. & C.2d at 147; LEONARD D. DUBOFF, THE DESKBOOK OF ART LAW 942 (1st ed. 1977) [hereinafter DUBOFF, ART LAW].

few statutory formulas provide any definitive guidance for museum trustees planning to deaccession parts of their collection.[80] Even so, as illustrated by the Metropolitan's de Groot controversy, museum trustees may be subject to investigation by the attorney general if their conduct appears to be less than prudent or out of line with professional standards.[81] Although professional codes of ethics do not have the force of law, they provide essential guidance for the museum professional.[82]

After legal and ethics codes are exhausted, history may be a museum trustee's best guide. For example, the Metropolitan's revised deaccession policy, devised in conjunction with Attorney General Lefkowitz after the de Groot controversy, sets out some of the chief considerations for a museum's deaccession plans. The policy encompasses many of the issues already discussed, including public notice,[83] strict application of procedures and written deaccession policies,[84] prudent and responsible dealing,[85] and responsibility for

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80 *See, e.g.*, COLO. REV. STAT. § 24-80-202 (1995) (stating that nothing shall prevent the sale, exchange, or other disposition of materials held by the state historical society that are determined to be duplicates of other items, redundant examples of items, items that are beyond the scope of the society's mission, or items that are lacking in usefulness or historical value); FLA. STAT. ch. 265.26(14a) (1995) (trustees of the John and Mable Ringling Museum of Art "may sell any art object in the museum collection, which object has been acquired after 1936, if the director and the board of trustees determine it is no longer appropriate for the collection"); MONT. CODE ANN. § 22-3-107(6) (1995) (giving the trustees of the Montana Historical Society the right "to sell or exchange . . . surplus museum or art objects or artifacts not pertinent to the region encompassed by the society['s] . . . mission").

81 Malaro counsels museum trustees to be particularly careful when taking on matters concerning deaccession. The trustees will need to demonstrate that they acted prudently, responsibly, and candidly in the event that they are called upon to justify their actions. *See* MALARO, MUSEUM GOVERNANCE, *supra* note 3, at 56-57.

82 Museum leaders are subject to no fewer than six codes of professional ethics. Among them are *Museum Ethics* published by the American Association of Museums ("AAM"), the *Curators' Code* published by the Curators Committee of the AAM, the *Registrars' Code* published by the Registrars' Committee of the AAM, the *Art Museum Directors' Code* published by the Association of Art Museum Directors, *Professional Practices in Art Museums* published by the Ethics and Standards Committee of the Association of Art Museum Directors, and the *ICOM Code of Professional Ethics* published by the International Council of Museums. *See* Marie C. Malaro, *The Museum's Perspective*, *in* The Law and Business of Art 1990 (PLI Pat., Copyrights, Trademarks & Literary Prop. Course Handbook Series No. G4-3851, 1990), *available in* WESTLAW, at 297 PLI/Pat 849; *cf.* DUBOFF, ART LAW, *supra* note 79, at 915 (describing the value of ethics codes as a sort of peer pressure).

83 The public notice provision read:

> No object valued by the Museum at more than $25,000, and which has been on exhibition in the Museum within the preceding ten years, will be disposed of until at least 45 days after the issue of a public notice identifying the work and giving the range of its estimated value based on outside appraisals. . . . At the conclusion of this 45-day period, public comments will be studied, and either the Board or its Executive Committee will again consider the work in question and make the final decision . . . .

METROPOLITAN MUSEUM PROCEDURES FOR DEACCESSIONING AND DISPOSAL, *supra* note 3, at 7-149.

84 The Metropolitan Museum deaccession procedures included separate and distinct

the public trust.[86]

While few museum professionals anticipated the resulting agreement to have any effect beyond the specific facts of the Metropolitan Museum's de Groot deaccession,[87] conduct in blatant violation of the articulated standards was not ignored. In 1974, the Museum of the American Indian-Heye Foundation conducted extensive deaccessions pursuant to policies that contravened the very essence of Lefkowitz's objections to the Metropolitan's conduct.[88]

The Museum of the American Indian-Heye Foundation, at the time of its deaccession controversy, held the largest collection of Native American art in the world.[89] Allegations of the Museum director's breach of the public trust prompted Attorney General Lefkowitz to investigate the "'surreptitious and wasteful' way in which artifacts from the museum's collection were either sold or given away."[90] Lefkowitz found that Director Frederick J. Dockstader's plan for the poorly located[91] and financially troubled museum in-

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plans for objects valued at less than $25,000 and those greater than $25,000. While the deaccession plan for objects valued under $25,000 only required three steps, deaccessions of objects over $25,000 required eleven steps. *Id.* at 7-148 to 7-150. *But see* CRITIQUE BY THE MUSEUM OF MODERN ART OF DISPOSITION PROCEDURES AGREED TO BY THE METROPOLITAN MUSEUM OF ART [hereinafter CRITIQUE BY MUSEUM OF MODERN ART], *reprinted in* MERRYMAN & ELSEN (1979), *supra* note 3, at 7-151 (criticizing the arbitrary selection of $25,000 as a cutoff for heightened procedures).

85 In relevant part, the procedure stipulated that no object valued in excess of $25,000 shall be deaccessioned unless "three disinterested outside appraisals [are] obtained . . . the curator in charge of the department which requested the deaccessioning, seeks the best sale of exchange possibilities . . . the Museum obtains approval from the donor or his heirs if available. . . . [After the deaccessioning,] the sale or exchange of the object is reported to the next meeting of the Board of Trustees . . . . [and] The Museum's Annual Report will include a statement of the cash proceeds from the sale of objects disposed of during the relevant year . . . ." METROPOLITAN MUSEUM PROCEDURES FOR DEACCESSIONING AND DISPOSAL, *supra* note 3, at 7-149 to 7-150.

86 In addition to public notice, "public comments will be studied, and either the Board or its Executive Committee will again consider the work in question and make the final decision." *Id.* at 7-1489.

87 *See* DUBOFF, ART LAW, *supra* note 79, at 940.

88 *Id.* at 887.

89 *See* MERRYMAN & ELSEN (1987), *supra* note 20, at 700.

90 BAUGHMAN, *supra* note 9, at 107. The Museum of the American Indian's deaccession "policy" came to light when a new trustee was offered artifacts for purchase that he recognized to be part of the Museum's collection. Further investigation showed that these pieces had never been removed from the Museum's inventory listing. *See* DUBOFF, ART LAW, *supra* note 79, at 887. Dr. Edmund Carpenter, the trustee who exposed the Museum's practice said, "I'm sick of being told museums must deaccession. Of course, they must. But in this instance that's an excuse to mask surreptitious deals on the commercial market." BAUGHMAN, *supra* note 9, at 106.

