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Introduction

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CHICAGO-KENT SYMPOSIUM: *WHO GUARDS THE GUARDIANS?:
MONITORING AND ENFORCEMENT OF CHARITY GOVERNANCE*

INTRODUCTION

DANA BRAKMAN REISER* AND EVELYN BRODY**

This symposium comes at a historic time for charities. The U.S. Senate Finance Committee is spearheading a review of federal tax exemption and deductibility rules, and mulling various reforms that would greatly expand federal power over charities and their fiduciaries and employees.¹ The Committee staff released a discussion draft outlining a huge number of potential legal reforms last summer,² and its leadership has called on the nonprofit community to offer constructive responses and suggestions to improve any potential legislation.³ The Joint Committee on Taxation followed up with an analysis of some of these proposals—and made some additional ones—in January 2005.⁴ States also are showing interest in stepping up their charitable enforcement roles. Some legislatures have considered sweeping reforms of nonprofit corporate law,⁵ and attorneys general and courts in these states and others have been deploying their enforcement and oversight powers over nonprofit corporations and charitable trusts to address perceived problems of accountability in the charitable sector.⁶

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1. See Letter from Senators Charles E. Grassley & Max Baucus, Chairman and Ranking Member of the U.S. Senate Committee on Finance, to Diana Aviv, President and CEO of Independent Sector 2 (Sept. 22, 2004) [hereinafter SFC Letter to Independent Sector], available at <http://philanthropy.com/free/update/2004/09/finance.pdf>. For the Independent Sector's response, see <http://www.nonprofpanel.org>.

2. STAFF OF SENATE COMM. ON FINANCE, 108TH CONG., STAFF DISCUSSION DRAFT (2004), available at <http://finance.senate.gov/hearings/testimony/2004test/062204stfdis.pdf>.

3. See SFC Letter to Independent Sector, *supra* note 1.

4. See STAFF OF THE JOINT COMM. ON TAXATION, JCS-02-05, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES (Jan. 27, 2005) [hereinafter JOINT COMM. ON TAXATION], available at <http://www.house.gov/jct/s-2-05.pdf>.

5. See The Nonprofit Integrity Act, 2004 Cal. Stat. ch. 919 (as signed by governor Sept. 29, 2004), available at http://www.leginfo.ca.gov/pub/03-04/bill/sen/sb_1251-1300/sb_1262_bill_200-40930_chaptered.pdf; S.B. 4836-B, 226th Leg., Reg. Sess. (N.Y. 2004); Office of the Massachusetts Attorney General Tom Reilly, An Act to Promote the Financial Integrity of Public Charities: Draft 1.0, available at <http://www.providers.org/Charities%20Fin%20Integrity%20Legis%20Jan%2004.pdf>.

6. See Grant Williams, *Making Philanthropy Accountable*, CHRON. PHILANTHROPY, June 26, 2003, at 23 (quoting New York Attorney General Eliot Spitzer citing “the failure of boards to properly

This upsurge of reform and enforcement activity appears to stem largely from concerns about media accounts of scandals in charities of all sizes, types, and pedigrees.⁷ Although charity leaders may argue that these accounts identify outliers and concern over them is exaggerated,⁸ the stories appear to have taken hold of the political imaginations of certain vital players in charity regulation and enforcement. Thus, the sector and its scholars ignore them at their peril.

This symposium, which was held at Chicago-Kent College of Law on September 10, 2004, brought together leading scholars and practitioners of charity law to share their thoughts on emerging issues of governance and enforcement, and to place them within important historical and comparative contexts.⁹ Many of the speakers' comments elicited lively debate, thanks largely to Marion Fremont-Smith¹⁰ and Harvey Dale,¹¹ our extremely experienced and thoughtful invited commentators. We also were fortunate to have the participation of a large audience of additional scholars, regulators, practitioners from within organizations and from law firms, and charity leaders and managers. The articles included in this issue profited greatly from this discussion, and will form part of the scholarly backdrop for the creation and critique of ongoing charity reform efforts. The symposium articles fall broadly into two groups. The first group focuses on current trends and questions relevant to charity enforcement in the United States. In doing so, they draw on and describe many of the legal sources relevant in crafting and enforcing effective charity regulation. The second group of articles offers the perspective needed to contextualize the ongoing domestic debates about charity enforcement, drawing on the modern and historical experiences of charity law reform in other countries.

fulfill their fiduciary duty" as his "greatest concern" and reporting that his office was pursuing dozens of investigations into fiduciary misconduct); Stephanie Strom, *Strong Arm-Shaking of Charities Raises Ethics Qualms*, N.Y. TIMES, May 11, 2003, at 22 (noting efforts by attorneys general in Minnesota, Pennsylvania, and Illinois to secure changes of directors and trustees of nonprofits whose practices they have investigated and criticized).

