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INTRODUCTION

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WHAT is charity? The question was asked at this symposium to provoke thought about what is central to the nature or activity of organizations in the private, nonprofit sector that justifies special treatment under law and public policy. The symposium brought together a collection of people eminently qualified to explore this question and the ramifications of various answers that have been or might be proposed. Our aim was to bring together legal scholars, economists, and historians, academics and practitioners, with the idea that what each had to say, shaped by his or her particular expertise and perspective, would feed and be fed by the perspectives of the others. It is our hope that the collection of papers and commentary presented here will continue to enrich the ongoing discussion.

Where have we looked for the answer to the question that is the theme for this symposium? Where *should* we look? Should we look to what organizations which purport to be "charitable" do? Should we attempt to define a sphere of activity that is uniquely and quintessentially "charitable"? Of course, this approach begs the question. We can look to what content the law has traditionally given to the term charitable. What we find, however, is not

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especially helpful, for the law has generally spoken in terms that are themselves difficult to pin down — defining charity to “include whatever will promote, in a legitimate way, the comfort, happiness, and improvement of an indefinite number of persons.”¹

Perhaps, then, we should look to the deeper historical roots of charity, in the hope that we may find there an organizing principle or principles by which we can determine whether any particular activity or organization can be properly and consistently considered to be “charitable.” There is, of course, a substantial literature on the concept of charity, derived from philosophy, theology, and historical experience. A broad distinction emerges, for instance, between the Judeo-Christian notion of charity, or “*tzedaka*,” and the Greek idea of philanthropy. The Judeo-Christian notion is grounded in interpersonal activity through which one individual helps a less fortunate one, or more broadly, a community rallies to the aid of those of its members in need. Important contributors to moral philosophy, Maimonides prominently among them, have developed this line of thought into a theory of self-help in which there is a ladder of virtues, with the highest form of charity considered to be that which assists individuals in achieving independence and self-respect.² This notion of “*tzedaka*” is one principle that might guide the construction of law and public policy in differentiating between those activities and organizations that are worthy of special tax benefits and those that are not, and in determining which activities and organizations warrant special regulatory treatment.

The Greek idea of philanthropy is broader and less personal than that of “*tzedaka*,” although it too is closely related to the notion of community. Philanthropy, in the Greek sense, focuses on

1. *Harrington v. Pier*, 105 Wis. 485, 520, 82 N.W. 345, 357 (1900). The English Statute of Charitable Uses, St. 43 Eliz. c. 4 (1601), provides an early catalogue of activities and institutions considered “charitable,” although its list has never been considered all-inclusive. The statute’s preamble enumerated the following list of recognized “charitable” purposes:

Relief of aged, impotent, and poor people, maintenance of sick and maimed soldiers and mariners, schools of learning, free schools, and scholars in universities, repair of bridges, ports, havens, causeways, churches, seabanks and highways, education, and preferment of orphans, relief, stock or maintenance of houses of correction, marriages of poor maids, supportation, aid and help of young tradesmen, handicraftsmen, and persons decayed, relief or redemption of prisoners and captives, aid of any poor inhabitants concerning payments of fifteens, setting out of soldiers, and other taxes.

2. O’Connell, *Our Religious Heritage*, in *AMERICA’S VOLUNTARY SPIRIT* 1-4 (B. O’Connell ed. 1983)(citing J. MINKIN, *THE WORLD OF MOSES MAIMONIDES* 45-49 (1957)).

broad-scale contributions to the public infrastructure and to a society's institutions of education, culture, and other aspects of its general well-being and quality of life. The benefits of philanthropy fall broadly and without reference to specific recipients of aid.³ The Greek idea of philanthropy is another concept that might serve as a guide for tax and regulatory treatment of institutions and activities in the nonprofit sector.

But examination of history has not yet given us a satisfying answer to the question, "what is charity?" We will not find a consistent notion of charity underlying the development of the legal framework of charity in this country that will be useful for steering its further evolution, because there have been too many intertwined, and even inconsistent, forces shaping policy, law, and even the scholarly attempts to explain them.