91 The Museum was located at 155th Street and Broadway in New York City. Texas billionaire H. Ross Perot once offered $70 million to the Museum if its trustees would agree to move the collection to Dallas, Texas. New York Attorney General Robert Abrams quickly notified the trustees that any removal of the collection from New York State would require court approval. These trustees, like Thomas Hoving at the Metropolitan Museum, were not aware that they did not "own" the collection, but were merely administering it in trust for the people of New York State. The Museum's collection has been distributed

cluded a scheme to sell and trade parts of the collection in order to enhance the Museum's holdings through a privately devised collections policy. The public trust was further violated by Dockstader's imprudent use of the collection; he sold and made gifts of parts of the collection as a means of appeasing trustees. None of the principles of disclosure, candidness, care, and loyalty which help to garner acceptance for beneficial deaccessions were present.[92]

The Attorney General found that the Museum of the American Indian's deaccessions were conducted solely by the director. There was no board consultation or approval.[93] Dockstader claimed to be improving the Museum's holdings by exchanging so-called duplicates[94] for pieces that satisfied a void in the collection. But the director's practice ran contrary to the Metropolitan Museum disposition procedures that required approval from the Curator in Chief, Director, Secretary, and usually the Museum President.[95] Dockstader deaccessioned pieces "without comparative valuations, committee approval or consultation with the trustees."[96]

Self-dealing further polluted the Museum and its board. The Attorney General found that a number of artifacts deaccessioned by Dockstader were in fact purchased by trustees of the Museum through the Museum's gift shop.[97] Another deal provided substantial tax benefits for a trustee who received artifacts and overvalued tax deductions in exchange for gifts of other artifacts to the Museum.[98] As a result of these activities, Dockstader and the trustees

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between a new facility in the U.S. Customs House in downtown Manhattan and the Smithsonian Institute in Washington, D.C. *See* BAUGHMAN, *supra* note 9, at 108; THE ENCYCLOPEDIA OF NEW YORK CITY, *supra* note 32, at 785.

92 Sloppy and imprudent museum practice only serves to raise public and political concern that museum boards should be subject to heightened scrutiny. Baughman writes, "[c]ertainly, if museum trustees do not assiduously follow good museum management practices, they can expect legislatures to enact laws to bring their actions more in line with the public good." BAUGHMAN, *supra* note 9, at 108.

93 *See* DUBOFF, ART LAW, *supra* note 79, at 887.

94 Dr. William Sturtevant, curator of ethnology at the Smithsonian Institution, said, "[t]here is no such thing as a duplicate." So-called duplicate pieces, Sturtevant intimated, serve as a great resource to scholars who can examine different examples of a certain item to gain further understanding of the culture being studied. BAUGHMAN, *supra* note 9, at 105.

95 METROPOLITAN MUSEUM PROCEDURES FOR DEACCESSIONING AND DISPOSAL, *supra* note 3, at 7-149 (not requiring presidential approval for deaccessions of works valued under $25,000).

96 DUBOFF, ART LAW, *supra* note 79, at 887. Though there was apparently no board approval, the trustees were not necessarily without culpability. DuBoff indicates that after the trustee-informant became aware of Dockstader's conduct and sought board approval to pursue fully disclosed public sales, the motion failed for lack of a second vote from another trustee. *Id.*

97 *See generally* MERRYMAN & ELSEN (1987), *supra* note 20, at 700-01.

98 *Id.*

stipulated in court to relinquish administrative control, while Attorney General Lefkowitz oversaw the appointment of a new director and trustees.[99] The Museum board's practices, completely violative of the public trust, do not speak for the many positive benefits of deaccessioning.

The Museum of the American Indian incident might suggest that the disposition procedures agreed to by the Metropolitan Museum represented quasi-legal standards for New York State Museums to follow if they wished to avoid prosecution by the Attorney General. However, leaders of the Museum of Modern Art, presiding over one of the largest and most important collections of modern art in the country,[100] squarely rejected the Metropolitan Museum's practices and vowed never to adopt such crippling rules.[101] Trustees for the Museum of Modern Art set out their objections and contrary practices in a detailed critique of the Metropolitan Museum's report and a summary of their own deaccession practices.[102]

A careful review of the criticisms and corresponding policy statements may explain why the Museum of Modern Art remains conspicuously absent from the long list of museums that have been subject to scrutiny for their deaccession practices. While the Museum of Modern Art trustees rejected strict scrutiny from the Attorney General and public notice requirements,[103] fearing that heightened review might impair their ability to manage the Museum's resources in their perpetual effort to recognize the modern aesthetic, they did present a highly formalized, thoughtful, and prudent deaccession process that addresses many of the problems present in the procedures followed by the Museum of the American Indian and Metropolitan Museum.[104]

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99 Lefkowitz v. Museum of the American Indian-Heye Found., No. 41416/75, Stipulation (N.Y. Sup. Ct. Aug. 27, 1975), *reprinted in* DUBOFF, ART LAW, *supra* note 79, at 887-892.

100 THE ENCYCLOPEDIA OF NEW YORK CITY, *supra* note 32, at 784-85.

101 Unlike Mr. Hoving's gaffe, in which he claimed that the trustees "owned" the artwork of the Metropolitan Museum, the Museum of Modern Art trustees argued that development of the public trust required their freedom to buy and sell the collection based on their own professional judgment. *See* CRITIQUE BY MUSEUM OF MODERN ART, *supra* note 84, at 7-151.

102 *Id.* at 7-151 to 7-153.

103 The Museum of Modern Art's critique argued that decisions regarding deaccessioning should remain with museum officials rather than "distant heirs, legal representatives, or members of the Attorney General's staff." Furthermore, public notice requirements, the Modern's officials claimed, would upset the Museum's ability to fetch the highest price for its works and possibly hinder their ability to acquire a new work to enhance the collection. *Id.* at 7-153.

104 The Museum of Modern Art's deaccession procedure requires a unanimous vote of the Staff Acquisitions Committee, unanimous approval of the Painting and Sculpture Committee on two separate occasions, and final approval from the Board of Trustees. The

First and foremost, the Museum of Modern Art report candidly revealed its practices; they deaccession artwork regularly and do not deny to donors or to the public that this process represents a vital element in the administration of the public trust.[105] Second, the Museum of Modern Art demonstrated a responsible acquisitions policy in which it contacts the donors or their direct heirs prior to deaccessioning. As a matter of courtesy, Museum officials seek the donor's approval of a subsequent purchase made with the sale proceeds from the original donation, which will then be credited as the donor's donation.[106] Finally, the Museum of Modern Art's trustees produced a formal, written deaccession policy, thereby addressing one of Lefkowitz's chief concerns with the Metropolitan Museum's deaccession policy.[107] By addressing the Attorney General's concerns, the trustees of the Museum of Modern Art retained the freedom to operate the museum and perform their fiduciary duties without onerous scrutiny.