7. See, for example, a series of eight articles published in the *Boston Globe* between October and December 2003, cited in JOINT COMM. ON TAXATION, *supra* note 4, at 274 n.587.

8. See, e.g., Marion R. Fremont-Smith, *Pillaging of Charitable Assets: Embezzlement and Fraud*, 46 EXEMPT ORG. TAX REV. 333 (2004); Marion R. Fremont-Smith & Andras Kosaras, *Wrongdoing by Officers and Directors of Charities: A Survey of Press Reports 1995-2002*, 42 EXEMPT ORG. TAX REV. 25 (2003).

9. The editors and participants greatly appreciate the efforts of the *Chicago-Kent Law Review* in organizing the on-site symposium and in editing these contributions.

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I. CHARITY GOVERNANCE AND ENFORCEMENT REFORM IN THE U.S.

The law regulating charities in the United States today is a complicated blend and balance of many different legal sources.¹² Federal tax law has a substantial effect on most charities, as they seek to keep their activities within the requirements for maintaining exemption from taxation and the deductibility of their donors' contributions.¹³ Nevertheless, state law regulates much of charities' internal affairs and defines the obligations of their leaders.¹⁴ This state law also comes from various sources. Trust law concepts sometimes regulate the affairs and obligations of charities and fiduciaries.¹⁵ In other circumstances, nonprofit corporate law provides the relevant standard.¹⁶ Because nonprofit corporate law is generally of relatively recent vintage and there are few court precedents applying it, for-profit corporate law also can provide useful analogues.¹⁷ These varying authorities are not neatly directed to distinct aspects of charitable activity, providing a clear and comprehensive set of regulations. Rather, they are simultaneously competing and complementary; sometimes they overlap, other times they leave disturbing gaps. Each of the four U.S.-focused papers in this symposium draws on these multiple sources of charity law, and takes up the challenge of offering assistance to the charity enforcers and reformers who must deploy and balance them.

Dana Brakman Reiser's article analyzing recent proposals for charity reform legislation demonstrates the influence of for-profit corporate law on

12. See MARION R. FREMONT-SMITH, GOVERNING NONPROFIT ORGANIZATIONS 43-115 (2004) (tracing the development of charitable trust, charitable and nonprofit corporate, and federal tax law to regulate nonprofit organizations in the United States, from the founding to the present); Evelyn Brody, *The Legal Framework for Nonprofit Organizations*, in THE NONPROFIT SECTOR: A RESEARCH HANDBOOK (Walter W. Powell & Richard S. Steinberg eds., 2d ed.) (forthcoming 2005) (Nov. 2004 draft at 4-7, on file with authors) (describing the breadth of sources from which the "law of nonprofit organizations" is comprised).

13. See, e.g., I.R.C. § 501(c)(3) (West 2004) (stating the requirements for exemption from federal income taxation as a charitable, religious, educational, scientific, or literary organization or one testing for public safety, fostering national or international amateur sports competition, or the prevention of cruelty to children or animals); *id.* § 170 (permitting a taxpayer to take a deduction for a "charitable contribution" and defining this term).

14. See Brody, *supra* note 12, at 4 ("[S]ubstantive nonprofit law is a State concern, with differences occurring across states.").

15. See, e.g., 760 ILL. COMP. STAT. 55/15 (2004) (defining the duties of charitable trustees).

16. See, e.g., MISS. CODE ANN. §§ 79-11-151, 79-11-293 (2004) (describing the powers of nonprofit corporations and stating the general prohibition against such corporations making distributions, respectively).

17. See, e.g., *Stern v. Lucy Webb Hayes Nat'l Training Sch. for Deaconesses & Missionaries*, 381 F. Supp. 1003, 1013 (D.D.C. 1974) (mem.) (noting the modern trend of applying corporate law principles in determining the liability of directors of charitable corporations).

the creation and enforcement of charity law.¹⁸ She focuses on the disclosure model of regulation that these charity reforms adapt from for-profit sources, particularly the federal Sarbanes-Oxley Act passed in response to the corporate and accounting scandals of the early 2000s.¹⁹ Starting just months after Sarbanes-Oxley's enactment, legislators began considering proposals for charity reform legislation incorporating pivotal components of the federal law.²⁰ As in Sarbanes-Oxley, these proposals would require charity officers to certify the accuracy and reliability of financial reports.²¹ They also follow the federal statute's reliance on auditing to improve accountability.²² Brakman argues that each of these reforms seeks to enhance charitable accountability by increasing the quantity or trustworthiness of charity disclosures, and that this emphasis is flawed.