Can we find our organizing principle in more recent history — in the official pronouncements of the Congress, the state legislatures, the courts, and the Internal Revenue Service? Looking there, we find no systematic set of rules and policies thoughtfully derived from a careful rationale. Instead, we see a pattern of benefits and regulations that resembles a crazy quilt. Perhaps that is to be expected. A look at the private, nonprofit sector reveals that the sector is far from homogeneous. While what we call the charitable organizations within the sector⁴ account for over 90% of the employment and income generated by the sector, they constitute under 60% of the total number of tax-exempt organizations.⁵ The other 40% are, in some very important ways, quite different from the charitable organizations. Many are what have come to be labeled "mutual benefit" organizations, which direct their activities and energies to the production of benefits for their own members. Perhaps because the sector is so diverse, our question tends to arise in very fact-specific contexts, where its answer will determine if an organization or activity belongs outside the nonprofit sphere or, within the sphere, outside the circle of tax-preferred charitable status. As a consequence, the focus of the inquiry and the responses to it have tended to be driven by the perception of the

3. Weaver, *Pre-Christian Philanthropy*, in *AMERICA'S VOLUNTARY SPIRIT* 5, 8-9 (B. O'Connell ed. 1983).

4. These would be the organizations which qualify for exemption under section 501(c)(3) of the Internal Revenue Code.

5. V. HODGKINSON & M. WEITZMAN, *DIMENSIONS OF THE INDEPENDENT SECTOR: A STATISTICAL PROFILE*, Tables 1-3 (Interim Update Fall 1988).

immediate problem, without reference to the larger context. In short, the legal and policy framework has not been built on a careful consideration of the question "what is charity?" Rather, it is made of a collection of responses to the question: "*this* can't be charity, can it?"

Suzanne Ross McDowell's paper in this volume addresses precisely this sort of situation. In it, she sets out to provide a careful and reasoned examination of a particular tax provision — the treatment of income from debt-financed investments of tax-exempt entities. The uncertainty and unfairness of the present rule appears to result, at least in part, from the fact that the formulation of the provision has been driven by some vague notion that this non-traditional mode of operation and support is somehow not what "charity" does — that it constitutes, at bottom, unprincipled trading on an organization's identification as charitable. Instead, McDowell suggests, we can and should construct the rule on a foundation of principled analysis. Similarly, Richard Steinberg's paper takes on the question of whether "excessive" fundraising costs somehow negate the charitable nature of the fundraising organization. Steinberg suggests that our intuitions with respect to this question may not withstand careful analysis. He proposes, then, that any attempts to regulate fundraising behavior ought to be informed by a better understanding of the real relationship between fundraising costs and practices and an organization's charity. Otherwise, by blindly following our intuitions, we run the risk of hampering exactly that charitable activity we want to promote.

The search for a coherent rationale by which at least the future directions of law and policy could be shaped has led some scholars to offer both positive and normative explanations of the charitable sector. The concepts of *tzedaka* and philanthropy both hinge on private, voluntaristic activity undertaken in areas where governmental action is a clear alternative. Government can and does provide relief and welfare services and supplies much of the infrastructure that undergirds and enhances the quality of life for the citizenry as a whole. In pure form, these are activities from which business cannot profit.⁶ As a consequence, we would not

6. Speaking generally, the effects of high transaction costs and free-rider behavior will cause the normal operation of the private, for-profit market to undersupply "public" or "collective" goods — that is, commodities which, if supplied to anyone, will necessarily benefit many others.

expect them to be supplied in the marketplace, and governmental or voluntary nonprofit initiative is required if they are to be supplied at all. A leading scholar of economic theory of the nonprofit sector has proposed a model to explain when and why we might expect government to be ineffective as a corrector of private market failures and distributional inequities.⁷ Information about some kinds of interests is likely to be more available to policymakers than information about other sorts of interests because of differences among interest groups in their ability to organize and transmit their preferences to policymakers. Furthermore, the incentives to which policymakers respond, such as reelection in the case of legislators, or rewards for success in achieving misdefined goals in the case of administrative officials, are likely to lead policymakers to pay more attention to some expressed preferences than to others. Where the information available to governmental decisionmakers or the incentives faced by decisionmakers are skewed, government will not likely be "able to take the steps required by the pursuit of the public interest in efficiency and equity."⁸ In some subset of these situations, the nonprofit, charitable sector will be the more effective vehicle for correcting market failure. Perhaps the answer to our question — what is charity? — is to be found in the accurate characterization of the sphere of activities where the nonprofit form both corrects for private, for-profit market failure and is free of the particular shortcomings which keep government, in some cases, from serving as an adequate corrector of that private market failure.