While the Museum of Modern Art's policy represents a victory for proponents of freer deaccessions, it followed other institutions by earmarking the resulting sale proceeds for the purchase of new artwork. In the most recent deaccession incident in New York City, concerning the New-York Historical Society, deaccession sale proceeds were used to finance the institution's operating expenses. The Historical Society's auction of 183 works in early 1995, prompted by a financial crisis that closed the Museum for two years, received approval from Attorney General G. Oliver Koppell after a unique agreement was reached ensuring a highly regulated, prudent deaccession.[108]

Questions concerning the Historical Society deaccession began as early as 1993 when the Society's leaders appeared before a public State Assembly committee meeting. They testified that the proposed sale represented a necessary step in restoring financial security to the day-to-day operations of the Museum.[109] The agree-

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Museum does not sell restricted gifts without court approval. The Museum trustees explained that a requirement that all works be sold at public auction would serve to hinder their ability to appeal to those purchasers who may pay the highest price. *Id.*

[105] The report reads: "[m]any of our greatest works were acquired through sale and/or exchange . . . . This great Collection would not exist in anything like its present comprehensive form had the professionals who developed it been obstructed by such a restriction [as the one adopted by the Metropolitan Museum]." *Id.* at 7-152.

[106] *Id.* at 7-154.

[107] *See supra* note 37.

[108] *See generally* Lee Rosenbaum, *New-York Historical Society Sells New York Heritage,* WALL ST. J., Jan. 19, 1995, at A16; Peter C. DuBois, *Master Plan,* BARRON'S, Dec. 19, 1994, at 27 [hereinafter Dubois, *Master Plan*].

[109] Kim Schaye, *Museum's Plan to Sell Assets Sparks Debate,* NEWSDAY, Apr. 12, 1993, at 6.
The New-York Historical Society was no stranger to deaccessions. In an earlier battle

ment reached between the Attorney General and the Society stipulated that deaccession represents an action of last resort, to be pursued only after all other efforts are exhausted.

The Historical Society's relevant professional organizations, the American Association of Museums and the American Association for State and Local History, did not challenge the sale or the intended use of the proceeds.[110] The auction proceeds were contributed to the museum's endowment, which had been depleted by many years of poor fundraising and mismanagement.[111] Even after the auction and the influx of approximately $11.2 million, the future of the Society remained in doubt as it redefined its statement of purpose and considered suggestions that it merge with an institution with firmer financial footings.[112] The New-York Historical Society, the oldest museum in New York,[113] re-opened on May 11, 1995. Due to the deaccession auction, and the codes and agreements permitting it to enhance its endowment with the proceeds, the Historical Society was financially viable.

The central element of the deaccession agreement, brokered by the Historical Society and Koppell, permitted any qualifying public museum, library, or archive in New York State to preempt the successful bidder at auction for a price of three to ten percent less than the winning bid.[114] The preemption clause allowed a number of paintings to remain in public hands, and to some ex-

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to win court approval for the sale of paintings bequeathed by Thomas Bryan, the report of the Society's legal committee read:

> For several generations we've ben tryin' to ease restrictions set by Bryan; that is, to loosen up the strictures governing our use of his gorgeous pictures. Now, though our treasury is diminished we can report the Bryan case is finished! With blood and tears, and a little fun, the ghastly lawsuit is finally won!

GUTHRIE, *supra* note 15, at 141.

110 *See supra* note 59. Despite the fact that the American Association of Museums had dramatically revised its deaccession ethics clause in 1993 to allow the use of sale proceeds for the "direct care of collections," as well as for the purchase of new paintings, the association's Executive Director Edward Able criticized the Historical Society's interpretation of the exception as too broad and not contemplated by the ethics guidelines. *See* Rosenbaum, *supra* note 108, at A16.

111 The agreement reached by Attorney General Koppell and the Historical Society, prohibited the society from using the auction proceeds to pay back a highly controversial $1.5 million loan from Sotheby's auction house secured by, among other things, the Historical Society's original copy of the Declaration of Independence. *See* DuBois, *Master Plan*, *supra* note 108, at 27.

112 Peter C. DuBois, *Saga's End: Unusual Art Auction Settled: Three Bids Are Pre-empted*, BARRON'S, Jan. 23, 1995, at 15; Rosenbaum, *supra* note 108, at A16.

113 THE ENCYCLOPEDIA OF NEW YORK CITY, *supra* note 32, at 832-33; *New York Buyers to Get First Try at Museum Pieces*, WALL ST. J., Sept. 12, 1994, at A11P.

114 Public auctions are generally governed by the Uniform Commercial Code. *See* U.C.C. § 2-328(2) (West 1995) ("[a] sale by auction is complete when the auctioneer so announces by the fall of the hammer or in other customary manner . . . ."); U.C.C. § 1-102(3) ("[t]he effect of provisions of this Act may be varied by agreement").

tent answered critics of deaccession who disapproved of moving art from public to private hands.[115]

Critics of the deaccession were led by Keith Christiansen, the curator of European paintings at the Metropolitan Museum of Art, where some of the deaccessioned paintings had hung on loan for nearly fifteen years. Christiansen criticized the Historical Society's decision in a scathing diatribe:

> De-accessioning [sic] takes on many forms, and from time to time mistakes are made by even the most well-intentioned institutions. Seldom, however, has it been practiced in such a consistently short-sighted, self-interested fashion, one that calls into question the very thing the New-York Historical Society so desperately needs in order to regain the public's confidence: its integrity as a cultural institution.[116]

Furthermore, Christiansen questioned the virtue of the pre-emption provisions, stating that "[i]f you don't have the money, pre-emption is bogus."[117] The Metropolitan Museum was the pre-emptive purchaser of only one work, the most expensive piece sold at auction.[118]

V. THE *CY PRES* DOCTRINE AND REGULATION OF DEAD HAND CONTROL

Charitable trust law seeks to resolve the tension between perpetual dead hand control[119] and changing circumstances that adversely affect the public benefit conferred by the trust.[120] In the

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[115] *See* Schaye, *supra* note 109, at 6. The preemption option was created by the Charities Bureau of the Attorney General's office based on the public trust concept, which views all museum holdings as part of the locale's patrimony. They reasoned that the auction rules, although somewhat burdensome for private bidders, served to satisfy the donor's intent that the works be available to the public.