Brakman's critique highlights the differences between the context in which charities operate and the for-profit corporate arena, from which the various proposals she describes are drawn. Notably, Sarbanes-Oxley applies, in general, only to publicly traded companies and not to the millions of smaller businesses. As in the business world, most charities are small; moreover, many rely on volunteer labor. Brakman warns that significant new disclosure mandates may force charities to choose between legal compliance and delivering vital services.²³ Brakman identifies the lack of enforcement resources available in the charitable context as an even more serious obstacle to the success of disclosure-based charity reform legislation. The paucity of resources for charity enforcement is a well-known and long-standing problem. She argues that improving charity disclosures cannot enhance enforcement unless funding is provided to build regulators' capacity to review and act on disclosed information.²⁴ Further, she observes that powerful private enforcement mechanisms available to monitor and act on for-profit disclosures simply do not have analogues in the charitable context.²⁵

Brakman concedes that the problem of compliance burdens may be diminished by tying disclosure obligations to organizational size or wealth,

18. Dana Brakman Reiser, *There Ought to Be a Law: The Disclosure Focus of Recent Legislative Proposals for Nonprofit Reform*, 80 CHI.-KENT L. REV. 559 (2005).

19. *See id.* at 568–76.

20. *See id.* at 562–68.

21. *See id.* at 569–72.

22. *See id.* at 573–76.

23. *See id.* at 586, 591, 594, 597.

24. *See id.* at 597–601.

25. *See id.* at 601–05 (noting the lack of private enforcers akin to shareholders, research analysts, or class action plaintiffs' attorneys in the nonprofit context).

which many of the recent reform proposals attempt.²⁶ Yet, she argues that the absence of enforcement resources can only be dealt with by significant investments in enforcement infrastructure, which none of the recent proposals offers.²⁷ Thus, she recommends that charity reformers abandon their quest for greater disclosure, at least until a far greater level of enforcement of existing law can be achieved.²⁸ If this about-face is politically untenable, she argues that recent disclosure reforms could be improved by focusing on mandating processes for producing and vetting organizational information, rather than on enhancing disclosure outputs.²⁹ Such efforts at least would direct those within charitable organizations to obtain and act on information suggesting neglect or malfeasance.

Norman Silber's article explores another crucial balance in charity law—that between the legal authority of federal and state actors charged with enforcing the responsibilities of charities and their fiduciaries.³⁰ To lay the foundation for his argument, Silber recounts two disturbing stories of nonprofit actions that neither authority rushed to address,³¹ and sketches two potential accounts of how state and federal regulators might be apportioning authority for charity enforcement. He notes that at one time, a rough division of labor was seen to exist, in which state attorneys general would concentrate on enforcing the obligations of charity fiduciaries, while officials of the federal Internal Revenue Service would police access to tax exemption and deductibility.³² Silber identifies an additional gloss on this apportionment of authority, whereby federal authorities tend to take the lead in regulating private foundations, and states direct greater attention to public charities.³³

The main point of Silber's article, however, is to debunk the myth of a division of labor, by demonstrating instead the significant overlap in state and federal enforcement authority. He calls this phenomenon the "inter-jurisdictionality" of charity enforcement. State regulators can target a con-

26. *See id.* at 586, 592, 594–95, 597.

27. *See id.* at 598–601. Although federal tax proposals suggest authorizing new funds to facilitate charity enforcement, the Senate Finance Committee lacks the power to secure this funding on its own. *See id.* at 600–01 (describing the disappointing history of attempts to secure additional enforcement resources directed to the Internal Revenue Service Exempt Organizations Division). If such funding is not forthcoming, the proposals suggest fees levied on exempt organization filers as an alternative source of resources; Brakman questions whether such a funding strategy is likely or wise. *See id.* at 601.

28. *See id.* at 607.

29. *See id.* at 606–11.

30. Norman I. Silber, *Nonprofit Interjurisdictionality*, 80 CHI.-KENT L. REV. 613 (2005).

31. *See id.* at 613–17 (relating suspect uses of charitable funds at the Citizenship Education Fund and conflicted investment decisions at the Kenneth and Linda Lay Family Foundation).

32. *See id.* at 618, 624.