A third concept which emerges as a theme in discussions of law and policy toward the nonprofit sector is "trust." In brief, there is a broad class of goods and services that *can* be profitably provided by the business sector, but for which there is doubt that for-profit enterprises would provide, as the British say, a "fair value for money." These goods and services are ones for which the consumer is at a severe informational disadvantage, relative to the supplier, and therefore has difficulty judging the quality of the product received. In sensitive and critical areas, such as health care or care for children or the elderly, the consequences of this informational disadvantage may be dire. Hansmann⁹ and others¹⁰

7. B. WEISBROD, *PUBLIC INTEREST LAW: AN ECONOMIC AND INSTITUTIONAL ANALYSIS* 30-41 (1978).

8. *Id.* at 31.

9. Hansmann, *The Role of Nonprofit Enterprise*, 89 *YALE L.J.* 835 (1980).

argue that while profit-making businesses have direct financial incentives to exploit informational advantages over the consumer, nonprofit institutions, because they cannot distribute profits to owners or managers, have no such incentive. Partly because of this lack of incentive to exploit informational advantages, nonprofits are seen to be more "trustworthy" and therefore deserving of special consideration under law and public policy, at least where alternative institutional mechanisms such as professional licensure, direct regulation of business, or direct governmental supply are less effective.

In the United States, all three traditions and concepts — *tzedaka*, philanthropy, and fiduciary responsibility — are strongly ingrained and intermixed. Is this triad of ideas — charity, philanthropy, and trust — sufficiently powerful to allow a defensible and operational rationale for public tax preference and regulation to be built upon them? Judging by the debates captured within the papers in this volume, the question remains open.

What is charity? Often, the answer is tied to some overarching notion of public benefit or public good. That much is easy — pursuit of public benefit is integral to our oldest and most basic ideas of charity. What is more difficult is that very specific, and not necessarily consistent, ideas about what constitutes the public interest often drive our decisions about how to treat organizations which purport to pursue it. Those ideas are often built on agreement or disagreement with a particular vision of the public good or on generalized notions about the inherently charitable or non-charitable nature of the means used to pursue that vision.

Our regulation of political advocacy by tax-exempt, charitable organizations provides a good example. The law restricts advocacy by certain kinds of nonprofit organizations and limits the tax benefits available to those which engage in advocacy work, especially lobbying. Legislative, administrative, and judicial formulations of various aspects of these limits have tended to reflect implicit and often inconsistent conclusions about the charitability of particular viewpoints, or about the noncharitability of particular means of achieving admittedly charitable ends. The unsatisfying state of the law in this area reflects, perhaps, not so much a ten-

10. See, e.g., Ellman, *Another Theory of Nonprofit Corporations*, 80 MICH. L. REV. 999 (1982); Nelson & Krashinsky, *Two Major Issues of Public Policy: Public Policy and Organization of Supply*, in PUBLIC POLICY FOR DAY CARE OF YOUNG CHILDREN 47 (R. Nelson & D. Young eds. 1973).

dency to arrive at wrong answers as the impossibility of arriving at an acceptable and consistent solution to a question that has not been properly formulated. Is advocacy in the public interest? Is it consistent with notions of charity, philanthropy, and trust? Does the answer depend on what is being advocated? Is advocacy of antivivisection in the public interest? Gay rights? Pro-life? Pro-choice? Welfare reform? There is no way to arrive at a consensus as to whether successful advocacy in these areas would benefit the public. One possible response is to ban advocacy activity altogether, which we have come near to doing, since we cannot tell "good" advocacy from "bad" advocacy. But perhaps in this context we need yet another concept of charity. In this context, it would make sense to focus on breadth of support — to define charity as any vision, within the broad outlines of tzedeka and philanthropy, which attracts enough voluntary support to give us some assurance that the organization's viewpoint is not simply a reflection of narrow, private interests.¹¹ This approach is consistent with Weisbrod's observation that the form in which a non-profit organization receives its revenue is a useful proxy measure of the "degree of collectiveness" of the organization's activities, with a high proportion of contributions, gifts, and grants, as compared to dues and sales, indicating that the organization is probably providing collective goods of the sort that the private marketplace can be expected to undersupply.¹² Certainly, Charles Clotfelter's observations about the distorting effects of our tax treatment of charitable contributions and Richard Steinberg's analysis of the effects of donor information and fundraising costs take on a critical importance if we decide that an ability to attract broad, voluntary public support is the organizing principle behind the concept of charity, at least for some purposes.