Gloria Hillman Valdez, a descendant of the benefactor who contributed the paintings auctioned by the Historical Society, moved for an injunction to halt the sale on the basis that the paintings were given with the intention that they remain on display for the public. Valdez may have been angered that she learned of the proposed deaccession through press reports rather than from the Society itself. The parties settled out of court with an understanding that Valdez would be notified in the event that additional paintings from the collection were deaccessioned. *See* Rosenbaum, *supra* note 108, at 27.

[116] Christiansen, *supra* note 10, at A30.

[117] DuBois, *Master Plan, supra* note 108, at 27.

[118] *Id.* at 15. The Metropolitan Museum purchased a $2.2 million painted wooden tray honoring the birth of Lorenzo de Medici, the art patron. Other successful preemptive bidders included the Brooklyn Museum, which purchased an altar piece by Nardo di Cione, and Vassar College, which purchased a 15th century Brussels School crucifixion scene. *Id.*

[119] Perpetual control by the settlor, known as dead hand control, severely limits a charitable institution's ability to respond to changes in circumstances. *See* Joseph A. DiClerico, Jr., *Cy Pres: A Proposal for Change,* 47 B.U. L. REV. 153, 155 (1967).

[120] *See* Rob Atkinson, *Reforming Cy Pres Reform,* 44 HASTINGS L.J. 1111, 1114 (1993).

area of private trusts, the rule against perpetuities limits a settlor's power to control the trust *corpus* beyond the period of the rule.[121] However, since the rule does not apply to charitable trusts,[122] courts have employed the *cy pres* doctrine to address changes of circumstances that the settlor did not contemplate.[123] Generally, *cy pres* cannot be applied if the settlor expressly provided for termination of the trust in the event that his special or particular charitable intentions could not be performed.[124] The fact that there may be viable alternatives to fulfill the settlor's charitable purpose in a more general way does not affect the failure of the trust under these circumstances.[125]

Cy pres allows courts to construe a more general charitable intent and avoid failure of the trust. Even when the settlor does not provide for a gift over or reverter on the happening of a particular

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[121] JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 833 (5th ed. 1995).

[122] *See In re* Rolston's Will, 253 N.Y.S.2d 614, 617 (Sur. Ct. 1964) (holding that the rule against perpetuities does not apply to the duration of a charitable trust); IVA SCOTT ON TRUSTS, *supra* note 5, § 365, at 109 ("A charitable trust is valid although it is to continue beyond the rule against perpetuities. It is valid even though it is to continue indefinitely."). *But cf.* IVA SCOTT ON TRUSTS, *supra* note 5, § 365, at 111-12 ("Although a charitable trust may continue for a period longer than the period of the rule against perpetuities, a contingent disposition in favor of a charity, following a disposition for non-charitable purposes, is invalid . . . .").

[123] *See* GEORGE GLEASON BOGERT & GEORGE TAYLOR BOGERT, THE LAW OF TRUSTS AND TRUSTEES § 431 (2d ed. 1991) (discussing the value of the rule in dealing with changed circumstances in charitable bequests). *But see* Board of Trustees of the Museum of the Am. Indian v. Board of Trustees of the Huntington Free Library and Reading Room, 610 N.Y.S.2d 488, 501 (N.Y. App. Div. 1st Dept. 1994) (assessing the negative effects of *cy pres* on charitable giving as substantial enough to impose stringent dispositionally based conditions on the use of the *cy pres* power).

[124] *See* N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(c)(1) (McKinney 1995):

> [W]henever it appears to such court that circumstances have so changed since the execution of an instrument making a disposition for religious, charitable, educational or benevolent purposes as to render impracticable or impossible a literal compliance with the terms of such disposition, the court may, on application of the trustee or of the person having custody of the property subject to the disposition . . . make an order . . . directing that such disposition be administered or applied in such manner as in the judgment of the court will most effectively accomplish its general purposes, free from any specific restriction, limitation or direction contained therein.

Contra 20 PA. CONS. STAT. ANN. § 6110(a) (1995).

> [T]he court may, on application of the trustee or of any interested person or of the Attorney General . . . order an administration or distribution of the interest for a charitable purpose in a manner as nearly as possible to fulfill the intention of the conveyor, *whether his charitable intent be general or specific.*

Id. (emphasis added).

[125] The *cy pres* doctrine must be distinguished from the deviation doctrine that courts use to prevent failure of a private trust due to circumstances not known to the settlor at the time the trust instrument was drafted. Deviation may be used to alter the administration of the trust, not to change substantive parts of the trust such as beneficiaries. Under *cy pres* the court can make more extensive, substantive changes. *See* IVA SCOTT ON TRUSTS, *supra* note 5, § 399, at 476-84; *cf.* Atkinson, *supra* note 120, at 1111 n.2 (arguing that the distinctions between deviation and *cy pres* are historically difficult to make).

event, courts can employ *cy pres* to save the gift.[126] According to the *Restatement*, courts are equipped with the equitable power of *cy pres* to amend trust provisions after adherence "becomes impossible,[127] impracticable,[128] or illegal to carry out the particular purpose, and if the settlor manifested a more general intention[129] to devote the property to charitable purposes."[130]

Judges have a great deal of discretion when applying the *cy pres* doctrine. In formulating a new charitable scheme,[131] the court must "consider evidence as to what would probably have been the wish of the settlor at the time when he created the trust if he had realized that the particular purpose could not be carried out."[132] The subjective nature of the task invites varying standards of application and consequently, accusations of judicial abuse.[133] Thus, legislatures have sought to limit courts' powers with statutory artic-

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126 *Huntington Free Library*, 610 N.Y.S.2d at 495 (finding that N.Y. EST. POWERS & TRUSTS LAW § 8-1.1(c)(1) prevents the failure of charitable trusts when the general purpose of the disposition is possible to accomplish); *In re* Estate of O'Brien, 627 N.Y.S.2d 544, 547 (Sur. Ct. 1995) ("It is not the policy of the courts of this state to allow a gift in which the testator evidences a general charitable intent to fail."); *cf.* MASS. GEN. LAWS ANN. ch. 12, § 8k (West 1996) ("A gift made for a public charitable purpose shall be deemed to have been made with a general intention to devote the property to public charitable purposes, unless otherwise provided in a written instrument of gift.").