33. *See id.* at 624–25, 636.

flict of interest by a charitable fiduciary by threatening or prosecuting an action for breach of the duty of loyalty or failure to comply with statutory disclosure requirements. These same transactions might well be ripe for federal enforcement actions under tax law prohibitions on self-dealing in private foundations or the conferral of excess benefits on the insiders of public charities.³⁴ Likewise, Silber reports that both state and federal regulators have authority to challenge lobbying or other political activities by nonprofit entities,³⁵ and that both impose procedures for proper dissolution.³⁶ Silber's analysis demonstrates that the wrongs addressed by state and federal charity regulators substantially coincide, even if the legal forms of action they may take to remedy them vary.

In addition to revealing a more complicated matrix of charity enforcement, Silber articulates the potential for mischief that interjurisdictionality creates. When remedial authority over a perceived wrong by a charity or its leaders exists in two places, the possibility of double penalties looms.³⁷ If the perception arises that the potential penalties for missteps by charities are excessive, the desire of well-intentioned parties to participate in charitable activities may be chilled. Even more damaging, however, is the opposite possibility—the penchant Silber identifies for each potential regulatory authority to assume or assert that the other will take the lead, resulting in a gap in charity enforcement.³⁸

Finally, Silber warns that recent charity reform proposals would magnify the current interjurisdictionality phenomenon. Proposals by the staff of the U.S. Senate Finance Committee would greatly extend the authority and involvement of federal tax officials in charity governance issues once dominated by state regulators, by instituting continuing periodic reviews of exempt organizations' activities and performance.³⁹ The proposals also recommend an expansion of state authority into traditionally federal realms, by empowering state charity officials directly to enforce more federal tax rules and by authorizing greater information-sharing between state and federal regulators.⁴⁰ Allowing regulators to share information and achieve economies of scale might improve the overall level of enforcement in a political environment where a significant infusion of funding is

34. See *id.* at 625 & chart 2 (citing I.R.C. §§ 4951, 4958).

35. Compare *id.* at 622–23 chart 1, with *id.* at 625–26 chart 2 (citing I.R.C. §§ 501(c)(3), 501(h), 4911, 4912, 4945).

36. Compare *id.* at 622–23 chart 1, with *id.* at 625–26 chart 2.

37. See *id.* at 636–38.

38. See *id.* at 617–18.

39. See *id.* at 628–29.

40. See *id.* at 629–30.

unlikely. Yet, Silber calls for reformers to allocate clear and enforceable spheres of authority between state and federal regulators.⁴¹ Failure to do so, Silber's article cautions, risks unwittingly enabling regulators at both levels of government to sidestep their charitable enforcement responsibilities.

Evelyn Brody's article draws out another set of the multiple legal influences that impact charity law: trust law and corporate law.⁴² U.S. charities have (at least) two options for their legal form, the nonprofit corporation and the charitable trust.⁴³ This choice could have significant consequences if the use of trust or corporate law to govern a charity's internal operations and the obligations of its fiduciaries would result in the application of widely divergent standards. Brody's article examines the content of charitable trust and nonprofit corporate law standards on a range of important issues facing charities to measure and illuminate the real differences between these vaunted legal categories.

Brody's work reveals that choice of form is not destiny for charitable organizations. She notes the widespread acceptance that trust and corporate law standards are substantively identical in a considerable range of circumstances.⁴⁴ These include the standards of behavior required by charitable fiduciaries (converging on the corporate standard);⁴⁵ the process for modifying an outmoded use of a gift made for a restricted charitable purpose (converging on the trust standard);⁴⁶ and the relevant supervisory and regulatory regimes.⁴⁷ On a few key issues, however, Brody reports that the trust and corporate form have certain irreducible differences. Notably, trust law remains distinct in the ability of the settlor to assign differing duties to trustees of a trust having multiple trustees (and absolving those trustees not

41. *See id.* at 638–39.

42. Evelyn Brody, *Charity Governance: What's Trust Law Got to Do with It?*, 80 CHI.-KENT L. REV. 641 (2005).

43. *See id.* at 646 & n.12 (noting these two principal forms of organization available to charities, but recognizing that an unincorporated association is also an option, and that other forms may rise in popularity over time).

44. *See id.* at 648–49 (drawing on the current draft of the Restatement (Third) of Trusts and drafts she is preparing for the American Law Institute as Reporter of its project on Principles of the Law of Nonprofit Organizations).

45. *See id.* at 651–55. While corporate law default rules for fiduciaries are more relaxed, Brody reports that it has become easy for trust settlors to draft trust documents to achieve corporate level fiduciary responsibility and to function like a corporate board. *See id.* at 655–60, 665–68.