"For some purposes" — perhaps that is the key. Ultimately, it is fruitless to approach the question, "what is charity?" without first addressing the question, "why do you ask?" That question is implicit in the second half of the symposium title, "Implications for Law and Policy." As we consider ways to improve upon the patchwork, ad hoc legal framework that currently defines and reg-

11. For a more complete discussion of this idea, see Chisolm, *Exempt Organization Advocacy: Matching the Rules to the Rationales*, 63 IND. L.J. 201 (1987).

12. Weisbrod, *Private Goods, Collective Goods: The Role of the Nonprofit Sector*, in *THE ECONOMICS OF NONPROPRIETARY ORGANIZATIONS* 139 (K. Clarkson & D. Martin eds. 1980).

ulates charity, we would do well to identify carefully just what we are trying to accomplish with our regulations and determine, as best we can, whether a particular choice will likely move us toward or away from our larger policy goals.

We must ask, "what is charity?" because the concept of charity is useful in defining the boundaries between the private, nonprofit sector and the rest of the economy — that is, from business and government — and also for making distinctions within the nonprofit sector itself. The boundaries must be drawn and the distinctions made, if we are to tailor our tax and regulatory treatment to best accomplish our social goals. And, as Michael Hone suggests in his paper, only if we ask what our purpose is in seeking to characterize an organization or an activity *this time* can we hope to arrive at an answer with any functional value at all. The question — "what is charity?" — may call for a very different answer when it is asked for purposes of devising a justifiable scheme for regulating charitable fundraising solicitation than when the same question is asked in the context of working out the dimensions and details of charitable tax exemption. And as Henry Hansmann points out, we ought to be sure to separate in our minds two questions which are too often inappropriately tangled; "what is charity?" is distinct from "what is nonprofit?" and it is essential to bring the right inquiry to bear on any given policy formulation. Michael Hone explains why the proposed Revised Model Nonprofit Corporation Act, to which he was a major contributor, provides separate organizational categories for charitable and noncharitable nonprofit organizations. Henry Hansmann takes another view, maintaining that it makes sense to distinguish between charity and non-charity as we construct fiscal and regulatory law, but that organizational law need not ask or resolve that issue. He argues that organizational law is better constructed on the broader definitional base of "nonprofit."

There has been, to date, precious little systematic analysis to guide the formulation of law and policy. Evaluation of the effectiveness of existing provisions must rely, at best, on comparisons of arrangements that have occurred serendipitously, without overall design. And, as Charles Clotfelter ably demonstrates in his paper in this collection, the policy instruments by which we have sought to promote the objectives of charity in its various manifestations do not have clean, singular impacts, but rather a variety of sometimes conflicting effects which may work at cross purposes.

The papers that compose this volume delve deeply into the

intricacies of the present policies and alternative proposals surrounding tax exemption and regulation of nonprofit organizations. As the authors explore various corners of the complicated legal framework that presently defines and regulates charity, underlying and informing their inquiries and conclusions are explicit and implicit responses to the question, "what is charity?" The papers and the discussions that follow from them fail to reach consensus on the meaning of charity or on the definitive merit of particular policies or proposals. They reflect the difficulty of using traditional concepts of charity, philanthropy, and trust to unequivocally classify organizations and activities into those worthy or not worthy of tax preference, appropriate or not appropriate for special regulatory treatment. Rather, they suggest that some new ways of thinking about these old and venerable subjects may be appropriate. The law of nonprofits is yet a young discipline. We hope that these essays open some doors to new and renewed attention by the best of thinkers in the future.