127 For example, enforcement of a charitable trust becomes impossible when the amount of money bequeathed would be insufficient to fulfill the charitable purposes of the gift. *See* IVA SCOTT ON TRUSTS, *supra* note 5, § 399.2, at 489-90.

128 An impracticable situation in a charitable trust is one in which, "it is possible to carry out the particular purpose of the settlor . . . [but] to carry it out would fail to accomplish the general charitable intention of the settlor." RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. q (1959); *see* Dunbar v. Board of Trustees of George W. Clayton, 461 P.2d 28 (Colo. 1969) (allowing change in school's policy that restricted admission to poor, white, male orphans between the ages of six and ten years, to a policy which permitted admission to children regardless of color between the ages of six and eighteen years who have been deprived of parental care and support). *But see In re* Estate of Buck, (Cal. Super. Ct., Marin County, 1986), *reprinted in* DUKEMINIER & JOHANSON, *supra* note 121, at 679, 685 (equating impracticability with impossibility).

129 *See* RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. c (1959) ("[Even if] the terms of the trust [provide] that the property shall be devoted 'forever' to a particular purpose, or . . . devoted to that purpose and 'no other purpose', or . . . given 'upon condition' that it be applied to that purpose, does not necessarily indicate the absence of a more general charitable intention . . . .").

130 RESTATEMENT (SECOND) OF TRUSTS § 399 (1959); *cf.* IVA SCOTT ON TRUSTS, *supra* note 5, § 399.2, at 490 ("This principle is easy to state but is not always easy to apply"); *accord* BOGERT & BOGERT, *supra* note 123, § 439 ("The line between impossibility, impracticability, and inexpediency on the one side, and inconvenience or slight undesirability on the other, may be difficult to draw, but it may constitute the boundary between the use of *cy pres* and the refusal to apply the doctrine.").

131 Courts may appoint special masters to assist them in formulating a scheme. The judge may also depend upon the trustees to make suggestions. The trustees may not unilaterally devise and implement a new scheme without court approval. *See* IVA SCOTT ON TRUSTS, *supra* note 5, § 399.

132 RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. d (1959).

133 Atkinson, *supra* note 120, at 1115 ("[I]t places too much confidence in the courts as guarantors of the public benefits that charitable trusts are supposed to provide"); BOGERT & BOGERT, *supra* note 123, § 433 ("[A] rule of arbitrary disposition, giving the chancellor

ulations of the *cy pres* doctrine.[134] Limitations on the courts' powers to amend restrictive trusts only serve to strengthen dead hand control over charitable institutions.[135]

VI. Applying *Cy Pres* to the Museum: Pennsylvania's Barnes Foundation Collection

Museum officials seeking to deaccession a piece of art may be constrained by the terms of a restrictive gift limiting the use or sale of the painting. These deaccession issues are best addressed at the time of acquisition,[136] when museum officials have the greatest ability to negotiate the terms of the bequest.[137] More frequently though, museums wishing to sell artwork bequeathed to them in a restrictive trust seek alternative constructions of the trust instrument in order to free themselves from its terms. These alternative constructions often result in disingenuous readings of trust instruments which only help to convince critics of the clandestine nature of deaccessions.[138]

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power to remake deeds and wills and to allocate capital or income according to his own social or religious views . . . .").

134 *See, e.g.*, Ga. Code Ann. § 53-2-99 (1995) (applying *cy pres* to testamentary bequests); Ga. Code Ann. § 53-12-113 (1991) (applying *cy pres* to trusts where settlor's gift cannot be executed in the exact manner provided by the settlor); N.Y. Est. Powers & Trusts Law § 8-1.1(c) (McKinney 1995) (allowing application of *cy pres* when literal compliance with general purposes has become impossible or impracticable); 20 Pa. Cons. Stat. Ann. § 6110(a) (allowing application of *cy pres* to fulfill the intent of the settlor whether his intent was general or specific); *cf.* Bogert & Bogert, *supra* note 123, § 433 (federal courts apply the *cy pres* law of the jurisdiction in which the trust would be adjudicated in a state court; no federal *cy pres* law exists).

135 *See* DiClerico, *supra* note 119, at 200.

136 *See* ICOM Code of Ethics, *supra* note 8, § 3.5 ("Offers that are subject to special conditions may have to be rejected if the conditions proposed are judged to be contrary to the long-term interests of the museum and its public.").

137 Malaro contributes extensively to this area of the debate. She argues that museums cannot rationally bow to the so-called dead-hand and cede control over the use of art works to the dead-hand for perpetuity. She asks, "[c]an such gifts be justified in light of current concepts of the role of museums?" Malaro, Museum Governance, *supra* note 3, at 79-81; *see also id.* at 80 (noting that the normal museum practice of accepting restricted gifts with little worry has evolved to the point where restricted gifts are now contemplated more thoroughly); *cf. Huntington Free Library*, 610 N.Y.S.2d at 501 (warning that restrictions on judiciary's use of *cy pres* power exist so as not to discourage charitable giving or upset the stability of charitable organizations).

138 The much debated de Groot bequest read:

> All other works of art owned by me at the time of my death and not effectively disposed of under any of the foregoing provision of this Will, I give and bequeath to said Metropolitan Museum of Art. Without limiting in any way the absolute nature of this bequest, I request said Metropolitan Museum of Art not to sell any of said works of art, but to keep such of said works of art as it desires to retain for itself, and to give the balance to such one or more important Museums as said Metropolitan Museum of Art shall select . . . .

Metropolitan Museum Report on Art Transactions, *supra* note 37, at 7-145. Commenting on the de Groot case, Merryman and Elsen wrote, "[i]t is important to recognize that the museum directors, curators, and trustees who deal with the collector in negotiating for

When financial circumstances have changed sufficiently,[139] making pursuit of the museum's mission impossible, and the applicable trust instrument fails to provide for any contingencies, museums must be able to use their charitable resources for the furtherance of their mission. *Cy pres* and court-approved deaccessions are the best method of accomplishing their mission.[140]

An incident concerning the Barnes Foundation[141] collection in Merion, Pennsylvania illustrates the process. On March 20, 1991, Barnes Foundation President Richard H. Glanton proposed the sale of up to fifteen paintings to provide for a $15 million renovation of the foundation building, as well as a much needed $10 million enrichment of the endowment that had failed to generate sufficient income to cover the operating expenses of the museum.[142] A petition to the courts sought application of the *cy pres*

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the donation are, or are backed up by, experienced professionals; they have done this before. . . . They will interpret everything that is said in favor of their museum's interests." MERRYMAN & ELSEN (1987), *supra* note 20, at 616-17. Karl Meyer addressed the Metropolitan's questionable interpretation by writing, "her [de Groot's] wish, expressed in her will even if not in terms that were legally binding, was that the Metropolitan give to other museums . . . any works it did not want . . . Was the spirit of the bequest violated by ignoring a donor's wishes?" MEYER, *supra* note 36, at 52-53. Paul Bator, in a letter to the *New York Times* during the scandal, wrote, "[t]he de Groot paintings were left to the museum on the donor's express request that they not be sold and that, if the Metropolitan did not wish to keep them, they be kept in the public domain by gifts to other museums." Bator, *Letter to the Editor*, *supra* note 77, at 38.