46. An open issue is the extent to which the trust "cy pres" rules apply to a nonprofit corporation that is changing its charitable purposes.

47. Both a co-trustee and a co-director may initiate suit against a co-fiduciary for breach of fiduciary duty (although the obligation to do so is largely unsettled). In the absence of such a suit, however, both charitable trusts and corporations will be monitored and policed by state attorneys general and the federal IRS. *See id.* at 672–73.

assigned particular duties); by contrast, all directors of a nonprofit corporate board are equally responsible for participating in oversight.⁴⁸

With this more accurate depiction of the consequences of organizational form as background, Brody turns from form to function. The idea of a charitable trust may bring to mind an organization managed by a small, insular group, with fewer opportunities for monitoring and enforcement by other constituencies. Yet, it is the small managing group, rather than the status of the organization as a charitable trust, that recommends imposing on fiduciaries a heightened duty to challenge missteps by their colleagues.⁴⁹ In contrast, an incorporated charity may suggest an entity organized and operated by more formal processes, with a larger governing group and greater potential for monitoring and enforcement by dissidents or outsiders. It is the fact of such a larger governing team, rather than the corporate form, that makes it sensible to place reliance on committees or review by subgroups of independent fiduciaries. At the same time, too large a board invites free-riding and lack of involvement, with attendant concentrations of power in an executive committee or even a shift in power to management.⁵⁰

Ultimately, Brody's work questions whether significant legal consequences should continue to be tied to choice of organizational form or whether some other trigger would be more appropriate. If charity law uses organizational form merely as a proxy for certain structural characteristics, perhaps it would be more sensible to link those characteristics to the relevant legal rules and restrictions.⁵¹ Moreover, she reminds us, to the extent trust and corporate law remain different and organizational form remains the determinative factor, it permits well-counseled charity founders to choose the content of the law that binds them.⁵²

Robert Katz's article, exploring how and by what means the mission of a charity should be allowed to change over time, also addresses the blending and balancing of charitable trust and nonprofit corporate law.⁵³ Trust law has long offered a single, and rigid, answer to the question of how the mission of a charity can be transformed: by application to and

48. *See id.* at 662–64.

49. *See id.* at 676–77.

50. *See id.* at 662–72.

51. *See id.* at 686–87.

52. *See id.* at 685–86.

53. Robert A. Katz, *Let Charitable Directors Direct: Why Trust Law Should Not Curb Board Discretion over a Charitable Corporation's Mission and Unrestricted Assets*, 80 CHI.-KENT L. REV. 689 (2005).

authorization by a court in an action for cy pres.⁵⁴ Strict cy pres cases severely limit the circumstances in which such a change in a charity's purpose can be made to only those situations where serving the intent of the donor of a charity's funds is no longer possible or extremely impracticable.⁵⁵ Further, in a traditional action for cy pres, the court directs its attention back to the intent of a charity's original founders and will permit only incremental change in a charity's purpose, in the hopes of continuing to serve that original intent as nearly as possible.⁵⁶ In Katz's principal/agent framework, charitable trust law sees the founder of a charity as a powerful and primary principal, whose wishes must be carefully protected even against the wishes of its beneficiaries.⁵⁷

In contrast, nonprofit corporate law has at times been interpreted to offer a more flexible route to changes in charitable purpose or mission. Incorporated charities could be required to petition a court to change their purposes, and courts could demand as much fidelity as possible to the original intent described in their founding documents. Yet, cases and commentators have often taken a different approach, stating that in a charitable corporation, governance mechanisms may be used to authorize a broad range of changes to mission.⁵⁸ A vote by such a charity's board of directors or its members, if any, may provide legal shelter to even far-reaching changes in charitable purposes.⁵⁹

Without disturbing the application of trust law's cy pres requirements to charitable trusts or restricted gifts, Katz asks what model should be applied to the charitable corporations funded by unrestricted gifts or earned revenue. "Trust law parallelism" could be imposed on these charities, regardless of the organizational form they take, whereby changes in mission could be permitted only upon leave from a court and only for small deviations from the charitable purposes identified by their charters.⁶⁰ Alternatively, if "corporate law parallelism" were applied, mission change could proceed by more flexible means, permitting even extreme changes in mission upon a valid vote of directors or members.⁶¹

Katz argues in favor of corporate law parallelism and asserts that the evolution of a charity's mission should remain linked to the organizational

54. *See id.* at 695–96.

55. *See id.*

56. *See id.*

57. *See id.* at 710–14.

58. *See id.* at 696–97.

59. *See id.* at 697.

60. *See id.* at 691–92.

61. *See id.* at 696–98.

form its founders select. If a charity's founder chooses to settle a trust, the court-authorized *cy pres* model should apply unless alternative arrangements are set forth in the trust documents.⁶² But, if a charity's founder instead opts to incorporate, governance systems alone should be available to transform mission, limited only by any additional restrictions imposed in the articles and bylaws.⁶³ For Katz, linking the required process for mission transformation to organizational form respects the contributions of charity founders by delegating to them the choice between two different levels of mission protection.⁶⁴ Preserving the distinction based on organizational form can also reduce the transaction costs of designing an entity with the desired level of protection, at least for those founders sophisticated enough to understand the consequences of their choice.⁶⁵ Moreover, Katz argues that this dual system will produce benefits for society even when founders are unaware of the impact of their decision on form. When combined with the current tendency of charities funded by earned revenue or unrestricted gifts to incorporate, a default rule for charitable corporations that permits broad changes in mission without court interference will allow the charitable sector to evolve more easily to meet changing societal needs.⁶⁶

The contributions of Brakman, Silber, Brody, and Katz demonstrate the broad range of legal sources relevant to U.S. charities, as well as the challenge this variety of sources presents for reformers. The multiplicity of sources provides abundant source material and models for crafting better charity regulation. Yet, this patchwork of authority creates an intricate and interwoven system of regulation that resists simple solutions. By delving into these sources, their overlaps, and gaps, these contributions offer insights on the utility of various sources of law for solving the problems of governance and enforcement facing the charitable sector.

II. HISTORICAL AND COMPARATIVE PERSPECTIVES ON CHARITY GOVERNANCE AND ENFORCEMENT

The second group of articles in the symposium reminds us that the United States is far from unique in facing challenges in monitoring and policing the responsibilities of charities and their leaders. The historical

62. *See id.* at 715.

63. *See id.* at 715-16.

64. Katz reminds us that even if founders of charitable corporations often do not donate personal financial assets in order to establish their organizations, their contributions of time, energy, and creativity are vital to their nonprofits' ultimate success. *See id.* at 714-15.

65. *See id.* at 715.

66. *See id.* at 718-21.

background and comparative information presented by these contributions provide additional guidance for potential reformers of charity governance and enforcement.

James Fishman's article details England's attempts to secure greater accountability from its charities during the nineteenth century.⁶⁷ At the beginning of this "age of reform,"⁶⁸ the sole legal vehicle to address the misuse of a charity's assets or other missteps of its leaders was a suit in Chancery Court.⁶⁹ This method of securing charitable accountability, however, was far from satisfactory. Navigating Chancery had become complex and slow, due in part to its own rules and in part to inadequate staffing.⁷⁰ A few attempts at reforming Chancery resulted in some success, particularly those reforms instituted by Sir Henry Brougham. Ultimately, however, Brougham understood the problem was beyond Chancery's capacity to solve, and he convinced Parliament to organize a new institution with a mandate to inquire into and report on the activities of England's charities.⁷¹ Thus was born the Brougham Commission; by mid-century, Parliament established a permanent Charity Commission.⁷²

Fishman explains that this Charity Commission and its predecessor achieved some victories, but also experienced significant frustrations. License to reorganize and reform some charities, without the need to obtain time-consuming and costly court approvals, Fishman observes, enhanced the Commission's effectiveness.⁷³ In many respects, however, the hands of the Commission were tied by its lack of authority.⁷⁴ The Commission was not empowered to initiate reform in charities with more than a modest income; it never obtained authority to audit charities' books without leave from Chancery; and it never was given the power of *cy pres*.⁷⁵ To make matters worse, at times the Commission was delegated responsibility for extraordinarily controversial reforms, for which it had inadequate powers, resources, or political capital to implement.⁷⁶

67. James J. Fishman, *Charitable Accountability and Reform in Nineteenth-Century England: The Case of the Charity Commission*, 80 CHI.-KENT L. REV. 723 (2005).

68. *Id.* at 724.

69. *See id.* at 726.

70. *See id.* at 726–28.

71. *See id.* at 731–36.

72. *See id.* at 736–44.

73. *See, e.g., id.* at 752–57 (describing the Charity Commission's successes in reforming the City of London charities).

74. *See id.* at 747–49.

75. *See id.* at 771–74.