139 *See supra* note 1. *Compare* Atkinson, *supra* 120, at 1156 ("[T]he need for charity to respond rapidly to social change has become increasingly clear . . . .") *with Huntington Free Library*, 610 N.Y.S.2d at 499 ("[*C*]*y pres* does not authorize judicial alteration of a charitable disposition simply because there may be some even more efficacious way of achieving the dispositional purposes. The unsettling effect of such a promiscuous resort to the *cy pres* power can hardly be overstated . . . .").

140 In *Reforming Cy Pres Reform*, Rob Atkinson offers a revolutionary alternative to the extensive legal wrangling necessary in a *cy pres* action. Instead of vesting restrictive power in a trust instrument that failed to address possible changes in circumstance, or giving discretionary power to a judge whose expertise is presumably less than those trustees leading a museum, Atkinson advocates doing away with both and leaving the power of disposition in the hands of the trustees for use in charitable purposes. *See* Atkinson, *supra* note 120, at 1115-16.

141 The Barnes Foundation, once called "the finest collection of modern paintings in America," is made up of over 2500 works of art collected by Dr. Albert C. Barnes in the early part of the twentieth century. The collection is varied and includes works by Matisse, Cezanne, Seurat, Picasso, Renoir, Braque, and Van Gogh. All of the paintings are hung in the galleries in the precise manner and place Barnes mandated in his indenture. *See* Jo Ann Lewis, *Broadsides at the Barnes*, WASH. POST, Dec. 17, 1995, at G4; Lee Rosenbaum, *The Gallery: Masterpieces Back Home, Hung in Same Weird Way*, WALL ST. J., Nov. 28, 1995, at A12. *See generally* LINCOLN UNIVERSITY, GREAT FRENCH PAINTINGS FROM THE BARNES FOUNDATION: FROM CEZANNE TO MATISSE (1995).

142 Michael Kimmelman, *Barnes Foundation Seeks to Sell Some Paintings*, N.Y. TIMES, Mar. 29, 1991, at C23. Glanton proposed the sale in spite of the provision in Barnes's trust indenture which reads,

> After [Dr. Barnes's] death, no picture belonging to the collection shall ever be loaned, sold or otherwise disposed of except that if any picture passes into a state of actual decay so that it no longer is of any value it may be removed for that reason only from the collection.

doctrine in order to permit a sale of paintings, a direct contradiction of the trust indenditure.[143] Critics, including some trustees of the Barnes Foundation, attacked the plan as an irresponsible breach of the public trust and a direct contradiction to the terms of Barnes's trust indenture.[144]

One of the chief arguments against the proposed sale was Glanton's plan to use the deaccession proceeds to finance building renovations and endowment enhancement. Critics cited the ethics standard that museums should sell paintings only to finance new acquisitions, not to pay for operating and maintenance expenses.[145] Glanton responded to these criticisms by distinguishing the Barnes Foundation as an educational institution, not a museum, and therefore not subject to the ethical considerations of museums.[146] Nonetheless, Glanton and the trustees finally retreated from their position, withdrawing the court petition to allow the sale.[147]

In re Barnes Found., 12 Fiduciary Rptr. 2d 349, 352 (Pa. Ct. C.P., Montgomery County, Orphans' Ct. Div. July 21, 1992).

[143] For a description of the March 20th petition, see *In re Barnes Foundation*, 684 A.2d 123, 124 (Pa. Super. Ct. 1996); Atkinson, *supra* note 120, at 1128-29.

[144] Michael Kimmelman wrote,

> [f]ew would argue against a sale of paintings to save the foundation if all other fundraising alternatives . . . had been exhausted. There are ways for a place as culturally significant as the Barnes to come up with cash in an emergency. . . . It is the capability of the Barnes board that is cast in doubt when it cannot raise money for what is [sic] says are urgent needs without proposing to dismantle the collection it has been entrusted to safeguard.

Michael Kimmelman, *The Barnes Explores Other Byways*, N.Y. TIMES, Apr. 21, 1991, at 35. Members of the Barnes Foundation advisory board, including professionals from the National Gallery and Smithsonian Institution, were adamantly opposed to any sale until other financial remedies had been explored. *See* Kimmelman, *Barnes Foundation Seeks to Sell Some Paintings*, *supra* note 142, at C23.

[145] *See supra* note 59.

[146] Kimmelman, *The Barnes Explores Other Byways*, *supra* note 144, at 35. The Barnes Foundation's distinction as an educational institution and not a museum served as the basis for two cases concerning the institution's tax-exempt, public, charitable status. Before 1960, visitors to the Barnes Foundation were denied access to the gallery and given a card stating that "[t]he Barnes Foundation is not a public gallery. It is an educational institution with a program for systematic work. . . . Admission to the gallery is restricted to students enrolled in the classes." Wiegand v. Barnes Found., 97 A.2d 81, 86 (Pa. 1953) (Musmanno, J. dissenting). In *Wiegand*, the court denied standing to the plaintiff and did not reach the merits of the case. But in the second case, *Commonwealth v. Barnes Foundation*, 159 A.2d 500 (Pa. 1960), the court ordered that so long as the Barnes Foundation claimed public charity status, the foundation was to admit members of the public in a reasonable manner. *Id.* at 506.