76. *See, e.g., id.* at 762–70 (reporting the often severe criticisms the Charity Commission faced when it was tasked with tackling educational reform).

Fishman's discussion of the successes and pitfalls of England's nineteenth-century attempts to regulate charities offers important lessons as today's leaders attempt to craft better charity monitoring and enforcement mechanisms. He reminds us that adequate resources and authority are necessary, though not sufficient, conditions for effective charity regulators.⁷⁷ In addition to these vital ingredients, successful charity regulation requires realistic expectations and political support for achieving them.⁷⁸

Debra Morris's article, in contrast to Fishman's historical treatment, analyzes current proposals to reform charity regulation in the United Kingdom.⁷⁹ The Prime Minister's Strategy Unit published a report in September 2002 analyzing the existing framework for regulation of charities in England and Wales and making a series of recommendations for change.⁸⁰ After a period of public comment, the government issued its response, accepting most of the Strategy Unit's suggestions.⁸¹ Some of these changes already have been implemented administratively or through private means.⁸² Others await parliamentary action.⁸³

Morris focuses on two strains of reform recommended by the Strategy Unit: improving the accountability and transparency of the charitable sector in England and Wales and implementing "independent, open, and proportionate regulation."⁸⁴ The pursuit of accountability through transparency took a variety of forms in the Strategy Unit's proposals. Some recommendations involved reform of disclosure practices: existing disclosure documents should be revised to be more comprehensible; new disclosure documents tailored to lay review should be mandated; and public access to documents filed with the Charity Commission should be enhanced.⁸⁵ In addition, the Strategy Unit suggested improvements in fund-raising over-

77. *See id.* at 771-76.

78. *See id.* at 774-78.

79. Debra Morris, *New Charity Regulation Proposals for England and Wales: Overdue or Overdone?*, 80 CHI.-KENT L. REV. 779 (2005).

80. *See id.*

81. *See id.* at 784-85.

82. *See, e.g., id.* at 791-93 (describing the government's March 2003 deal with GuideStar UK to create and post on the internet a common base of information on the "finances, activities, and achievements of UK charities"); *id.* at 795 (reporting the adoption of the Strategy Unit's proposed measures to improve accountability and public confidence in fundraising through the Home Office's approval of the private Institute of Fundraising to develop self-regulation and provide oversight).

83. *See id.* at 799-800 & n.99 (noting that the Charities Bill recently before the House of Lords would not be passed due to the impending dissolution of Parliament).

84. *Id.* at 785.

85. *See id.* at 785-93.

sight and protections for charity trustees and their advisors, who might shrink from serving or whistleblowing for fear of personal liability.⁸⁶

The Strategy Unit's suggestions for improving regulation looked mainly to reforming the Charity Commission, perhaps most significantly by clarifying and focusing the reach of its authority.⁸⁷ Yet, apropos of a symposium on "guarding the guardians," Morris points out that the Strategy Unit also proposed improving regulation by increasing the transparency and accountability of the Charity Commission itself.⁸⁸ Suggestions along these lines included increasing the diversity of the Commission's board and the openness of its operations, and establishing a process for appeals of Commission decisions.⁸⁹

Morris views most of these proposals favorably, to a point. She approves of greater disclosure by charities, so long as legislators and regulators remain cognizant of the costs that disclosure mandates will impose and the need for charity disclosure documents to be sensitively devised.⁹⁰ Therefore, she urges reformers to continue to focus their disclosure efforts on larger charities, where she perceives a higher risk of scandal—both in terms of charitable assets potentially lost and the possible resulting damage to public confidence in the charitable sector.⁹¹ Further, she cautions against imposition of a disclosure system that merely mimics the one covering business organizations by focusing exclusively on financial data without reporting impacts, the true measure of charities' success.⁹² Morris's critiques resonate with those of her American colleagues.

Despite her support for many of the changes to charity regulation currently under consideration, however, Morris insists that the role of law in promoting charitable accountability must always be a small, if supporting, one.⁹³ In the heterogeneous and independent charitable sector, she argues that improving accountability requires the acceptance and action of charities themselves.⁹⁴ Therefore, although facilitating greater transparency and improving charity regulation are worthy goals, she asserts that government

86. *See id.* at 793–96.

87. *See id.* at 796–99. Proposals included raising the income threshold that triggers registration requirements, as well as rationalizing the various exceptions to and exemptions from current charity registration requirements, in an effort to ensure that basic information on all charities would be collected and maintained. *See id.* at 798–99.

88. *See id.* at 796–97.

89. *See id.*

90. *See id.* at 800–02.

91. *See id.*

92. *See id.* at 802.

93. *See id.* at 782–84, 802.

94. *See id.* at 784, 802.

can best promote charitable accountability by helping charities to build their own capacity to self-regulate, rather than by prescription.⁹⁵ Her insights surely apply across cultures, reflecting the universal desire to foster greater accountability of charities without threatening their flexibility and innovation.

Mark Sidel's article picks up this thread by exploring and evaluating several models of charity self-regulation currently in use in Asia, and drawing lessons for the United States.⁹⁶ Sidel reports that the charitable sectors in India and the Philippines have experienced a range of self-regulatory efforts. Indian and Philippine groups have been producing aspirational codes of conduct for their charitable sectors for the past fifteen years.⁹⁷ Sidel also demonstrates how an emerging set of associational entrepreneurs in these nations is driving efforts to improve the level of compliance with accountability standards. In what Sidel terms "intranet self-regulation," funding intermediaries have begun evaluating charities' level of compliance with financial and governance standards, and disclosing their findings to donors.⁹⁸ The most successful associational entrepreneur he studied even secured the support of government for its ratings system.⁹⁹

Sidel offers valuable insights for U.S. charities and regulators, as associational entrepreneurs offering accreditation and other self-regulatory mechanisms continue to proliferate here and to seek alliances with government.¹⁰⁰ His discussion of Indian and Philippine self-regulation reminds charities and regulators that while weak codes work weakly, they are not failures. They do educate and inspire charity leaders to improve their operations and governance, although they generally lack the ability to compel compliance.¹⁰¹

95. *See id.* at 802.

96. Mark Sidel, *The Guardians Guarding Themselves: A Comparative Perspective on Nonprofit Self-Regulation*, 80 CHI.-KENT L. REV. 803 (2005).

97. *See id.* at 816, 820–21 (describing the production of "guiding principles" for voluntary development organizations by the Indian Voluntary Action Network in the late 1990s and the efforts by Credibility Alliance to produce and disseminate the Minimum Norms for Enhancing Credibility of the Voluntary Sector in 2001–2002); *id.* at 822–23 (summarizing the code-setting efforts of the Philippines Caucus of Development NGO Networks in 1991 and their current attempts at code revisions).

98. *See id.* at 818–20 (describing intranet self-regulation systems created by India's Child Relief and You, the Give Foundation); *id.* at 825 (detailing the Caucus of Development NGO Network's "whitelist" of noncomplying grantees).

99. *See id.* at 823–24 (describing how the Philippine government relies on certifications by the Philippine Council for Nonprofit Certification).

100. *See id.* at 830–34 (relating the certification regime developed by the Maryland Council of Nonprofit Associations and replicated in five other states, as well as the U.S. Senate Finance Committee staff discussion draft's suggestion that regulators should rely on this or other certification mechanisms to limit charities' access to government benefits).

101. *See id.* at 809, 829–30, 834.

Moreover, Sidel reminds us of the potential perils of alliances between government and associational entrepreneurs. These entrepreneurs push for linkages with government not only to promote societal goals of improving charitable accountability, but also to promote the market value of their own products and organizations.¹⁰² Associational entrepreneurs offer government a way to demand that charities comply with accountability standards; however, mandating that charities obtain certification by such entrepreneurs may seriously burden small charities or preclude their access to government resources or assistance.¹⁰³ Finally, he cautions that self-regulation by nationwide associational entrepreneurs might be too close to government regulation, with the same potential to impede the flexibility and autonomy the charitable sector prizes.¹⁰⁴

These three contributions underscore the difficulty of creating a system that can effectively regulate charities to prevent fraud and abuse, while respecting their vital societal role and their autonomy. Taken together, the articles by Professors Fishman and Morris show us that England has struggled with the challenge of developing able and appropriate government regulation for nearly 200 years. Professor Sidel tackles the emerging idea of charity self-regulation, both on an independent basis and in concert with government. His evaluation of innovations in Asia demonstrates that creating capable and suitable self-regulation will likewise require diligence and compromise.

CONCLUSION

It is indeed a momentous time for charities. Politicians, the press, and the public are demanding that charities must not only serve their missions, but also be more accountable—and they are right. Thus, it is imperative that charity scholars, leaders, advisors, and regulators come together to create and support some means to improve charity governance and enforcement. The articles in this symposium will inform and enhance this important discussion and thus represent valuable steps toward the laudable, while elusive, goal of a more accountable charitable sector.

102. *See id.* at 824–25.

103. *See id.* at 835.

104. *See id.*