[147] In the wake of this decision, Richard L. Feigin, a member of the Barnes's advisory committee was dismissed from the committee by Glanton who said Feigin's service "[had] not been constructive." Though Glanton denied that Feigin's opposition to the deaccession had been the chief reason for his dismissal, Feigin said, "[b]y getting rid of me, they've snuffed the major vocal opposition [to the sale]." Grace Glueck, *Art Adviser Dismissed After Opposing Museum's Sales*, N.Y. TIMES, July 27, 1991, at 13. Esther van Sant, the Barnes Foundation's Educational Director, also claimed to have been forced to resign in the fallout of the proposed deaccession. Glanton's animosity towards Van Sant may have

In the wake of the Foundation's retreat, Glanton countered that "[the Foundation's announcement] reflects its view that the mounting adverse publicity surrounding this request is prejudicial to its case, and distorts and undermines the sound and reasonable basis on which it rests. . . . [The board will explore] alternative means of raising the revenues necessary to carry out its mission."[148] Not surprisingly, trustees for the Barnes Foundation were in court one year later, this time seeking application of the *cy pres* doctrine to gain permission for a tour of some Barnes Foundation paintings. Although the tour was another deviation from Dr. Barnes's indenture,[149] it was far less controversial in the public's perception than a deaccession.[150]

The decision by the Orphan's Court[151] to allow a tour of the Barnes Collection required application of Pennsylvania's liberal *cy pres* doctrine.[152] Judge Stefan made eighty paintings available to millions of people throughout the world, even in the face of a restrictive trust instrument.[153] Judge Stefan's innovative decision of 1992 wrested control of the foundation from the dead hands of Dr. Barnes, the foundation's benefactor, who died in 1951. Judge Stefan found that literal compliance with Barnes's indenture had become both "impracticable and inconsistent" with the central

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been caused by her position as co-trustee of the De Mazia Trust, an organization related to the Barnes Foundation and vehemently opposed to any divergence from the Barnes indenture. Van Sant accused Glanton of making her "position as director of education untenable." Carol Vogel, *Barnes Art Official Quits, Saying She Was Forced Out*, N.Y. TIMES, Feb. 21, 1992, at C18.

148 Grace Glueck, *Foundation Reverses Plan to Sell Paintings*, N.Y. TIMES, July 4, 1991, at C11.

149 *See supra* note 140.

150 Michael Kimmelman, a severe critic of the proposed deaccession, called the tour "a unique opportunity." Michael Kimmelman, *Collection of an Artful Dodger Comes Out From Under Wraps*, Courier-Journal (Louisville, Ky.), July 4, 1993, at 4I. Another critic called it "a rare treat for art lovers." *See* Nita Lelyveld, *Out in the Open: A Rare Private Collection is Released From the Clutches of its Dead Owner*, FORT WORTH STAR-TELEGRAM, June 8, 1993, at 1. *But see infra* note 156.

151 The Orphan's Court has jurisdiction over decedent's estates, testamentary trusts, inter vivos trusts, minors' estates, custodianships for minors' property, guardian of persons of minors, adoptions, custody of minors, birth records, incompetents' estates, absentees' and presumed decedents' estates, fiduciaries, specific performance of contracts, legacies, annuities and charges, construction of administrative power, disposition of title to real estate to render it freely alienable, title to personal property, appeals and proceedings from registers, marriage licenses, inheritance and estate taxes, and nonprofit corporations. *See* 20 PA. CONS. STAT. ANN. § 711 (1995).

152 20 PA. CONS. STAT. ANN. § 6110(a).

153 Nearly 80 works toured the world in *Great French Paintings from the Barnes Collection.* The tour included stops at the National Gallery in Washington, D.C., the Kimball Art Museum in Fort Worth, Texas, the Art Gallery of Ontario in Toronto, the Musee d'Orsay in Paris, the Museum of Western Art in Tokyo, and the Philadelphia Museum of Art. Attendance records were broken in Paris, Tokyo, and Philadelphia. *See* Jim Ruth, *Free at Last: Touring Exhibition Liberates Paintings from the Barnes Foundation*, LANCASTER NEW ERA, Jan. 15, 1995, at H1.

purpose of the indenture, namely the advancement of education, appreciation of fine arts, and preservation of the collection.[154]

Rather than rewrite the indenture to permit future tours, however, Judge Stefan temporarily suspended the terms of the indenture, pursuant to title 20, section 6110(a) of the Pennsylvania Code, until the collection could be returned to its renovated building at the end of the tour. Stefan concluded: "[t]his Court may permit deviation from at least the administrative provisions of the Indenture, if subsequent circumstances were not anticipated by the settlor, and literal compliance would defeat or substantially impair the accomplishment of the purpose of the Trust."[155]

Barnes's bequest had crippled the foundation by not allowing the trustees to take actions that would generate income necessary for the care of the paintings and preservation of the building. The use of the *cy pres* doctrine freed the trustees from the indenture's stifling constraints and ultimately served the settlor's purpose in a more complete and lasting way.

In light of the ruling regarding public tours, one can only wonder how Judge Stefan would have ruled on the *cy pres* application to allow the outright sale of the paintings. The Pennsylvania courts have not hesitated to contravene the exact word of the Barnes indenture in subsequent rulings.[156] Still, the general hostility toward deaccessions always presents an obstacle to any rescue plan based on outright sale. To counter this public sentiment, one could reason that the educational pursuits of the foundation would have been better served by a deaccession, since most of the paintings would never have left the foundation site, leaving them available for study without interruption.[157] Only through freer judicial

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154 *In re Barnes Found.*, 12 Fiduciary Rptr. 2d at 350.

155 *Id.* at 357.

156 After allowing the tour, the Orphan's Court has allowed the construction of a parking lot, the erection of a guard building, the reduction in the size of the surrounding arboretum, and a general expansion of the facilities, all contrary to the trust indenture. *In re* Barnes Found., 661 A.2d 889, 895 (Pa. Super. Ct. 1995). The Orphan's Court objected (but was later overruled) to allowing foundation social functions in contradiction of the trust indenture, which reads, "at no time after the death of said Donor, shall there be held in any building or buildings any society functions commonly designated receptions, tea parties, dinners, banquets, dances . . . or similar affairs . . . ." MERRYMAN & ELSEN (1987), *supra* note 20, at 651-52; *see also* Lewis, *supra* note 141, at G4.

157 Commenting on the Barnes Foundation tour, James Beck, the head of Artwatch International, an organization which monitors damage to works of art, said, "[i]t's shocking that the Barnes collection is being made into an artistic circus, and I thing that it does harm to the works of art—physically, even a little bit; maybe a lot. It even does harm to the works spiritually." *Morning Edition: Barnes Foundation Art Collection Faces Legal Battle* (National Public Radio broadcast, Oct. 25, 1993), 1993 WL 9612256; *see also* David D'Arcy, *Touring Matisse Found Damaged*, WASH. POST, Dec. 31, 1994, at B7 (reporting damage to *La Danse* while on display in Paris's Musee d'Orsay).

application of *cy pres* in all instances will trustees be able to gain control over their holdings and make use of restrictive bequests for the true benefit of their institutions when compliance with the bequests becomes impossible or impracticable.

VII. New York Legislation Affecting Museum Deaccessioning

Legislation passed last year[158] in the New York State Assembly and Senate imposes severe limitations on the New York State Museum's[159] ability to deaccession artwork and other holdings of any kind. Legislation of this sort was first considered after the de Groot controversy in 1973.[160] At the time, Museum officials fought the legislation, believing that it would limit the exercise of their professional judgment[161] in managing their institutions.[162] This point cannot be overstated. If commercial corporate boards are permitted to exercise their judgment when running a corporation, limited only by their duties of care and loyalty, then why subject museum professionals to a higher standard? The legislation does not serve to codify standards of conduct for museum trustees, but rather to limit their freedom of action when deaccessioning. The Legislature ought to pass reforms designed to clarify the supremacy of the museum board when making deaccession decisions.

The statute requires that "[t]he deaccessioning of property by the museum must be consistent with the mission of the museum."[163] Adherence to the Museum's mission statement, an inherently vague document subject to many interpretations, may subject Museum trustees to a suit for breach of fiduciary duty in the event that the Attorney General does not agree with the board's interpretation of the statement. For instance, the International Council on Museums defines a museum as a "permanent institution in the service of society . . . open to the public which acquires, conserves, researches, communicates and exhibits for purposes of study, education and enjoyment, material evidence of people and

158 N.Y. Educ. Law § 233-a became effective on Oct. 7, 1996.

159 Though the statute applies solely to the New York State Museum in Albany, previous drafts of the legislation would have amended the N.Y. Est. Powers & Trusts Law § 8-1.4 and applied the law to all museums in the state. *See* A.B. 286-C § 1(A), 218th Gen. Assembly, 1st Sess. (N.Y. 1995).

160 *See supra* note 42 and accompanying text.

161 *See supra* notes 73-76 and accompanying text (discussion of business judgment rule).

162 DuBoff noted that, "[i]t was felt that new legislation would further complicate the deaccession process by requiring additional supervision." DuBoff, Art Law, *supra* note 79, at 941.

163 N.Y. Educ. Law § 233-a.2.

their environment."[164] The deaccession of one painting may enable the institution to conserve additional paintings, hire additional researchers, or provide better educational programs for the betterment of the community, all actions consistent with the museum's mission.

Actions which further a museum's mission in one respect may harm it in another. Museum mission statements, like any written document, are subject to numerous interpretations. The statute should read:

> The deaccessioning of property by the museum must be consistent with the mission of the museum *as interpreted and practiced by the board of trustees.*

Legislation that protects the museum board's authority to manage the museum's holdings and institutional goals would ratify the value of their professional qualifications and judgment in the running of the museum.

Under this legislation, deaccession proceeds "shall be used only for the acquisition of property for the collection or for the preservation, protection and care of the collection and shall not be used to defray ongoing operating expenses of the museum."[165] While this represents a somewhat enlightened position, similar to the position taken by the American Association of Museums,[166] limitations of any sort serve to constrict museum professionals and trustees' freedom when running their museums and utilizing their resources. If a museum's board of trustees finds itself in the desperate position of having to sell a piece of artwork, the public and the legislature should yield to its judgment. In what way could the New York State Attorney General's expertise exceed that of a museum professional when considering budgetary needs or the value of a particular painting to the museum's collection? No legislature would support such intrusive, authoritarian regulations over private corporations' budgetary matters. The ongoing operating expenses of a museum are as important to a museum's mission as any expense spent on the preservation, protection, and care of the collection. The statute should be amended to read:

> Proceeds derived from the deaccessioning of any property from the collection of the museum shall be used in the manner prescribed by the board of directors, including, but not limited to

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164 MALARO, MUSEUM GOVERNANCE, *supra* note 3, at 146 (citing ICOM CODE OF PROFESSIONAL ETHICS art. 2, para. 1).

165 N.Y. EDUC. LAW § 233-a.5(a).

166 *See supra* note 60.

> the acquisition of property for the collection, preservation, protection and care of the collection, improvements to the museum building, and any expenses that further the educational, artistic, or institutional goals of the museum as determined and practiced by the board of trustees.

Any law that limits the board's ability to manage deaccession proceeds to further its goals amounts to an unnecessary restraint on museum management.

The newly passed statute's disclosure requirements address a persistent problem with museum deaccessions and consequently should be passed. The law requires a museum to disclose its deaccession policy to the donor prior to receipt of a bequest:

> Prior to the acquisition of property by gift, the Museum shall provide the donor with a written copy of its mission statement and collections policy, which shall include policies and procedures of the Museum relating to deaccessioning.[167]

The disclosure requirements endorsed by the law operate to remove some of the secrecy from the deaccession process and may help to garner public acceptance for deaccessioning.

The legislation is silent regarding public notice. The lesson of the de Groot controversy and Museum of the American Indian incident was that all deaccessions should be conducted with full, public disclosure. Without disclosure, museum trustees find it difficult to quell the public's conception that museums are pursuing clandestine, underhanded transactions. In the Historical Society's case, its leaders spoke openly and defended their action as a last resort. They explained it as a truly unique situation that called for a unique remedy, ultimately receiving the support of the Attorney General.[168] This new statute must include a provision similar to the one adopted by the Metropolitan Museum,[169] so that the public will have adequate notice of a proposed deaccession.

VIII. Conclusion

Deaccessions are unromantic (how could a thing of inexplicable value be sold for cash?) and undemocratic (the sale of art out of the public sphere represents a lost opportunity for the greater populace to profit from viewing artwork). But they *are* legal and they *are* necessary. Deaccessions represent a last resort for many

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167 N.Y. Educ. Law § 233-a.
168 Schaye, *supra* note 109, at 6.
169 *See supra* note 83.

museums, providing an opportunity to raise funds without which other parts of the museum's collection, physical plant, or educational goals may suffer. This Note does not endorse free-wheeling deaccessions for public art museums. Instead, it advocates legitimizing the process through public disclosure and use of the *cy pres* doctrine.

Museums in financial straits can lend legitimacy to the practice of selling artwork given to them in restrictive bequests by employing the *cy pres* doctrine. A judge's examination of the facts, particular to each case, will serve as a more beneficial regulation than authoritarian legislation that limits the board's authority to act in all situations.

Museum trustees who understand the scope of their duty to the public trust ought to be given the opportunity to exercise their judgment without overly burdensome legislation. The common law has provided a check on the museum trustee in the form of the attorney general, who may bring an action for breach of the public trust. Statutory measures of professional judgment only serve to diminish the museum trustee's ability to operate the museum to the fullest benefit of the public trust.

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